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(2023) 6 ILRA 5
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.05.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Civil Misc. Arbitration Application No. 13 of 2023
and
Civil Misc. Arbitration Application No. 15 of 2023
and
Civil Misc. Arbitration Application No. 16 of 2023

M/S A'Xykno Capital Services Pvt. Ltd. ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Prashant Puri, Paavan Awasthi

Counsel for the Opposite Parties:
Samir Om, Samir Om

A. Civil Law - Arbitration and Conciliation Act,1996-Sections 29A & 2(1)(e)-Maintainability of-objection raised by opposite parties regarding extension of time under section 29A(4) to the effect that such an application would be maintainable only before the principal Civil Court of original jurisdiction in a district as the concept of 'Court' as envisaged under section 29A read with section 2(1)(e) of the Act 1996 does not include a High Court not having original civil jurisdiction as in the case of Allahabad High Court-Hence, the application is not maintainable. (Para 69 to 70)

The application is dismissed. (E-6)

List of Cases cited:

1. Nimet Resources INC & anr.. Vs Essar Steels Ltd. (2009) 17 SCC 313

2. K.V. Muthu Vs Angamuthu Ammal (1997) AIR SCC 628

3. P. Kasilingam & ors. Vs P.S.G College of Tech.(1995) Supp(2) SCC 348

4. Jayant Verma & ors. Vs U.O.I. & ors. (2018) 4 SCC 743

5. Indian Farmers Fertilizers Coop. Ltd. Vs M/s Manish Engg. Enterprises (2022) 4 AdJ 162: (2022) SCC Online Alld 150

6. M/S Lko Agencies & anr.. Vs U.P Avas Vikar Parishad & ors. 2019 SCC Online Alld. 4369

7. Garhwal Mandal Vikar Nigam Ltd Vs Krishna Travel Agency (2008) 6 SCC 741

8. St. of Mah. thru Exe. Engr. Rd. Dev. Divn. No. 111. Panvel & anr.. Vs Atlanta Ltd (2014) 11 SCC 619

9. St. of W.B. & ors. Vs Assoc. Contractors (2015) 1 SCC 31

10. St. of Jharkhand Vs Hindustan Cons. (2018) 2 SCC 602

11. Lko Agencies Lko thru Sole Proprietor & anr. Vs U.P Avas Vikas Parishad thru Housing Commission LKO & ors. (2019) SCC Online All 4369

12. M/s B.M.G Cons. Vs National Small Indus. Corp. Ltd (2012) SCC Online Alld1042

13. Jai Bahadur Singh Vs St. of U.P. Writ-C No 41221 of 2018

14. Amit Kumar Gupta Vs Dipak Prasad (2021) SCC Online Cal 2174

15. DDA Vs M/s Tara Chand Sumit Cons. Co. OMP (Misc) Comm No 236 of 2019

16. Nilesh Ramanbhai Patel Vs Bhanubhai Ramanbhai Patel (2019) 2 GLR 1537

17. Cabra Instalaciones Y. Servicies S.A. Vs Mah. St. Electricity Distribution Co. Ltd (2019) SCC Online Bom 1437

18. M/s Lots Shipping Co. Ltd Vs Cochin Port Trust Board of Trustees (2020) AIR Ker. 169

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

1. Heard Mr. Pritish Kumar, Mr. Amal Rastogi and Mr. Prashasht Puri, learned counsels for applicant(s) and Mr. Sandeep Dixit, Senior Advocate assisted by Ms. Radhika Verma, Mr. Samir Om, Mr. Bhanu Bajpai as well as Mr. Mukund Tewari, learned counsel for opposite parties.

2. Issue under consideration is with regard to extension of time under Section 29A(4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996) with the question involved being :--

Whether the concept of 'Court' as envisaged under Section 29A read with Section 2(1)(e) of the Act of 1996 would include a High Court not having original civil jurisdiction as in the case of Allahabad High Court?

3. A preliminary objection with regard to maintainability of this Application for extension of mandate under Section 29A of the Act of 1996 has been taken by opposite parties to the effect that such an application would be maintainable only before the principal Civil Court of original jurisdiction in a district or to a High Court which exercises ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration as if the same had been the subject-matter of a suit but since the Allahabad High Court does not exercise such original civil jurisdiction, the application would be cognizable only before commercial court and not the Allahabad High Court.

4. Mr. Sandeep Dixit, Senior Advocate expounding the aforesaid proposition has raised the following arguments:-

(i) Section 2(1)(e) of the Act of 1996 clearly indicates the definition of 'Court' to be the principal Civil Court of original jurisdiction in a district, and would include the High Court only in case such a High Court is exercising ordinary original civil jurisdiction also having jurisdiction to decide questions forming subject-matter of arbitration if the same had been the subject-matter of a suit. It is submitted that as such in view of clear definition of the term 'Court', the said term indicated in Section 29A of the Act of 1996 would be referable to such a definition whereby an application preferred under Section 29A of the Act in the State of U.P. would be maintainable only before principal Civil Court of original jurisdiction, which in this case would be the commercial court and not the High Court.

(ii) There being no ambiguity in the definition of term 'Court' as indicated in Section 2(1)(e) of the Act of 1996, no original jurisdiction can be ascribed to Allahabad High Court and as such it is only the principal Civil Court where such an application would be maintainable.

(iii) That definition of 'Court' as per Section 2(1)(e) of the Act of 1996 has to be maintained with regard to provisions of the Act of 1996 and cannot keep changing with each Section.

(iv) Once an appointment of Arbitrator has been made under Section 11(6) of the Act, High Court would become functus officio whereby the proceedings would come to an end and cannot be carried further to include extension of mandate under Section 29A of the Act.

(v) That there is no provision for bifurcation under Section 29A of the Act with regard to arbitrators being appointed mutually or by intervention of Court under Section 11(6) of the Act of 1996.

(vi) Analogy has been drawn where arbitrator is appointed under Section 11(6) of the Act of 1996 and an award is passed, the same is challengeable only before the principal Civil Court of original jurisdiction under Section 34 of the Act and for such purpose, the High Court cannot be considered to be 'Court' having original jurisdiction.

(vii) That even in case of termination of mandate where an application is required to be filed under Section 14 of the Act, the same is also maintainable only with the commercial court and not the High Court and same analogy would be applicable in case of extension of mandate under Section 29A of the Act.

(viii) Distinction under Section 10(2) and Section 10(3) of the Commercial Courts Act, 2015 has been adverted to whereby such procedure is required to be followed by filing an application only before the principal Civil Court having original jurisdiction.

(ix) A specific time frame under Section 29A(9) of the Act of 1996 has been indicated in the statute, which cannot bind a Constitutional court in exercise of its powers for extension of mandate and therefore such a provision can only refer to the principal Civil Court and not to High Court.

5. Mr. Mukund Tiwari, learned counsel appearing on behalf of the Lucknow Development Authority has made the following submissions:-

(i) As per the Arbitration and Conciliation Act, 1940, definition of Court had been provided under Section 2(c) which pertained only to a Civil Court having original jurisdiction and did not include a High Court. It is further submitted that under Section 28 of the Act, Powers of extension of mandate of arbitrator were provided to Civil Court having original jurisdiction with time limit being indicated in clause (3) of Schedule 1 of the Act of 1940.

(ii) It is submitted that Section 29A of the Act has been added subsequent to notification of the Act and it is not a self contained provision but has to be seen in conjunction with other provisions of the Act as well.

(iii) Attention has been drawn to Sections 47 & 56 of the Act of 1996 to submit that earlier provision including Civil Court of original jurisdiction has now been omitted by means of an amendment and it is now only the High Court which can take cognizance under the aforesaid Sections. Argument has been raised that High Court has been included as having jurisdiction in particular matters only, in the wisdom of Legislature and such deliberate intention of legislature cannot be over-ridden.

(iv) That the word 'means' used in the definition of term 'Court' under Section 2(1)(e) of the Act of 1996 is exclusionary in nature and not inclusionary particularly since the word 'means' is not followed immediately with the words 'and includes'.

(v) That under the Act of 1996, a departure has been made in the definition of term 'Court' from the earlier definition in the Act of 1940 but only to include a High Court in a case only where High Court exercises original jurisdiction.

(vi) It has been further submitted that in the present case since there is no ambiguity in the definition of term 'Court' under Section 2(1)(e) of the Act of 1996, no purposive interpretation can be resorted to.

(vii) The words 'unless the context otherwise requires' would be applicable only in case there is ambiguity in the definition or its applicability and

where the strict interpretation would lead to absurd results.

(viii) It is also submitted that where the words 'means' and 'includes' are not used conjointly, the meaning/definition has to be given a confined definition.

Learned counsel has also adverted to various judgments to indicate the purpose and intent of the Act of 1996 with attention being drawn to various provisions to submit that a High Court not having original jurisdiction cannot be included in the definition of term 'Court' as envisaged under Section 29A.

6. Per contra, Mr. Pritish Kumar, learned counsel for applicant has submitted the following:-

(i) The definition as given under Section 2(1)(e) of the Act of 1996 is required to be given a purposive construction in order to achieve the ends for which it was inserted and for that purpose it has to be read along with provisions of Section 11(6) of the Act of 1996.

(ii) As per the purpose and intent of the Act of 1996, powers of appointment and therefore substitution or extension of mandate is required to be exercised by the highest judicial authority/Court in order to instill confidence in the proceedings and also not to prolong such arbitration proceedings which are required to be concluded expeditiously.

(iii) Power for extension of mandate under Section 29A of the Act of 1996 is required to be exercised by the High Court even though it does not have original civil jurisdiction to obviate an anomalous situation where an arbitrator is appointed by High Court and could very well be substituted by a subordinate court such as the commercial court.

(iv) That the words 'unless the context otherwise requires' itself indicates that the definition is not conclusive and is in fact required to be molded to be in accordance with the purpose and intent of different Sections of the Act of 1996.

(v) Learned counsel has also adverted to various judgments to submit that even though the court once having exercised powers under Section 11(6) of the Act of 1996 becomes functus officio but still retains power of review and as such finality cannot be attached to the term 'functus officio'.

(vi) The power to substitute an Arbitrator as envisaged under Section 29A of the Act of 1996 automatically is referable to the power to appoint the arbitrator, which in turn would be referable to powers exercised under Section 11(6) of the Act.

(vii) That even in case of appointment of arbitrator under Section 11 with intervention of Court, a time limit has been prescribed under Section 11(13) of the Act of 1996 and as such the argument raised by learned counsel for opposite party that a time frame cannot be made applicable to Constitutional Courts such as the High Court is not correct.

7. Mr. Prashasth Puri, learned counsel for petitioner appearing in CIVIL MISC. ARBITRATION APPLICATION No. - 13 of 2023 while adopting most of the arguments raised by Mr. Pritish Kumar, has adverted also to the fact that the power to substitute an arbitrator under Section 29A of the Act of 1996 would be referable to the power to appoint arbitrator under Section 11(6) of the Act as also to the aspect of anomaly in case an arbitrator appointed by a High Court is substituted by a Court subordinate thereto such as the commercial court.

8. For proper appreciation of question at hand, it would be apposite to consider the relevant provisions of Section 2 and Section 29 of the Act of 1996, which are as follows:-

"Section 2 in THE ARBITRATION AND CONCILIATION ACT, 1996

2 Definitions. *—(1) In this Part, unless the context otherwise requires,—*

(a)"arbitration" means any arbitration whether or not administered by permanent arbitral institution;

(b)"arbitration agreement" means an agreement referred to in section 7;

(c)"arbitral award" includes an interim award;

(d)"arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

2[(e)"Court" means-

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;]

2[29A. Time limit for arbitral award. *(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.*

Explanation. For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court. (6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of be arbitrators are substituted, the arbitral

proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

9. Since the present dispute pertains to jurisdiction of the Court concerned regarding extension of mandate of arbitrator, a brief legislative history of the said provision would also be required to be seen in order to achieve a better perspective of the dispute.

10. Prior to advent of the Act of 1996, the Arbitration Act, 1940 held the field in which definition of the word 'Court' was given under Section 2(c) which was as follows:

'(c) "Court" means a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject- matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court;'

11. Section 28 of the Act provided for extension of time to the Court in its discretion to enlarge from time to time, the time for making award. Schedule I clause 3 enjoined the Arbitrators to make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration or within such extended time as the Court may allow.

12. The aforesaid provisions of the Act of 1940 seen in the context of definition of the word 'Court' as defined under Section 2(c) of the said Act clearly meant a Civil Court having civil jurisdiction to decide the question forming the subject matter of reference. Exception pertained to small cause court. It is noticeable that the High Court as such did not enter into the picture with regard to said question under the Act of 1940.

13. With the advent of the Act of 1996, Section 29A pertaining to extension of mandate of arbitrator was included for the first time by means of Act no.3 of 2016 with effect from 23.10.2015.

14. It is also a relevant fact that at the time of enactment of the Act of 1996, the definition of 'Court' defined under section 2(1)(e) was as follows:

*"**2 Definitions.** —(1) In this Part, unless the context otherwise requires,—*

2[(e)"Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;."

15. The current definition of 'Court' has also been inserted by means of Act No.3 of 2016 with effect from 23.10.2015 whereby a distinction has been incorporated in case of an arbitration other than international commercial arbitration viz-a-viz in the case of international commercial arbitration. It is noticeable that after amendment in the year 2016, the distinction as indicated in Section 2(i)(e) is that in case of an arbitration other than international commercial arbitration, the meaning of 'Court' includes the principal Civil Court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction. In the case of international commercial arbitration, it is only the High Court in exercise of its ordinary original jurisdiction which comes under the definition of 'Court' with the principal Civil Court of original jurisdiction being excluded.

16. The distinction in the meaning of word 'Court' under Section 2 of the Act of 1996 pertaining to domestic and international arbitrations as such is quite glaring and requires to be given proper importance. It cannot be said that the legislature in its wisdom has inadvertently omitted or included words 'principal Civil Court' of original jurisdiction in one part while excluding it from the other part. It is settled law that words as inserted in statute have to be given the literal interpretation unless it results in absurdity or is in contradiction to another part thereof or statute.

17. In the considered opinion of this Court, the omission of a Civil Court of original jurisdiction in a district with regard to international arbitrations is therefore quite important and would mean that such a principal Civil Court of Original Jurisdiction would exercise powers with regard to domestic arbitrations and would be excluded only in case such powers are also required to be exercised by a High Court having simultaneous jurisdiction but only in case such a High Court exercises not only original civil jurisdiction but also having jurisdiction to decide questions forming subject matter of the arbitration in case the same had been the subject matter of a suit.

18. In the context of Section 29A of the Act as such, the powers of a Civil Court of a district having original jurisdiction can be readily inferred to the exclusion of the High Court only when such High Court exercises power as indicated in Section 2(1)(e)(i) of the Act.

19. It has been contended by learned counsel for applicants that the words 'unless the context otherwise requires' appearing at the start of Section 2 of the Act of 1996 are material and indicates flexibility in the definition clause. However the aforesaid words have clearly been explained by Hon'ble the Supreme Court in the case of ***Nimet Resources INC & Anr. versus Essar Steels Limited reported in (2009) 17 SCC 313*** in the following terms:

"13. The definition of "court" indisputably would be subject to the context in which it is used. It may also include the appellate courts. Once the legislature has defined a term in the interpretation clause, it is not necessary for it to use the same expression in other provisions of the Act. It is well settled that meaning assigned to a term as defined in the interpretation clause unless the context otherwise requires should be given the same meaning.

14. It is also well settled that in the absence of any context indicating a contrary intention, the same meaning would be attached to the word used in the later as is given to them in the earlier statute. It is trite that the words or expression used in a statute before and after amendment should be given the same meaning. It is a settled law that when the legislature uses the same words in a similar connection, it is to be presumed that in the absence of any context indicating a contrary intention, the same meaning should attach to the words. (See Lennon v. Gibson & Howes Ltd. [1919 AC 709 (PC)] , AC at p. 711, Craies on Statute Law, 7th Edn., p. 141 and G.P. Singh's Principles of Statutory Interpretation, 10th Edn., p. 278.)"

20. The aforesaid judgment was rendered explaining the definition of 'Court' with regard to an application under Section 14 of the Act of 1996 and clearly is a proposition that words or expression used in statute are to be given the same meaning in the absence of any context indicating a contrary intention. The said words have also been explained by Hon'ble the Supreme Court in the case of Pandey and Co. Builders Pvt. Ltd. versus State of Bihar and Ors. reported in (2007)1 SCC 467 and S.K. Gupta & Anr. versus K.P. Jain & Anr reported in (1979) 3 SCC 54 in which it has been held that even when a definition clause is preceded by the words unless the context otherwise requires, normally the definition given in the section should be applied and given effect to and that the frame of any definition more often then not is capable of being made flexible but precision and certainty in law requires that it should not be made loose but kept tight as far as possible.

21. Learned counsel for applicants themselves have adverted to judgment rendered by Hon'ble the Supreme Court in the case of ***K.V. Muthu v. Angamuthu Ammal*** reported in ***AIR 1997 Supreme Court 628*** is in the following terms;

"12.Where the definition or expression, as in the instant case, is preceded by the words "unless the context otherwise requires", the said definition set out in the Section is to be applied and given effect to but this rule, which is the normal rule may be departed from if there be something in the context to show that the definition could not be applied."

22. Upon applicability of aforesaid judgment, it is evident that it is the consistent law enunciated by Hon'ble the Supreme Court that even where a definition clause is preceded by words, 'unless context otherwise requires', the definition as given in the statute is required to be adhered to until and unless it is unworkable and leads to absurdity.

23. It is also relevant to consider the words 'means' 'and includes' as occurring in the definition clause. It is also relevant to indicate that both the terms are occurring in separate places of the definition clause and not together. It is settled law that wherever the word 'means' occurs in a definition, it is exclusionary whereas the words 'and includes' is expansive in nature. In this context, it is a relevant fact that while defining the word Court, the word 'means' has been inserted without the concomitant wordings 'and includes' with the later occurring only subsequently to include a High Court alongwith a Principal Civil Court of Original Jurisdiction.

24. The aforesaid terms have been defined and explained by Hon'ble the Supreme Court in the case of ***P. Kasilingam & Ors. versus P.S.G. College of Technology reported in 1995 Supp(2) SCC 348*** in the following terms:

19. ..... It has been urged that in Rule 2(b) the expression "means and includes" has been used which indicates that the definition is inclusive in nature and also covers categories which are not expressly mentioned therein. We are unable to agree. A particular expression is often defined by the Legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word 'means' indicates that "definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition". (See :Gough v.Gough[(1891) 2 QB 665 : 60 LJ QB 726]; Punjab Land Development and Reclamation Corpn. Ltd.v. Presiding Officer, Labour Court [(1990) 3 SCC 682, 717 : 1991 SCC (L&S) 71].) The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words "means and includes", on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions". (See :Dilworth v.Commissioner of Stamps [1899 AC 99, 105-106 : (1895-9) All ER Rep Ext 1576] (Lord Watson); Mahalakshmi Oil Mills v. State of A.P. [(1989) 1 SCC 164, 169 : 1989 SCC (Tax) 56]. .....

25. Upon applicability of aforesaid judgment in the present scenario and particularly the aspect that the words 'means' and 'and includes' having not been used conjointly in Section 2 would clearly indicate that the definition of Court is to be given a restrictive meaning and it is only the jurisdictional aspect of a Civil Court viz-a-viz a High Court which requires to be given an expansive meaning. Even then the expansive definition would be curtailed to the extent of power of High Court as indicated in the definition clause and cannot travel beyond that.

26. Hon'ble the Supreme Court in a number of decisions has clearly propounded the law that when the language of statutory provision is plain and unambiguous, it is determinative of legislative intent and as such has to be given the meaning attached to such wordings. It has also been held that while interpreting a provision, Courts cannot legislate particularly when the language of statute is plain and unambiguous, whereafter the concept of casus omissus cannot be supplied by judicial interpretative process.

27. The said enunciation of law would be evident from judgment rendered by Hon'ble the Supreme Court in the case of Union of India & Ors versus Priyankan Sharan & Anr. reported in AIR 2009 SC (Supp) 972 in the following terms:

"19. It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent.

20. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the Legislature enacting it. (See Institute of Chartered Accountants of India v. M/s Price Waterhouse and Anr. (AIR 1998 SC 74). The intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner (1846 (6) Moore PC 1), Courts, cannot aid the Legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See The State of Gujarat and Ors. v. Dilipbhai Nathjibhai Patel and Anr. (JT1998 (2) SC 253)). It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. (See Stock v. Frank Jones (Tiptan) Ltd. (1978 1 All ER 948 (HL). Rules of interpretation do not permit Courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn L.C. in Vickers Sons and Maxim Ltd. v. Evans (1910) AC 445 (HL), quoted in Jamma Masjid, Mercara v. Kodimaniandra Deviah and Ors. (AIR 1962 SC 847).

22. In Dr. R. Venkatchalam and Ors. etc. v. Dy. Transport Commissioner and Ors. etc. (AIR 1977 SC 842), it was observed that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

23. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See Commissioner of Sales Tax, M.P. v. Popular Trading Company, Ujjain (2000 (5) SCC 515). The legislative casus omissus cannot be supplied by judicial interpretative process."

28. From a consideration of aforesaid judgments, it is evident that statutory provisions are not to be interpreted at the whims and fancies or personal interpretation/views but are required to be given their literal meaning, which have been included in the wisdom of the legislature, particularly when the plain and simple language employed in a provision of statute is clear, unambiguous and does not lead to any absurd result. The principles of casus omissus are required to be supplied sparingly and in exceptional circumstances as indicated in the judgments referred to hereinabove.

29. In the present case, it is evident that the definition of word 'Court' as envisaged under section 2(1)(e) of the Act of 1996 is clear and unambiguous particularly when seen in the context of distinction indicated in international and domestic arbitrations. The intention of legislature in including a High Court only in case where it has original jurisdiction is clearly discernible.

30. The aspect can also be examined from another prespective i.e. incorporating

the doctrine of pith and substance which includes examination of statutory provision to deduce its true nature and character. Although the aforesaid doctrine is generally used for the purpose of determining whether a legislation is with regard to a particular list as per VIIth Schedule of the Constitution of India but since it is used to determine the true nature and character of a statutory provision, in the considered opinion of this Court, the same can be made applicable in the present facts and circumstances which have been explained in the recent judgment of Hon'ble the Supreme Court in the case of ***Jayant Verma and Ors. versus Union of India & Ors.*** reported in ***(2018) 4 SCC 743*** in the following manner:

" ……. 35. Moreover, the British Parliament when enacting the Indian Constitution Act had a long experience of the working of the British North America Act and the Australian Commonwealth Act and must have known that it is not in practice possible to ensure that the powers entrusted to the several legislatures will never overlap. As Sir Maurice Gwyer, C.J. said in Subrahmanyan Chettiar v. Muthuswami Goundan, 1940 SCC OnLine FC 9 : (1940) 2 FCR 188 : AIR 1941 FC 47] : (FCR p. 201 : SCC OnLine FC)

'It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one List, touches also on a subject in another List, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its "pith and substance" or its "true nature and character", for the purpose of determining whether it is legislation with respect to matters in this List or in that:"

36. Their Lordships agree that this passage correctly describes the grounds on which the rule is founded, and that it applies to provincial 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 provisions 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.

37. 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, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to provincial legislation could never effectively be dealt with. ……."

31. Even upon applicability of aforesaid doctrine, the true nature and character of the definition of Court under section 2 of the Act of 1996 clearly indicates inclusion of a High Court as a 'Court' only when it exercises not only original civil jurisdiction but also has the jurisdiction to decide questions forming subject matter of arbitration if the same had

been the subject matter of a suit. Therefore, these twin conditions are sine qua non for inclusion of a High Court as a Court defined under Section 2 of the Act of 1996.

32. Learned counsel for applicants have placed heavy reliance upon judgment rendered by a coordinate Bench of this Court in ***Indian Farmers Fertilizers Cooperative Ltd. v. M/s Manish Engineering Enterprises reported in 2022 (4) ADJ 162: 2022 SCC Online Allahabad 150***. Aforesaid judgment rendered by coordinate Bench of this Court has specifically gone into the aspect of definition of 'court' as envisaged under Section 29A of the Act of 1996 and has held that an application for extension of time for arbitral award filed under Section 29A would be maintainable before the High Court even though not having original jurisdiction.

33. A perusal of aforesaid judgment makes it evident that the proposition of law followed in the said judgment has been indicated in following paragraphs:-

"35. Once the appointment of arbitrator or arbitral Tribunal has been made by the High Court or the Supreme Court exercising power under sub-sections (4), (5) and (6) of Section 11 then the power to substitute the arbitrator or the Arbitral Tribunal only vest with the said appointing authority i.e. High Court or Supreme Court, as the case may be.

36. The argument raised from the side opposite that the word 'Court' occurring in Section 2(1)(e) means the principal Civil Court and not the High Court cannot be accepted, as once the appointment was made by the High Court exercising power under Section 11, the power to substitute an arbitrator cannot vest under sub-section (6) of Section 29A with the principal Civil Court.

43. Here, we are concerned with the extension of time limit for the arbitral award under Section 29A, wherein an arbitrator has been appointed by the High Court exercising power under Section 11 of the Act. Section 42 will not be attracted and it is only the High Court which has the power to grant extension to the Arbitral Tribunal for making award."

34. As per the judgment, the primary aspect of holding the High Court to have jurisdiction for extension of mandate under Section 29A of the Act of 1996 is that once the appointment of Arbitrator has been made by the High Court or the Supreme Court exercising powers under Sub-Sections (4), (5) & (6) of Section 11 then the power to substitute the arbitrator can rest only with the appointing authority which would be the High Court or the Supreme Court, as the case may be and therefore the definition of the word 'Court' occurring in Section 2(1)(e) cannot be accepted to be that of the principal Civil Court and not the High Court.

35. The entire analogy of including a High Court not vested with original civil jurisdiction appears to be the fact that the power to substitute an arbitrator would be co-terminus with the power to appoint an Arbitrator. The said coordinate Bench has referred to judgments rendered by various High Court as well as judgments rendered by another coordinate Bench of this Court in ***M/S Lucknow Agencies and Another v. U.P. Avas Vikas Parishad and others reported in 2019 SCC Online Allahabad 4369.*** However, the aforesaid judgment has been distinguished on fact that the dispute therein pertained to appointment of Arbitrator without intervention of Court

whereas in ***Indian Farmers Fertilizers Cooperative Ltd.****(supra)*, appointment of Arbitrator was made by intervention of Court under Section 11(6) of the Act of 1996.

36. However from a perusal of the aforesaid judgment in ***Indian Farmers Fertilizers Cooperative Ltd.****(supra)*, it is discernible that relevant judgments rendered by Hon'ble the Supreme Court though noticed have escaped consideration or appreciation in the context of its ratio decidendi. The judgment seeks to include even a High Court not having original jurisdiction under the terminology of 'Court' on the twin grounds that power to substitute as indicated in Section 29A of the Act of 1996 is akin to the power to appoint under Section 11(6) of the Act and secondly that the once power to appoint an arbitrator is exercisable by a High Court or the Supreme Court, substitution of such arbitrators by the Civil Court would lead to anomalous situation.

37. With all due respect, with regard to such findings, learned Judge although noticing judgment rendered in the case of ***Nimet Resources*** (supra) has failed to consider the aspect enunciated therein that the Chief Justice or his designate exercises a limited Jurisdiction under Section 11(6) of the Act of 1996 and once an arbitrator is nominated, the Court does not retain any jurisdiction and becomes functus officio. The relevant paragraph of the aforesaid judgment is as follows:

"18. Jurisdiction under Section 11(6) of the 1996 Act is used for a different purpose. The Chief Justice or his designate exercises a limited jurisdiction. It is not as broad as sub-section (4) of Section 20 of the 1940 Act. When an arbitrator is nominated under the 1996 Act, the court does not retain any jurisdiction with it. It becomes functus officio subject of course to exercise of jurisdiction in terms of constitutional provisions or the Supreme Court Rules."

38. In the same judgment, it has been held that since Patna High Court does not exercise any original civil jurisdiction, it would only be the Principal Civil Court of original jurisdiction in a district which would have jurisdiction to entertain an appeal under Section 37 of the Act.

39. The aforesaid proposition of law has also been indicated in the judgments rendered by Hon'ble the Supreme Court in the case of ***Garhwal Mandal Vikas Nigam Limited versus Krishna Travel Agency reported in (2008)6 SCC 741;***

"9.There is another facet of the problem. The party will be deprived of the right to file an appeal under Section 37(1)(b) of the Arbitration and Conciliation Act. This means that a valuable right of appeal will be lost. Therefore, in the scheme of things, the submission of the learned counsel cannot be accepted. Taking this argument to a further logical conclusion, when the appointment is made by the High Court under Section 11(6) of the Arbitration and Conciliation Act, then in that case, in every appointment made by the High Court in exercise of its power under Section 11(6), the High Court will become the Principal Civil Court of Original Jurisdiction, as defined in Section 2(1)(e) of the 1996 Act. That is certainly not the intention of the legislature. Once an arbitrator is appointed then the appropriate forum for filing the award and for challenging the same, will be the Principal Civil Court of Original

Jurisdiction. Thus, the parties will have the right to move under Section 34 of the 1996 Act and to appeal under Section 37 of the 1996 Act. Therefore, in the scheme of things, if appointment is made by the High Court or by this Court, the Principal Civil Court of Original Jurisdiction remains the same as contemplated under Section 2(1)(e) of the 1996 Act.

10. We further reiterate that the view taken by this Court in National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. [(2004) 1 SCC 540] and State of Goa v. Western Builders [(2006) 6 SCC 239] is the correct approach and we reaffirm the view that in case any appointment of arbitrator is made by the High Court under Section 11(6), the Principal Civil Court of Original Jurisdiction remains the District Court and not the High Court. And likewise, if an appointment of the arbitrator is made by this Court, in that case also, the objection can only be filed before the Principal Civil Court of Original Jurisdiction as defined in Section 2(1)(e) of the 1996 Act. Thus, in this view of the matter, we hold that the plea raised by learned counsel for the petitioner that this Court should entertain the award given by the arbitrator appointed by this Court and all objections to it should be disposed of by this Court is unacceptable and consequently, the prayer made in the application is rejected."

39.i. ***State of Maharashtra through Executive Engineer, Road Development Division No.111, Panvel & Anr. versus Atlanta Limited reported in (2014)11 SCC 619;***

24.1. Firstly, the very inclusion of the High Court "in exercise of its ordinary original civil jurisdiction", within the definition of the term "court", will be rendered nugatory, if the above conclusion was not to be accepted. Because, the "Principal Civil Court of Original Jurisdiction in a district", namely, the District Judge concerned, being a court lower in grade than the High Court, the District Judge concerned would always exclude the High Court from adjudicating upon the matter. The submission advanced by the learned counsel for the appellant cannot therefore be accepted, also to ensure the inclusion of "the High Court in exercise of its ordinary original civil jurisdiction" is given its due meaning. Accordingly, the principle enshrined in Section 15 of the Code of Civil Procedure cannot be invoked whilst interpreting Section 2(1)(e) of the Arbitration Act.

24.2. Secondly, the provisions of the Arbitration Act, leave no room for any doubt, that it is the superior-most court exercising original civil jurisdiction, which had been chosen to adjudicate disputes arising out of arbitration agreements, arbitral proceedings and arbitral awards. Undoubtedly, a "Principal Civil Court of Original Jurisdiction in a district", is the superior-most court exercising original civil jurisdiction in the district over which its jurisdiction extends. It is clear that Section 2(1)(e) of the Arbitration Act having vested jurisdiction in the "Principal Civil Court of Original Jurisdiction in a district", did not rest the choice of jurisdiction on courts subordinate to that of the District Judge. Likewise, "the High Court in exercise of its ordinary original jurisdiction", is the superior-most court exercising original civil jurisdiction, within the ambit of its original civil jurisdiction. On the same analogy and for the same reasons, the choice of jurisdiction will clearly fall in the realm of the High Court, wherever a High Court exercises "ordinary original civil jurisdiction".

39.ii. ***State of West Bengal and Ors versus Associate Contractors reported in (2015)1 SCC 31;***

"20. As noted above, the definition of "court" in Section 2(1)(e) is materially different from its predecessor contained in Section 2(c) of the 1940 Act. There are a variety of reasons as to why the Supreme Court cannot possibly be considered to be "court" within the meaning of Section 2(1)(e) even if it retains seisin over the arbitral proceedings. Firstly, as noted above, the definition is exhaustive and recognizes only one of two possible courts that could be "court" for the purpose of Section 2(1)(e). Secondly, under the 1940 Act, the expression "civil court" has been held to be wide enough to include an appellate court and, therefore would include the Supreme Court as was held in the two judgments aforementioned under the 1940 Act. Even though this proposition itself is open to doubt, as the Supreme Court exercising jurisdiction under Article 136 is not an ordinary appellate court, suffice it to say that even this reason does not obtain under the present definition, which speaks of either the Principal Civil Court or the High Court exercising original jurisdiction. Thirdly, if an application would have to be preferred to the Supreme Court directly, the appeal that is available so far as applications under Sections 9 and 34 are concerned, provided for under Section 37 of the Act, would not be available. Any further appeal to the Supreme Court under Article 136 would also not be available. The only other argument that could possibly be made is that all definition sections are subject to context to the contrary. The context of Section 42 does not in any manner lead to a conclusion that the word "court" in Section 42 should be construed otherwise than as defined. The context of Section 42 is merely to see that one court alone shall have jurisdiction over all applications with respect to arbitration agreements which context does not in any manner enable the Supreme Court to become a "court" within the meaning of Section 42. It has aptly been stated that the rule of forum conveniens is expressly excluded by Section 42 see JSW Steel Ltd. v. Jindal Praxair Oxygen Co. Ltd. [Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd., (2006) 11 SCC 521] , SCC at p. 542, para 59). Section 42 is also markedly different from Section 31(4) of the 1940 Act in that the expression "has been made in a court competent to entertain it" does not find place in Section 42. This is for the reason that, under Section 2(1)(e), the competent court is fixed as the Principal Civil Court exercising original jurisdiction or a High Court exercising original civil jurisdiction, and no other court. For all these reasons, we hold that the decisions under the 1940 Act would not obtain under the 1996 Act, and the Supreme Court cannot be "court" for the purposes of Section 42."

"25.....(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act,1996.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original

jurisdiction in the district, as the case may be....."

40. Judgment rendered in the case of ***Associate Contractors*** (supra) has thereafter been affirmed by Constitution Bench judgment in the case of ***State of Jharkhand V. Hindustan Construction reported in (2018)2 Supreme Court Cases 602*** in which it has also been held as follows:

"66. ..... Solely because a superior court appoints the arbitrator or issues directions or has retained some control over the arbitrator by requiring him to file the award in this Court, it cannot be regarded as a court of first instance as that would go contrary to the definition of the term "court" as used in the dictionary clause as well as in Section 31(4). Simply put, the principle is not acceptable because this Court cannot curtail the right of a litigant to prefer an appeal by stating that the doors are open to this Court and to consider it as if it is an original court. Original jurisdiction in this Court has to be vested in law. Unless it is so vested and the Court assumes, the court really scuttles the forum that has been provided by the legislature to a litigant. That apart, as we see, the said principle is also contrary to what has been stated in Kumbha Mawji [Kumbha Mawji v. Union of India, 1953 SCR 878 : AIR 1953 SC 313] . It is worthy to note that this Court may make a reference to an arbitrator on consent but to hold it as a legal principle that it can also entertain objections as the original court will invite a fundamental fallacy pertaining to jurisdiction.

67. ..... It is to be borne in mind that the Court that has jurisdiction to entertain the first application is determinative by the fact as to which Court has the jurisdiction and retains the jurisdiction. In this regard, an example may be cited. When an arbitrator is not appointed under the Act and the matter is challenged before the High Court or, for that matter, the Supreme Court and, eventually, an arbitrator is appointed and some directions are issued, it will be inappropriate and inapposite to say that the superior court has the jurisdiction to deal with the objections filed under Sections 30 and 33 of the Act. The jurisdiction of a court conferred under a statute cannot be allowed to shift or become flexible because of a superior court's interference in the matter in a different manner."

41. The aforesaid judgments have been distinguished in the case of ***Indian Fertilizer***s (supra) on the ground that they do not pertain to examination of jurisdiction of a Court in terms of Section 29A, however the aspect of consideration of the definition of Court under Section 2 of the Act of 1996 and the ratio indicated in aforesaid judgments have not been appreciated in their true sense.

42. The concept of precedent, ratio decidendi and stare decisis has been explained by Hon'ble the Supreme Court in the case of ***Jayant Verma*** (supra) in the following terms;

"54. This question is answered by referring to authoritative works and judgments of this Court. In Precedent in English Law by Cross and Harris (4th Edn.), "ratio decidendi" is described as follows:

"The ratio decidendi of a case is any rule of law expressly or impliedly treated by the Judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a

necessary part of his direction to the jury." (at p. 72)

55. In Dalbir Singh v. State of Punjab [Dalbir Singh v. State of Punjab, (1979) 3 SCC 745 : 1979 SCC (Cri) 848 : (1979) 3 SCR 1059] , a dissenting judgment of A.P. Sen, J. sets out what is the ratio decidendi of a judgment : (SCC p. 755, para 22 : SCR pp. 1073-74)

"22. ... According to the well-settled theory of precedents every decision contains three basic ingredients:

'(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of (i) and (ii) above.'

For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi. [R.J. Walker & M.G. Walker : The English Legal System. Butterworths, 1972, 3rd Edn., pp. 123-24.] It is not everything said by a Judge when giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of Qualcast (Wolverhampton) Ltd. v. Haynes [Qualcast (Wolverhampton) Ltd. v. Haynes, 1959 AC 743 : (1959) 2 WLR 510 : (1959) 2 All ER 38 (HL)] it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts of an earlier case appear to be identical to those of the case before the court, the Judge is not bound to draw the same inference as drawn in the earlier case."

43. In view of aforesaid, in the considered opinion of this Court and with due respect, the aforesaid judgments could not have been brushed aside only on the ground that they pertain to a different section since the terminology of all the sections considered in the aforesaid judgments were referable to definition of a Court under Section 2 of the Act of 1996. The mere aspect that an appeal is maintainable against an award and not against an order under Section 29A of the Act would not make any material difference in view of the language used in said provisions. The aspect that the power to substitute an arbitrator under Section 29A of the Act would be referable to power to appoint under Section 11(6) of the Act cannot be inferred in view of the aforesaid judgments which have clearly indicated the absurd results which would accrue therefrom particularly in case such result is made applicable and particularly when taking such proposition to a logical conclusion where an application to substitute an arbitrator under Section 29 A would also then lie before the Supreme Court, which would be against the terminology used in Section 2 of the Act.

44. Here it is also relevant to advert to the provisions of Section 10 of the ***Commercial Courts' Act, 2015***, which is as follows:

"Section 10: Jurisdiction in respect of arbitration matters.- *Where the subject-matter of an arbitration is a commercial dispute of a Specified Value and–*

(1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(2) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(3) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted."

45. The aforesaid provision specifically provides that in case of an international commercial arbitration, all applications arising out of such arbitration would be maintainable in a High Court in its commercial division and in case of domestic arbitration, all applications arising out of such arbitration that have been filed on the **original side of High Court** are to be heard by its commercial division and in case of domestic arbitrations all applications maintainable before a Principal Civil Court of original jurisdiction (not being a High Court) are to be heard by the Commercial Court where it has been constituted.

46. The aforesaid section clearly indicates the three categories with High Court not exercising original jurisdiction having been vested with such jurisdiction only in case of an international commercial arbitration and not in domestic arbitrations where such High Court does not have original jurisdiction.

47. The aforesaid aspect has also been considered by another coordinate bench of this Court in the case of ***Lucknow Agencies Lucknow through Sole Proprietor and Anr. versus U.P. Avas Vikas Parishad through Housing Commissioner LKO & Ors.*** reported in ***2019 SCC Online All 4369*** in which held as follows:

"12. On a bare reading of the aforesaid provision it is evident that if an Arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such

Commercial Division has been constituted in such High Court. Now, this provision applies where the High Court exercises original civil jurisdiction to try suits involving commercial dispute as deferred in Section 2(1)(c) of the Act, 2015 as is evident from the use of the words "filed on the original side of the High Court". The Allahabad High court does not exercise original civil jurisdiction involving commercial disputes as defined in Section 2(1)(c) of the Act, 2015 as is evident from Rule 1 to 9 of Chapter VIII of the Allahabad High Court Rules, 1952. Moreover, Sub-section 3 of Section 10 of the Act, 2015 very categorically provides that if an arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the Act, 1996 that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted. Therefore, in the facts of the present case as the Allahabad High Court does not exercise original civil jurisdiction involving commercial disputes the application under Section 29-A of the Act, 1996 relating to a commercial dispute would lie before the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted and in an Arbitration relating to a non commercial dispute it would lie before the principal civil court of original jurisdiction i.e. the Court of District Judge as referred hereinabove. This is how the Act of 1996 and the Act, 2015 have to be read together to arrive at a harmonious understanding of the two Acts in matters of Arbitration."

48. The aforesaid judgment also while being noticed in the case of ***Indian Fertilizers,*** has been distinguished only on the ground that in the said case, Arbitrator had been appointed by Housing Commissioner and not under Section 11(6) of the Act of 1996 although the case of ***Lucknow Agencies Lucknow*** (supra) does not make any such distinction and has considered the provisions of Section 29A in terms of Section 2 of the Act of 1996 and therefore it was the ratio in the case of ***Lucknow Agencies Lucknow***(supra) which was required to be considered in view of the proposition of ratio decidendi as enunciated in the case of ***Jayant Verma*** (supra).

49. However, a perusal of the aforesaid judgment in ***Indian Fertilizer*** also indicates the fact that other judgments rendered prior thereto by other coordinate Benches such as in ***M/s B.M.G. Construction v. National Small Industries Corporation Ltd. reported in 2012 SCC Online Allahabad 1042*** as well as in ***Jai Bahadur Singh v. State of U.P. [Writ - C No.41221 of 2018]*** have not been brought to the notice of the learned judge although they have adverted to a proposition of law contrary to judgment rendered in ***Indian Farmers Fertilizers Cooperative Ltd.*** (supra). The relevant paragraphs of aforesaid judgments are as follows:

"11.Thus on the plain reading of the above definition of the 'Court', High Court is included within the principle Civil Court of original jurisdiction only if it exercises original civil jurisdiction and in such exercise has the power to determine the subject-matter of arbitration had it been brought before it by way of a suit. Therefore, for including the High Court within the principle Civil Court of original

jurisdiction two conditions are necessary namely:

(i) High Court must exercise original civil jurisdiction; and

(ii) in such exercise of original jurisdiction it must also have the jurisdiction to decide the subject-matter of the arbitration as a regular suit.

12. It is not disputed before me that the High Court of Judicature at Allahabad does not exercise original civil jurisdiction. Therefore, apparently the first of the above two conditions is not fulfilled by this High Court so as to include it within the meaning of the Civil Court of original jurisdiction. Accordingly, the High Court of Allahabad is not a 'Court' under section 2(1)(e) of the Act before whom an application for seeking termination of the mandate of the arbitrator can be maintained.

13. This High Court is not even vested with the original jurisdiction to decide the subject-matter of the arbitration had it been subjected to the suit."

50. It is also a relevant factor that in ***Indian Fertilizer***s (supra) power to substitute an arbitrator has been held akin to the power under Section 14 of the Act of 1996 but has failed to consider the aspect that in the case of ***Nimet Resources*** (supra), Hon'ble the Supreme Court while considering provisions of said Section 14 of the Act has clearly held that it is only a High Court exercising original civil jurisdiction where an application under Section 14 of the Act of 1996 would be maintainable and as such also the said reasoning appears to be incongruous to the judgment rendered by Hon'ble the Supreme Court.

51. It is also a factor noticeable but not adverted to in the judgment of ***Indian Fertilizer***s that the exclusion of a High Court not having original jurisdiction with regard to entertainability of an application under Section 29A is deliberate and intentional as would be evident from amendments made to Sections 47 and 56 of the Act of 1996.

52. Section 47 of the Act pertains to evidence and explanation to Section 47(2) indicates a definition of 'Court' as distinct from such definition under Section 2 of the Act. It is relevant that prior to current explanation inserted vide Act No.3 of 2016 in Section 47, it was the principal Civil Court of original Jurisdiction in a district which came within the definition of Court and included a High Court in exercise of its ordinary original civil jurisdiction but by means of the new explanation inserted in 2016, it is now only the High Court having original jurisdiction which comes within meaning of the word Court under the explanation and the principal civil court of original jurisdiction in a court has been deleted.

53. Same is the situation under Section 57 of the said Act pertaining to conditions for enforcement of foreign awards where earlier the explanation regarding a court was akin to the current definition under Section 2 of the Act of 1996 but by means of amendment incorporated, the principal Civil Court of original jurisdiction in a District has been deleted.

54. In view of aforesaid, the intention of legislature to include a High Court specifically having jurisdiction over aspects under specific provisions of the Act of 1996 has clearly been delineated. However no such amendment has been incorporated in Section 2 (1)(e) to exclude a civil court of original jurisdiction so far as it pertains to

Section 29A of the Act. Considered in the light of amendments made in Sections 47 and 56 of the Act, the intention of legislature to include a High Court only when it has original jurisdiction is thus clear and unambiguous and in such circumstances, where there is no ambiguity, no purposive interpretation is required to be resorted to implant a perceived casus, which even otherwise was not omissus.

55. It is also evident that judgment rendered in ***Indian Fertilizer***s takes into account a supposed anomalous situation where an arbitrator appointed by Constitutional courts is substituted by district court. The aforesaid proposition clearly does not take into account a situation where an award rendered by an arbitrator appointed under Section 11(6) of the Act of 1996 can be set aside by a commercial court exercising powers under the Act of 2015 read with the Act of 1996. Once a commercial court has the power and jurisdiction to set aside the award of an arbitrator appointed under Section 11(6) of the Act of 1996, it does not stand to reason as to why such an arbitrator cannot be substituted exercising power under Section 29A of the Act in the circumstances indicated therein. Taking the aforesaid proposition of India Fertilizers further to its logical conclusion, it would mean that any award rendered by an arbitrator appointed under Section 11(6) of the Act would necessarily be required to be challenged only either in the High Court or in the Supreme Court but the said proposition of law has already been rejected by Hon'ble the Supreme Court in the case of ***Atlanta Limited, Associate Contractors and Hindustan Construction Company***(supra).

56. The judgment in ***Indian Fertilizer***s also incorrectly presupposes that all appointments of arbitrators would be only under Section 11(6) of the Act and does not take into account where an application under Section 29A has been filed in an arbitration where arbitrators have been appointed by mutual consent. Making such a distinction, again would amount to including words and phrases in Section 29A of the Act where they have not been deliberately incorporated in the wisdom of the legislature.

57. The judgment in India Fertilizers also does take into account a situation where an arbitral tribunal compromises some members appointed mutually and others appointed under Section 11(6) of the Act as in the present case where one arbitrator was appointed by mutual consent and the other under Section 11(6) of the Act and subsequently, the presiding arbitrator was appointed by consent of both arbitrators.

58. At the cost of repetition, such a distinction not having been made under Section 29A, in the considered opinion of this Court cannot be inserted by judicial legislation.

59. In the case of ***Indian Fertilizers,*** the power of substitution under Section 29A of the Act has been made referable to Sections 14 and 15 of the Act without considering the distinction in substitution of arbitrator under provisions of Section 15 and Section 29 A of the Act. It is relevant to indicate that under Section 29A, substitution of arbitrator is at the instance of Court and under sub-section (7) the arbitral tribunal thus reconstituted is deemed to be in continuation of the previously appointed arbitral tribunal, whereas under Section 15 of the Act, substitution of arbitrator is to be without

intervention of court and as per rules which were applicable to the appointment of arbitrator being replaced. Sub-section (3) of Section 15 of the Act does not indicate that the re-constituted arbitral tribunal would be in continuation of the previously appointed arbitral tribunal. Even otherwise provisions of Section 29A cannot be said to pre-suppose an automatic substitution of arbitrator and as such the basic premise of the aforesaid judgment, with all due respect, appears to be flawed.

60. The submission of learned counsel for applicants is that the provisions of Arbitration Act are in variance with Section 15 of the Code of Civil Procedure with regard to grade of court where proceedings can be entertained at the first instance and therefore application under Section 29A is required to be filed only in the High Court in order to lend credibility to the proceedings.

61. Learned counsel has placed reliance on the Judgment of ***Associate Contractors*** (supra), the relevant paragraphs of which are as follows:-

"13. .....The framers of the statute must certainly be taken to have been conscious of the definition of 'court' in the Act. It is easily possible to contemplate that they did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction. The intention apparently was to confer the power on the highest judicial authority in the State and in the country, on the Chief Justices of High Courts and on the Chief Justice of India. Such a provision is necessarily intended to add the greatest credibility to the arbitral process. The argument that the power thus conferred on the Chief Justice could not even be delegated to any other Judge of the High Court or of the Supreme Court, stands negatived only because of the power given to designate another. The intention of the legislature appears to be clear that it wanted to ensure that the power under Section 11(6) of the Act was exercised by the highest judicial authority in the State or in the country concerned. This is to ensure the utmost authority to the process of constituting the Arbitral Tribunal.

18. It is true that the power under Section 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court. One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by courts in the arbitral process. Therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices. They have been conferred the power or the right to pass an order contemplated by Section 11 of the Act. We have already seen that it is not possible to envisage that the power is conferred on the Chief Justice as persona designata. Therefore, the fact that the power is conferred on the Chief Justice, and not on the court presided over by him is not sufficient to hold that the power thus conferred is merely an administrative power and is not a judicial power."

It is obvious that Section 11 applications are not to be moved before the "court" as defined but before the Chief Justice either of the High Court or of the

Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or his delegate have now to decide judicially and not administratively. Again, Section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not "court" as defined by Section 2(1)(e). The said view was reiterated somewhat differently in Pandey & Co. Builders (P) Ltd. v. State of Bihar [(2007) 1 SCC 467] , SCC at pp. 470 & 473, Paras 9 & 23-26."

62. The aforesaid submission also does not hold good ground since the said aspect has already been taken care of in the definition under Section 2 where the highest grade of court i.e. High Court has already been included in the definition of Court but only in case it exercises original civil jurisdiction and subject to conditions indicated therein.

63. Learned counsel for applicant has also adverted to the fact that the power under Section 11(6) of the Act has subsequently been held to be subject to review in view of the fact that the High Court as a superior Court of record, can entertain review.

64. The aforesaid submission also would not hold good ground in view of the fact that power to review under Section 11(6) of the Act of 1996 has nothing to do whatsoever with the power to extend mandate of Arbitrator under Section 29 A of the Act.

65. The judgment in ***Indian Fertilizer***s (supra) also places reliance on judgments of various High Courts such as in the cases of:

12. He has relied upon the decision of Calcutta High Court in case of ***Amit Kumar Gupta vs. Dipak Prasad 2021 SCC Online Cal 2174.*** *Relevant paras 17 and 18 of the judgment are extracted hereas under:*

"17. The meaning of the word "court" as ascribed in Section 2(1)(e) of the Act of 1996 is subject to the requirement of the context. In the context of Section 29A of the Act of 1996 which has prescribed a substantive provision for completion of the arbitral award and the time limit to do so, the meaning of the word "court" as used therein has to be understood. Under sub-section (6) of Section 29A of the Act of 1996, the Court has been empowered to substitute the arbitrator or the arbitrators in reconstituting the arbitral tribunal if so required. The power of appointment of an arbitral tribunal has been prescribed in Section 11 of the Act of 1996. Section 11 of the Act of 1996 has prescribed two appointing authorities given the nature of the arbitration. In the case of an international commercial arbitration, the authority to appoint an arbitrator, has been prescribed under Section 11 of the Act of 1996 to be the Supreme Court. In the case of a domestic arbitration, Section 11 of the Act of 1996 has prescribed that the appointing authority shall be the High Court.

18. In my view, the word "court" used in Section 29A of the Act of 1996 partakes the character of the appointing authority as has been prescribed in Section 11 of the Act of 1996 as, the Court exercising jurisdiction under Section 29A of the Act of 1996 may be required to substitute the arbitrator in a given case. Such right of substituting can be exercised by a Court which has the power to appoint. The power to appoint has been prescribed in Section 11. Therefore, the power to

substitute should be read in the context of the power of appointment under Section 11."

13. Reliance has also been placed upon decision of Delhi High Court in ***O.M.P. (Misc.) (Comm) No. 236 of 2019 (DDA vs. M/s Tara Chand Sumit Construction Co.)*** decided on 12.5.2020. Relevant paras 28, 29 and 30 of the judgment are extracted here as under :

"28. Power to extend the mandate of an Arbitrator under Section 29A(4), beyond the period of 12 months and further extended period of six months only lies with the Court. This power can be exercised either before the period has expired or even after the period is over. Neither the Arbitrator can grant this extension and nor can the parties by their mutual consent extend the period beyond 18 months. Till this point, interpreting the term 'Court' to mean the Principal Civil Court as defined in Section 2(1)(e) would, to my mind, pose no difficulty. The complexity, however, arises by virtue of the power of the Court to substitute the Arbitrator while extending the mandate and this complication is of a higher degree if the earlier Arbitrator has been appointed by the High Court or the Supreme Court. Coupled with this, one cannot lose sight of the fact that the Legislature in its wisdom has conferred the powers of appointment of an Arbitrator only on the High Court or the Supreme Court, depending on the nature of arbitration and as and when the power is invoked by either of the parties. There may be many cases in which while extending the mandate of the Arbitrators, the Court may be of the view that for some valid reasons the Arbitrators are required to be substituted, in which case the Court may exercise the power and appoint a substituted Arbitrator and extend the mandate.

29. In case a petition under Section 29A of the Act is filed before the Principal Civil Court for extension of mandate and the occasion for substitution arises, then the Principal Civil Court will be called upon to exercise the power of substituting the Arbitrator. In a given case, the Arbitrator being substituted could be an Arbitrator who had been appointed by the Supreme Court or the High Court. This would lead to a situation where the conflict would arise between the power of superior Courts to appoint Arbitrators under Section 11 of the Act and those of the Civil Court to substitute those Arbitrators under Section 29A of the Act. This would be clearly in the teeth of provisions of Section 11 of the Act, which confers the power of appointment of Arbitrators only on the High Court or the Supreme Court, as the case may be. The only way, therefore, this conflict can be resolved or reconciled, in my opinion, will be by interpreting the term 'Court' in the context of Section 29A of the Act, to be a Court which has the power to appoint an Arbitrator under Section 11 of the Act. Accepting the contention of the respondent would lead to an inconceivable and impermissible situation where, particularly in case of Court appointed Arbitrators, where the Civil Courts would substitute and appoint Arbitrators, while extending the mandate under Section 29A of the Act.

30. Similarly, in case of International Commercial Arbitration, if one was to follow the definition of the term Court under Section 2(1)(e) and apply the same in a strict sense, then it would be the High Court exercising Original or Appellate jurisdiction which would have the power to extend the mandate and substitute the Arbitrator. In such a situation, the High Court would be substituting an Arbitrator appointed by the Supreme Court which would perhaps lead

to the High Court over stepping its jurisdiction as the power to appoint the Arbitrator is exclusively in the domain of the Supreme Court. Thus, in the opinion of this Court, an application under Section 29A of the Act seeking extension of the mandate of the Arbitrator would lie only before the Court which has the power to appoint Arbitrator under Section 11 of the Act and not with the Civil Courts. The interpretation given by learned counsel for the respondent that for purposes of Section 29A, Court would mean the Principal Civil Court in case of domestic arbitration, would nullify the powers of the Superior Courts under Section 11 of the Act."

14. He then placed before the Court the decision rendered by Gujrat High Court in the case of ***Nilesh Ramanbhai Patel vs. Bhanubhai Ramanbhai Patel 2019 (2) GLR 1537*** wherein the Court had taken the similar view. Relevant paras 14, 15 and 16 of the judgment are extracted hereas under :

"14. As is well-known, the arbitration proceedings by appointment of an arbitrator can be triggered in number of ways. It could be an agreed arbitrator appointed by the parties outside the Court, it could be a case of reference to the arbitration by Civil Court in terms of agreement between the parties, it may even be the case of appointment of an arbitrator by the High Court or the Supreme Court in terms of sub-secs. (4), (5) and (6) of Sec. 11 of the Act. The provisions of Sec. 29A and in particular sub-sec. (1) thereof would apply to arbitral proceedings of all kinds, without any distinction. Thus, the mandate of an arbitrator irrespective of the nature of his appointment and the manner in which the Arbitral Tribunal is constituted, would come to an end within twelve months from the date of Tribunal enters upon the reference, unless such period is extended by consent of the parties in term of sub-sec. (3) of Sec. 29A which could be for a period not exceeding six months. Sub-section (4) of Sec. 29A, as noted, specifically provides that, if the award is not made within such period, as mentioned in sub-sec. (1) or within the extended period, if so done, under sub-sec. (3) the mandate of the arbitrator shall terminate. This is however with the caveat that unless such period either before or after the expiry has been extended by the Court. In terms of sub-sec. (6) while doing so, it would be open for the Court to substitute one or all the arbitrators who would carry on the proceedings from the stage they had reached previously.

15. This provision thus make a few things clear. Firstly, the power to extend the mandate of an arbitrator under sub-sec. (4) of Sec. 29A beyond the period of twelve months or such further period it may have been extended in terms of sub-sec. (3) of Sec. 29A rests with the Court. Neither the arbitrator nor parties even by joint consent can extend such period. The Court on the other hand has vast powers for extension of the period even after such period is over. While doing so, the Court could also choose to substitute one or all of the arbitrators and this is where the definition of term 'Court' contained in Sec. 2(1)(e) does not fit. It is inconceivable that the Legislature would vest the power in the Principal Civil Judge to substitute an arbitrator who may have been appointed by the High Court or Supreme Court. Even otherwise, it would be wholly impermissible since the powers for appointment of an arbitrator when the situation so arises, vest in the High Court or the Supreme Court as the case may be in terms of sub-secs. (4), (5) and (6) of Sec. 11 of the Act. If therefore, there is a case for extension of the term of an arbitrator who

has been appointed by the High Court or Supreme Court and if the contention of Shri Mehta that such an application would lie only before the Principal Civil Court is upheld, powers under sub-sec. (6) of Sec. 29A would be non-operatable. In such a situation, sub-sec. (6) of Sec. 29A would be rendered otiose. The powers under sub-sec. (6) of Sec. 29A are of considerable significance. The powers for extending the mandate of an arbitrator are coupled with the power to substitute an arbitrator. These powers of substitution of an arbitrator are thus concomitant to the principal powers for granting an extension. If for valid reasons the Court finds that it is a fit case for extending the mandate of the arbitrator but that by itself may not be sufficient to bring about an early end to the arbitral proceedings, the Court may also consider substituting the existing arbitrator. It would be wholly incumbent to hold that under sub-sec. (6) of Sec. 29A the Legislature has vested powers in the Civil Court to make appointment of arbitrators by substituting an arbitrator or the whole panel of arbitrators appointed by the High Court under Sec. 11 of the Act. If we, therefore, accept this contention of Shri Mehta, it would lead to irreconcilable conflict between the power of the superior Courts to appoint arbitrators under Sec. 11 of the Act and those of the Civil Court to substitute such arbitrators under Sec. 29A(6). This conflict can be avoided only by understanding the term "Court" for the purpose of Sec. 29A as the Court which appointed the arbitrator in case of Court constituted Arbitral Tribunal.

16. Very similar situation would arise in case of an international commercial arbitration, where the power to make an appointment of an arbitrator in terms of Sec. 11 vests exclusively with the Supreme Court. In terms of Sec. 2(1)(e), the Court in such a case would be the High Court either exercising original jurisdiction or appellate jurisdiction. Even in such a case, if the High Court were to exercise power of substitution of an arbitrator, it would be transgressing its jurisdiction since the power to appoint an arbitrator in an international commercial arbitrator rests exclusively with the Supreme Court."

15. According to Sri Goyal, the question whether the meaning of word "Court' would be High Court while exercising powers under Section 29A was also dealt with by the Bombay High Court in the case of ***Cabra Instalaciones Y. Servicios. S.A. vs. Maharashtra State Electricity Distribution Company Limited 2019 SCC OnLine Bom 1437***. Relevant paras 7 and 8 of the judgment are extracted hereas under :

"7. On a plain reading of Section 29A alongwith its sub-sections, it can be seen that for seeking extension of the mandate of an arbitral tribunal, these are substantive powers which are conferred on the Court and more particularly in view of the clear provisions of sub-section (6) which provides that while extending the period referred to in sub-section (4), it would be open to the Court to substitute one or all the arbitrators, which is in fact a power to make appointment of a new/substitute arbitrator or any member of the arbitral tribunal. Thus certainly when the arbitration in question is an international commercial arbitration as defined under Section 2(1)(f) of the Act, the High Court exercising power under Section 29A, cannot make an appointment of a substitute arbitral tribunal or any member of the arbitral tribunal as prescribed under sub-section (6) of Section 29-A, as it would be the exclusive power and jurisdiction of the Supreme Court considering the provisions of Section 11(5) read with

Section 11(9) as also Sections 14 and 15 of the Act. It also cannot be overlooked that in a given case there is likelihood of an opposition to an extension application and the opposing party may pray for appointment of a substitute arbitral tribunal, requiring the Court to exercise powers under sub-section (6) of Section 29-A. In such a situation while appointing a substitute arbitral tribunal, when the arbitration is an international commercial arbitration, Section 11(9) would certainly come into play, which confers exclusive jurisdiction on the Supreme Court to appoint an arbitral tribunal.

8. Thus, as in the present case once the arbitral tribunal was appointed by the Supreme Court exercising powers under Section 11(5) read with Section 11(9) of the Act, in my opinion, this Court lacks jurisdiction to pass any orders under Section 29-A of the Act, considering the statutory scheme of Section 29-A. It would only be the jurisdiction of the Supreme Court to pass orders on such application under Section 29-A of the Act when the arbitration is an international commercial arbitration. The insistence on the part of the petitioner that considering the provisions of sub-section (4), the High Court would be the appropriate Court to extend the mandate of the arbitral tribunal under Section 29-A, would not be a correct reading of Section 29A as the provision is required to be read in its entirety and in conjunction with Section 11(9) of the Act."

16. He placed before the Court judgment of Division Bench of Kerala High Court rendered in ***M/s Lots Shipping Company Limited vs. Cochin Port Trust Board of Trustees 2020 AIR (Kerala) 169***. Relevant paras 9 and 11 of the judgment are extracted here as under :

"9. Question to be decided is whether the term "court" contained in Section 29A(4) requires a contextual interpretation apart from the meaning contained in Section 2(1)(e)(i) of the Act. A contextual interpretation is clearly permissible in view of the rider contained in sub-section (1) of Section (2), "unless the context otherwise requires". As argued by the counsel on either side and as submitted by the learned Amicus Curiae, a contextual interpretation is required since the power conferred on the court under Section 29A, especially under sub-sections (4) and (5), are more akin to the powers conferred on the Supreme Court and the High Court, as the case may be, under Sections 11(6), 14 & 15 of the Act, for appointment, termination of mandate and substitution of the arbitrator. It is pointed out that, the amendments introduced in the year 2015, with effect from 23.10.2015, has recognized the judgment of the Constitutional Bench of the apex court in SBP & Company v. Patel Engineering Company Ltd. (2005) 8 SCC 618 and conferred the power of appointment on the Supreme Court or the High Court. The amendment has not in any manner enhanced the power of the principal civil court, which continues only with respect to matters provided under Sections 9 and 34 of the Act. It is significant to note that the orders passed by the principal civil court of original jurisdiction under Sections 9 and 34 are made appealable under Section 37 of the Act. So also, order if any passed refusing to refer the parties to arbitration under Section 8 of the Act, was also made appealable under Section 37(1)(a) of the Act. Section 29A was introduced to make it clear that, if the arbitration proceedings is not concluded within 18 months, even if the parties have consented for an extension, it cannot be continued unless a judicial

sanction is obtained. The power to grant extension by the court is introduced under an integrated scheme which also allows the court to reduce the fees of the arbitrator or to impose cost on the parties and/or to substitute the arbitrator(s). The power of extension is to be exercised on satisfying "sufficient cause' being made out. In all respect, such power conferred under Section 29A for permitting extension with respect to the proceedings of arbitration, is clearly akin to the powers conferred under Sections 14 & 15 of the Act. The absence of any provision for an appeal with respect to the exercise of such power under Section 29A, in the nature as mentioned above, would indicate that the power under Section 29A is not to be exercised by the principal civil court of original jurisdiction. Otherwise, it will create anomalous situation of identical powers being exercised in a contrary manner, prejudicial to the hierarchy of the courts. In a case where appointment of an arbitrator is made under Section 11(6) of the Act by the High Court or the Supreme Court, as the case may be, it would be incongruous for the principal civil court of original jurisdiction to substitute such an arbitrator or to refuse extension of the time limit as provided under Section 29A, or to make a reduction in the fees of the Arbitrator. Therefore a purposive interpretation becomes more inevitable.

11. Taking note of the principle enunciated herein above and on the basis of the detailed analysis, we are inclined to hold that the term "court" used in Section 29(4) has to be given an contextual and purposive interpretation, which is to be in variance with the meaning conferred to the said term under sub-section Section 2(1)(e)(i) of the Act. The term "court" contained in Section 29(4) has to be interpreted as the ''Supreme Court' in the case of international commercial arbitrations and as the "High Court' in the case of domestic arbitrations. Hence it is held that, either of the party will be at liberty to file an arbitration petition before the High Court under Section 29A(5) of the Act, seeking extension of time for continuance of the arbitration proceedings in exercise of the power conferred under Section 29A(4) of the Act, in the case of any domestic arbitration. The reference is answered accordingly."

66. A perusal of aforesaid judgments indicates that the same have been rendered on the proposition that the right to substitute can be exercised only by a Court which has the power to appoint and that substitution in fact of arbitrators appointed under Section 11(6) of the Act would lead to an anomalous situation. The said aspect of the matter has already been dealt with hereinabove and therefore no further exposition on the same is required particularly in the light of judgments rendered by Hon'ble the Supreme Court that interpreting the provisions in the manner as have been done in the said judgments would in fact lead to anomalous situation.

67. The concept of judgment having been rendered per incuriam has been considered in the case of ***Jayant Verma*** (supra) in the following terms:

58. Further, in State of M.P. v. Narmada Bachao Andolan [State of M.P. v. Narmada Bachao Andolan, (2011) 7 SCC 639 : (2011) 3 SCC (Civ) 875] , it was stated : (SCC pp. 679 & 680, paras 65 & 67)

"65. "Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. The courts

have developed this principle in relaxation of the rule of stare decisis. Thus, the "quotable in law" is avoided and ignored if it is rendered in ignorance of a statute or other binding authority.

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67. Thus, "per incuriam" are those decisions given in ignorance or forgetfulness of some statutory provision or authority binding on the court concerned, or a statement of law caused by inadvertence or conclusion that has been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

59. It is clear, therefore, that where a matter is not argued at all by the respondent, and the judgment is one of reversal, it would be hazardous to state that the law can be declared on an ex parte appraisal of the facts and the law, as demonstrated before the Court by the appellant's counsel alone. That apart, where there is a detailed judgment of the High Court dealing with several authorities, and it is reversed in a cryptic fashion without dealing with any of them, the per incuriam doctrine kicks in, and the judgment loses binding force, because of the manner in which it deals with the proposition of law in question. Also, the ratio decidendi of a judgment is the principle of law adopted having regard to the line of reasoning of the Judge which alone binds in future cases. Such principle can only be laid down after a discussion of the relevant provisions and the case law on the subject. If only one side is heard and a judgment is reversed, without any line of reasoning, and certain conclusions alone are arrived at, without any reference to any case law, it would be difficult to hold that such a judgment would be binding upon us and that we would have to follow it. In the circumstances, we are of the opinion that the judgment in Yasangi Venkateswara Rao [SBI v. Yasangi Venkateswara Rao, (1999) 2 SCC 375] cannot deter us in our task of laying down the law on the subject.

68. Upon applicability of aforesaid judgment, clearly the ratio decidendi enunciated not only by previous Coordinate Benches of this Court but also by Hon'ble the Supreme Court as indicated hereinabove as well as specific provisions of statute, in the considered opinion of this Court and with all due respect could not be considered in the case of ***Indian Fertilizer***s (supra) due to which it cannot be said to have attained the status of a binding precedent.

69. In the light of aforesaid aspects as indicated hereinabove, the question is answered as follows:-

'The concept of 'Court' as envisaged under Section 29A read with Section 2(1)(e) of the Act of 1996 does not include a High Court not having original civil jurisdiction as in the case of Allahabad High Court and an application as such under Section 29A of the Act of 1996 would be maintainable only in the Principal Civil Court of original jurisdiction in a district.'

70. In light of aforesaid, the applications being not maintainable before this Court are therefore **dismissed**. Parties to bear their own costs.

(2023) 6 ILRA 34
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.04.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE PRASHANT KUMAR, J.

Appeal Under Section 37 of Arbitration and Conciliation Act 1996 No. 224 of 2023

Sri Deviram Singhal & Ors. ...Appellants
Versus
Sri Manjeet Singh & Anr. ...Respondents

Counsel for the Appellants:
Sri Ravi Yadav, Sri Utkarsh Srivastava, Sri Navin Sinha (Sr. Advocate)

Counsel for the Respondents:
Sri Jata Shankar Pandey, Sri Syed Safdar Ali Kazmi

A. Civil Law - Arbitration and Conciliation Act, 1996-Sections 2(e)(1), 9, 20, 34 & 37-Arbitral award-Jurisdiction-place of arbitration not mentioned in arbitration clause-In present case, Section 9 application was filed before District Judge, Agra prior to seat being determined by Arbitral Tribunal at Jaipur-Though seat of arbitration was in Jaipur however, application u/s 34 filed in Commercial Court Agra is valid as Court in Agra would have supervisory jurisdiction over arbitration.(Para 20 to 26)

B. Arbitration and Conciliation Act, 1996-Sections 34 and 37-Setting aside of award-Claim made by claimant never disputed and also same was supported by evidence-Arbitrator before passing award analysed in detail evidence on record and had also kept in mind provisions of section 25(b)-Award was well reasoned and well analysed-Plea of appellant that award was passed without any reasoning cannot be sustained.(Para 28 and 29)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Bharat Aluminium Co. Vs Kaiser Aluminium Technical Services Inc.(2012) 9 SCC 552

2. BGS SGS SOMA JV Vs NHPC Ltd (2020) 4 SCC 234

3. Indus Mobile Distribution (P) Ltd. Vs Datawind Innovations (P) Ltd.(2017) 7 SCC 678

4. BBR (India) Pvt Ltd Vs S.P. Singla Cons. Pvt Ltd (2023) 1 SCC 693

5. Renusagar Power Co. Ltd. Vs. Gen. Electric Co. (1994) AIR 860

6. St. of Har. Vs. S.L. Arora & Co. (2010) 3 SCC 690

7. M/S Hyder Consulting (UK) Ltd. Vs. Gov. St. of Ori. thru Chief Eng. (2015) 2 SCC 189

8. ONGC Ltd. Vs. Saw Pipes Ltd. (MANU/SC/0314/2003: (2003) 5 SCC 750)

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

1. Heard Sri Navin Sinha, learned Senior Counsel assisted by Sri Utkarsh Srivastava, counsel for the appellants and Sri Syed Safdar Ali Kazmi, learned counsel for the respondents.

2. Brief facts of the case are, that the parties herein had entered into a partnership agreement on 01.04.1997 with the intention to construct a hotel and run the same in the partnership. It was decided that the business would be carried out in a partnership which would run the hotel, bar and restaurant in Agra and the head office of this business would be at E-14, Kailash Colony at New Delhi. This arrangement was such where the claimant (respondents herein) would invest the capital, and the appellants (herein) would be a working

partner and would be responsible for running the business, maintaining the accounts and handle the situation which arises in the ordinary course of business. During the construction of hotel the claimant not only provided sufficient fund for construction and for running the hotel, but also gave a personal loan of Rs. 20 lakh to the appellants. The construction was completed in December 1999. After opening and till July 2002, the hotel ran well and made a profit. After July, 2002, the appellants (herein) turned dishonest and stopped paying the profit to the respondents on the pretext that the business was running in loss. He did not allow the respondents to inspect the accounts. Since the hotel was located at the prime location, hence, the occupancy was very high. After February 2003, the appellants stopped the respondents from entering into the property the hotel.

3. In the agreement there was an arbitration clause which provided for arbitration in case of dispute between the parties which is reproduced herein under:-

"9. In case of dispute relating to the partnership or the business carried on under it, shall be referred to arbitrator and his decision shall be binding on both the parties."

It was worthwhile to mention that the arbitration clause was silent on the place of arbitration.

4. Since the respondents were not given the due profit share neither they were allowed to enter the property or had access to the accounts, so the respondents were left with no other option, but to invoke the arbitration clause, and approached the Court for appointment of arbitrator to adjudicate the differences so arose between the parties.

5. The respondents (herein) on 09.11.2006 had filed application under Section 9 of the Arbitration and Conciliation Act, 1996 (herein after for the sake of brevity has been referred to as "Arbitration Act") which was numbered as Arbitration Case No. 533 of 2006.

6. On this Section 9 application, the Court was pleased to direct that, "the applicant (respondents herein) would be allowed to enter the premises and inspect the record relating to the business and to take part in the management of the business as well".

7. On 02.01.2008 on the joint request of the parties one Sri Rakesh Kaushal resident of Jaipur was nominated by both the parties to be the sole arbitrator in the case. Accordingly, the Court appointed Sri Rakesh Kaushal as sole arbitrator. The Court directed that the arbitrator shall be at liberty to pass orders under Section 17 of the Arbitration Act. The Court further directed that claimants would not be restrained by the appellants from entering the business premises and also from taking part in the management of the business.

8. The arbitrator took up the Arbitration Reference on 12.07.2008 and after hearing both the parties, the Tribunal decided that the venue of the Arbitration Tribunal, would be at 43, Burmese Colony, Jaipur.

9. On 17.08.2008 the Claimant/Respondents filed his claim. Numerous opportunities were given to the appellants to file Statement of defence/Written statement. For the reasons best known to them, they chose not to file the same. They neither filed any counter claim inspite of getting sufficient number of opportunities. It was clear that the appellants were avoiding the arbitration proceedings and were adopting dilatory tactics.

10. Right from the inception of the arbitration proceedings, it was the endeavour of the appellants either to scuttle the hearings, or to delay the arbitration proceedings. They went to the extent of threatening the arbitrator to withdraw from the proceedings.

11. The Arbitral Tribunal after going through the statement of claimant and the written argument and after considering the facts and evidence on record, came to the conclusion that, the hotel business which was run under the partnership had earned profit, and gave an Award under various heads in favour of the respondents. Further the Tribunal held that the award will carry an interest of 15% per annum from the date of award till its realization.

12. Aggrieved against the award, the appellants filed an application under Section 34 of the Arbitration Act for setting aside the arbitral award before the Commercial Court Agra, inter alia on the ground of independence of the arbitrator, venue of arbitration, not affording an opportunity of hearing. This application was numbered as arbitration Case No. 73 of 2010 in the Commercial Court, Agra. The Commercial Court, Agra after hearing both the parties was pleased to reject the application filed under Section 34 of the Arbitration Act by the appellants vide order dated 23.01.2023 on the ground that the award passed by the arbitrator was not against a public policy and was not in conflict with the public policy of India.

13. Aggrieved against order passed by the Commercial Court, Agra, the appellants (herein) had preferred the instant appeal under Section 13 (1A) which is specifically enumerated under Section 37 of the Arbitration Act.

14. Heard counsel for the parties and perused the record.

15. In this appeal, two issues were raised, firstly, about the seat of arbitration and the court which would have supervisory jurisdiction. Secondly, on facts, that the award was passed without any evidence and was not a speaking award, there was a limitation issue, and compound interest on the pre award period could not have been awarded.

16. On the First issue, counsel for the appellants submits that both the courts in Agra and Jaipur would have jurisdiction to entertain application under Section 34 of the Arbitration Act as the cause of action arises in both the places.

17. Counsel for the respondents submits that since there was no place of arbitration mentioned in the agreement, hence, it was open for the arbitrator to choose the place of arbitration. Once the seat of arbitration have been chosen, any application/appeal subsequent to it, can only be filed or entertained in the court, which has supervisory jurisdiction over the place where arbitration is carried out. Hence the appeal filed under Section 34 of the Arbitration Act in Agra, could also not have been filed.

18. The respondents urged that the scope of Section 34 of the Arbitration Act is very limited, and as per various judgment of Hon'ble Supreme Court, it is clear that the Court cannot interfere unless and until it falls within the straight jacket of the provisions under Section 34 of the Arbitration Act. The counsel for the respondents further submitted that in various judgments of Hon'ble Supreme Court it has clearly been laid down that,

Section 37 of the Arbitration Act could not be entertained by the courts, as court of appeal who will look into the award on the appellate side, unless and until it is shown and proved that the award is in conflict with the public policy of India or in contravention of fundamental policies of Indian law or in conflict with most basic notion of morality or justice, or the award is vitiated by patent illegality appearing on the face of the award, the application or appeal cannot be entertained.

19. We deem appropriate to deal with the First issue of "jurisdiction of the supervisory Court" first.

20. Before entering into the dispute, the relevant provision of Arbitration Act, 1996 which is important for adjudication, is being reproduced herein under:-

*Section 2 (1)(e) "**Court**' means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes;"*

"Section 20. Place of arbitration.--(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

20A. A plain reading of Section 20 leaves no room for doubt that the parties are free to agree to any "place" or "seat" of Arbitration. In the absence of the parties' agreement thereto, Section 20 (2) of the Arbitration Act authorises the Tribunal to determine the place/seat of such arbitration.

21. The Five Judge Bench of the Hon'ble Supreme Court in the case of **Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc.1** in paragraph No. 96 held that:-

".....The term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process.

The provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy.

The legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties.

Both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located."

22. The decision of **Bharat Aluminium Company** was followed by the Hon'ble Supreme Court in **BGS SGS SOMA JV vs. NHPC Limited2** in which the issue was, as to which court would have exclusive jurisdiction over the arbitration, as opposed to the place where whole or part of the cause of action arises. The Hon'ble Supreme Court in paragraph-38 held that:-

"38..... The Balco vs.Kaiser Aluminium Technical Services Inc.3, judgment, when read as a whole, applies the concept of "seat" as laid down by the English judgments (and which is in Section 20 of the Arbitration Act, 1996), by harmoniously construing Section 20 with Section 2(1)(e), so as to broaden the definition of "court", and bring within its ken courts of the "seat" of the arbitration "

In this case it was held that jurisdiction would be given to two sets of courts, namely, those courts which would have jurisdiction where the cause of action is located; and those courts where the arbitration takes place.

23. Thereafter, in the matter of **Indus Mobile Distribution (P) Ltd. vs. Datawind Innovations (P) Ltd.4** the Hon'ble Supreme Court properly analyzed the provisions of Section 20 of the Arbitration Act and came to a conclusion that when there is no place of arbitration mentioned in the agreement and where the Arbitral Tribunal determines a particular place as the seat of the arbitration under Section 31(4) of the Arbitration Act, it becomes clear that the parties having chosen the seat, (or the Arbitral Tribunal having determined the seat), have also chosen the courts at the seat for the purpose of interim orders and challenges to the award.

24. The Hon'ble Supreme Court in the matter of **BBR (India) Private Limited Vs. S.P. Singla Constructions Private Limited5** had again dealt with the issue of jurisdiction or supervisory Court where the place of arbitration was fixed under Section 20 (2) of the Arbitration Act by the Arbitrator. The Hon'ble Supreme Court had held that, all applications under Part I will be preferred in the court where "the seat" is located as that court would alone have jurisdiction over the arbitration proceedings and all subsequent proceedings arising out of the arbitration proceedings. The quotation also clarifies that when either no "seat" is designated by an agreement, or the so-called "seat" is only a convenient venue, then there may be several courts where a part of the cause of action arises that may have jurisdiction. An application under Section 9 of the Arbitration Act may be preferred before the court in which a part of cause of action arises in the case where parties had not agreed on the "seat of arbitration". This is possible in the absence of an agreement fixing "the seat", as an application under Section 9 may be filed before "the seat" is determined by the Arbitral Tribunal under Section 20(2) of the Arbitration Act. Consequently, in such situations, the court where the earlier application has been made, being the court in which a part or entire of the cause of action arises, would then be the exclusive court under Section 42 of the Arbitration Act. Accordingly, such a court would have control over the arbitration proceedings.

25. In view of the ratio laid down by the Hon'ble Supreme Court, it is clear that in this case though the seat of arbitration was in Jaipur but the Court in Agra would also have supervisory jurisdiction as Section 9 application was filed before the District Judge, Agra prior to the seat being determined by the Arbitral Tribunal.

26. Accordingly, we find no merit in the arguments of the respondent, and hold that the application under Section 34 of the Arbitration Act has rightly been filed in the Commercial Court, Agra and the Court in Agra would have supervisory jurisdiction over arbitration.

27. Secondly, the appellants have challenged the Award on merit. Counsel for the appellants submitted that, it is a case of no evidence as award has been passed without there being any evidence on record, the award was not a speaking award, the future income could not have been contemplated, claim for share of profit was not arbitrable, the award is unreasoned and that the part of the claim was barred by limitation.

28. The appellant argued that, the Award lacks proper reasoning. Though, it has been further argued that it is the duty of the arbitrator under Section 25 (b) of the Arbitration Act to proceed without treating that failure of the respondent to rebut the allegation as an admission. The Award do not entail any reason or analysis whatsoever in support of the relief awarded to the claimant.

This argument raised by the counsel for the appellants that the impugned award is without any reasoning, will also hold no ground because of the fact that claimant has filed the statement of claim and had supported his claim with the available evidence on record. The claim made by the claimant has never been denied by the respondents. The Award was well reasoned and well analyzed.

29. Counsel for the appellants relied on the judgment passed by the Hon'ble Supreme Court in the matter of **Associate Builders v. Delhi Development Authority** and argued that if an arbitrator gives no reason for an award, then it will be in contravention of Section 31 (3) of the Arbitration Act, such award will be liable to be set aside."

This argument also, is of no help to the appellant, as it is not a case where the award was passed without any evidence, or documents and material on record. It cannot be said that the arbitrator has not given any reasoning while passing the award.

The Arbitrator while deciding the claim was careful enough not to pass an award merely for asking of the claimant but went deep into the details before passing the award, he had also kept in mind the provision of Section 25 (b) of the Arbitration Act before passing the award. Hence, it cannot be said that the impugned order was unreasoned.

30. In reply to the averments made by the counsel for the appellants, the respondents submitted that, all evidences and documents available with the claimant were produced before the arbitrator and the same was never objected to, or denied by the Appellants. Even affidavit of manager was filed before the arbitrator which clearly mentions the number of rooms, the amount charged, the occupancy of the hotel, the expenses, the income and the profits of the hotel. This has now been denied by the

appellants. Moreover, the counsel for the respondents took us to the record which shows that there was enough evidence on the basis of which the arbitrator had passed a speaking award.

31. Counsel for the respondents submitted that on the basis of income, expenses, profit, the arbitrator has assessed the future income. The appellants (herein) who had cheated the claimant by not giving his due shares and solely enjoying the property and the income coming out of the property. He was not furnishing the account and not giving true account so there was no way arbitrator could have calculated the profit and hence, proceeded to decide on the basis of proposed income. Hence, this procedure adopted by the Arbitrator in passing the Award seems to be perfectly justified.

32. The arguments raised by the counsel for the appellants that the award has been passed without any evidence is also not tenable. The share of profit of partnership firm arising out of room rent, boarding facility and other activities was available to substantiate the evidence before the arbitrator. The appellants made no endeavour to rebut the evidence before the Arbitrator. As a matter of fact, the Arbitrator, just not awarded, what was claimed by the claimant, but only awarded, what was substantiated by the evidence on record.

33. Counsel for the appellants further argued that partially the claim (in respect of profit w.e.f. 2000 to September 2003) was barred by limitation, he submitted that in the present case, the notice invoking arbitration necessary for the commencement of arbitral proceedings under Section 21 was issued on 11th October, 2006. Section 43 of the Arbitration Act provides as follows:-

"Section 43: Limitations - (1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21....."

Hence, the claim sought and granted for the period January 2000 to September, 2003 by the Ld. Arbitrator is barred by limitation under Article 137 of the Schedule to The Limitation Act, 1963.

34. In reply to it, counsel for the respondents submitted that the claim was not barred by limitation.

35. Article 5, Article 113 and Article 137 of the Schedule which have bearing on the issue, are as follows :-

	Description of Suit	Period of Limitation	Time from which period begins to run
5.	For an account and a share of the profits of a dissolved partnership.	Three years.	The date of the dissolution.
113.	Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.
137.	Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues.

36. In an action for an account and a share of the profits of a dissolved partnership firm, the time begins to run for purposes of calculating the limitation from the date of dissolution of the partnership. Under Article 113 and Article 137, the time starts running when the right to sue / apply accrues.

37. Lindley in his treatise on the Law of Partnership, Fifteenth Edition, while considering as to what would be the period for which account could be taken or carried back states that "the time from which an account is to begin will, in a general account of partnership dealings and transactions, be the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure". The limitation prescribed for bringing an action for accounts is not the same as the period for which account can be sought. Under Article 5, the time begins to run from the date of dissolution of partnership firm. Under Article 113/137, time begins to run from the date right to sue /apply accrues. The right to sue/apply under Article 113/137 would accrue when account is demanded but is denied or where the account is to be rendered periodically in terms of a specific stipulation in that behalf in the agreement and the same is not adhered to. In the instant case, the latter was not applicable and therefore, the right to sue/apply accrued when the account was demanded but was denied. It is not the case of the appellant that the claim as a whole was barred by limitation. What is alleged is that the claim for accounting in respect of the period January 2000 - September 2003 was barred by limitation. It is based on the premise that profit and loss was to be accounted for every year. Therefore, the time started running at the end of every year and after three years the claim for accounting for that particular year would be beyond limitation. However, as noted above, in the absence of any stipulation for sharing of profits/loss at the end of every year or on any specified date, we are unable to accept the contention. Infact the plea taken in this behalf is seemingly paradoxical. The appellant had opposed the relief relating to accounting, as noted in earlier part of the judgment, by contending that the claim was pre-mature in the absence of any specific date in the agreement for accounting.

38. While it is impermissible to re-open a settled account, there is no legal impediment in claiming profit/loss of the account for the entire period for which the account had not been rendered, unless any such bar could be inferred from the term of the partnership agreement. We thus find no merit in the contention that the claim in respect of profit w.e.f. 2000 to September, 2003 was barred by limitation.

39. The Counsel for the appellants argued that Arbitrator did not have the power to grant interest @ 15 % per annum consolidated. This argument was opposed by the counsel for the respondents.

40. Hon'ble Supreme Court in the matter of **Renusagar Power Co. Ltd vs General Electric Co.6**, has held that Award of compounding interest by an Arbitral Tribunal is not against the public policy of India. This portion as laid down was codified in the Arbitration Act, 1996.

41. Earlier a Division Bench of the Hon'ble Supreme Court in **State of Haryana vs. S.L. Arora and Company7,** had held that Arbitral Tribunal does not

have the power to award compound interest unless specifically provided in the contract or in the statute.

42. Thereafter, the Law Commission of India in its 246th Report clarified that the terms of Section 31 (7) of the Arbitration Act are of vital impact. As per the report, the Scheme of the relevant provisions of the Arbitration Act indicated that the award of interest is not only permitted but is also the norm. The Commission was of the opinion that the decision of SL Arora needs to be revisited.

43. Thereafter, the ratio laid down by Hon'ble Supreme Court in S.L. Arora (supra) was over-ruled by a Full Bench of Hon'ble Supreme Court in **M/S Hyder Consulting (UK) Ltd. vs Governor, State Of Orissa through Chief Engineer8**, wherein it was held that Section 31 (7) of the Arbitration Act uses "sum'. This would entail both principle and interest. Once interest is included in the sum, for which the award is made, the original sum and intent cannot be segregated or seen as independent of each other.

44. The Hon'ble Supreme Court again, in the matter of **UHL Power Company Limited Vs. State of Himachal Pradesh** has reiterated the ratio laid down in Hyder Consulting and has allowed the award containing interest in award.

45. In view of above mentioned ratio laid down by the Hon'ble Supreme Court, it is held that the Arbitrator has power to grant interest in a pre award period to be compounded annually, hence, we find no force in the argument of the appellants on the issue of grant of interest to be compounded annually for the pre award period.

46. We are well aware by scope of interference in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996, which arise out of Section 34 proceedings in the Arbitration Act. Though, Hon'ble Supreme Court in the **J.G. Engineers (P) Ltd. v. Union of India, Associate Builders v. Delhi Development Authority, SSangyong Engineering and Construction Company Pvt. Ltd. v. NHAI** has held that the scope of interference under Sections 34 and 37 of the Arbitration Act is very narrow. Keeping this view in mind, we do not intend to sit in appeal and look into the documents and re-appreciate the evidence.

47. Learned counsel for the respondents relied upon the judgment of Hon'ble Supreme Court in the matter of **ONGC Ltd. v. Saw Pipes Ltd.9** wherein, it was held that a court can set aside an award under Section 34(2)(b)(ii) of the Arbitration Act, if it is in conflict with the public policy of India, or if it is contrary to the fundamental policy of Indian law; or contrary to the interests of India; or contrary to justice or morality; or patently illegal. The Court further explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court, as then it would be opposed to public policy.

48. In the matter of **J.G. Engineers (P) Ltd. v. Union of India,** the Hon'ble Supreme Court has, demarcated the boundary while explaining the ambit of Section 34(2) of the Arbitration Act, this boundary so demarcated has to be strictly followed.

49. The Hon'ble Supreme Court in the matter of **Associate Builders v. Delhi Development Authority**, has further clarified the scope of judicial intervention under the appeal in the Arbitration Act held as under :-

"It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score[1]. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."

50. The law is well settled that, where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Arbitration Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under Section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the Court to interfere with the award merely because in the opinion of the Court, another view is possible. The duty of the Court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the fact, pleadings and evidence before the Arbitrator.

51. The extent of judicial scrutiny under Section 34 of the Arbitration Act is limited and scope of interference is narrow. Under Section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under Section 34, in an appeal under Section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings in the award by the Arbitral Tribunal and confirmed by the court under Section 34.

52. As a matter of fact, the arbitrator in his award had very categorically stated that it was an endeavour of the appellants to delay the hearing. They did not co-operate, and time and again only created hurdles in the arbitration proceedings. The Arbitrator on the basis of documents and other evidence on record has passed well reasoned award.

53. In view of the aforesaid facts, we come to the conclusion that the Commercial Court, Agra had jurisdiction to entertain the application filed under Section 34 of the Arbitration Act challenging the award. However, we find no ground to interfere in the matter. The instant appeal filed under Section 13 (1-A) of the Commercial Court Act, 2015 which infact are the appeals enumerated under Section 37 of the Arbitration Act. Accordingly, the order passed by the Commercial Court under Section 34 of the Arbitration Act is upheld.

54. The appeal is accordingly **dismissed.**

(2023) 6 ILRA 44
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Cancellation Application No. 172 of 2022

Smt. Shanti Rani Agarwal ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ashish Kumar Singh, Sri Imran Ullah

Counsel for the Opposite Parties:
G.A., Sri Nand Lal Pandey, Sri Suyash Pandey

Criminal Law - Criminal Procedure Code, 1973 - Section 173(2) & 482 - Indian Penal Code, 1860 - Sections 147, 387, 420, 467, 468, 471, 447, 504 & 506 - Constitution of India,1950 – Article 21 - Application for Bail Cancellation – FIR – Chargesheet – cognizance was taken – Anticipatory Bail was granted by court till the filing of charge-sheet – court finds that, it is admitted to both parties that before order of bail charge-sheet was already filed – Doctrine of clean hand – held, any order taken by suppressing facts is bad and cannot be sustained as the very foundation is weak, any subsequent order based on it also cannot be accorded any sanctity and is also unsustainable – as such, anticipatory bail order is set aside – accordingly, instant Bail cancellation application is allowed.
(Para – 29, 31, 32)

Bail Allowed. (E-11)

List of Cases cited:

1. Shivam Vs St. of U.P. & anr., AIR Online 2021 All. 484,

2. S.P. Chengalvaraya Naidu Vs Jagannath, 1994 AIR 853 SC,

3. A.V. Papayya Sastry & ors.Vs Govt. of A.P. & ors., Appeal (Civil) No. 5097 of 2004

4. Puran Vs Rambilas & anr., 2001 SCC (Cri) 1124,

5. Satender Kumar Antil Vs Central Bureau of Investigation & anr., 2022 SCC Online SC 825,

6. Gurcharan Singh Vs St. (Delhi Admn.) reported in AIR 1978 SC 179,

7. Nityanand Rai Vs St. of Bihar & anr., (2005) 4 SCC 178,

8. Manoj Kumar Khokhar Vs St. of Raj., (2022) 3 SCC 501,

9. Jagjeet Singh Vs Ashish Mishra @ Monu, AIR 2022 SC 1918,

10. Deepak Yadav Vs St. of U.P., AIR 2022 SC 2514,

11. Dolat Ram & ors. Vs St. of Har., (1995) 1 SCC 349,

12. Neeru Yadav Vs St. of U.P.& anr., (2016) 15 SCC 422,

13. Mahipal v. Rajesh Kumar Alias Polia & anr., AIR 2020 SC 670,

14. Colby Furniture Comp., Inc. Vs Belinda J. Overton, 299 So.3d 259,

15. Holy Family Catholic School Vs Boley 847 So.2d 371 (2002).

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

1. Heard Sri Imran Ullah, learned counsel for the applicant, Sri Nand Lal Pandey, learned counsel for the opposite party no. 2 and Sri V.K.S. Parmar, learned A.G.A. for the State.

2. The instant bail cancellation application has been filed on behalf of the applicant (complainant) with the prayer to cancel the bail granted to opposite party no. 2 by the court concerned in Case Crime No. 520 of 2020 under Sections 147, 420, 467, 468, 471, 387, 447, 504, 506 IPC, Police Station George Town, District Prayagraj.

PROSECUTION STORY:

3. The informant Smt. Shanti Rani Agarwal lodged an FIR at P.S. George Town on 30.9.2020 stating that she had purchased the plot no. 8/49 at C.Y. Chintamani Road, George Town, Prayagraj, from its original owner Dr. Pant. Adjacent to it, Anil Dwivedi @ Gulab Dwivedi had purchased a plot of dimension 30 x 72 ft. in resale. Subsequent to it, opposite party no. 2 Anil Dwivedi had illegally taken possession on the part of the land of the informant and had even undertaken illegal construction. On being objected by the informant, the opposite party no. 2 is stated to have threatened the applicant/informant alongwith his associates and had even demanded a ransom of Rs. 15 lakhs. The said illegal construction was ordered to be demolished by the Prayagraj Development Authority. The opposite party no. 2 is stated to have prepared forged documents and is stated to have again demanded ransom from her.

RIVAL CONTENTIONS:

CONTENTIONS ON BEHALF OF THE APPLICANT:

4. Learned counsel for the applicant has stated that after lodging of the FIR, the final report (charge sheet) was submitted by the investigating agency on 25.1.2021 and the cognizance was taken on 2.2.2021. The applicant challenged the said charge sheet and the order of cognizance by filing a petition under Section 482 Cr.P.C. as Application No. 10351 of 2021 before this Court and it was dismissed on merits vide order dated 6.10.2021.

5. The opposite party no. 2 filed an anticipatory bail application before the Sessions Judge, Allahabad, which was not pressed and was dismissed as such.

6. Subsequent to it, the applicant moved the second anticipatory bail application before the Sessions Judge, Allahabad, which was allowed by Additional Sessions Judge, Court No. 1, Allahabad vide order dated 23.12.2021 till the filing of the final report (charge sheet). The said order was taken by the applicant by concealing the fact that already the charge sheet was filed on 25.1.2021 and the cognizance had been taken by the court on 2.2.2021 and even the petition under Section 482 Cr.P.C. was dismissed on 6.10.2021.

7. Learned counsel has further stated that subsequent to it, the opposite party no. 2 challenged the said order of this Court dated 6.10.2021 passed in the petition filed under Section 482 Cr.P.C., by filing Special Leave to Petition (Criminal) No. 9987 of 2021, which was dismissed by the Supreme Court on 5.1.2022.

8. The applicant moved the third anticipatory bail application before the Sessions Judge, Allahabad, which was allowed by the Additional Sessions Judge, Court No. 1, Allahabad vide order dated 25.2.2022, by taking into consideration the fact that the applicant was already granted bail till submission of final report (charge sheet), as such, he was also entitled for anticipatory bail till conclusion of trial.

9. Learned counsel has next stated that the said order has been granted as the opposite party no. 2 has played fraud with the court, as such, is a nullity. No sanctity can be accorded to the said order as the first order on merits passed by this Court on the second anticipatory bail application of the applicant dated 1.11.2021 was taken by keeping the court in dark about the fact that the final report (charge sheet) had already been filed.

10. Learned counsel has stated that in light of the judgement of this Court passed in ***Shivam vs. State of U.P. and Another1***, the applicant was not entitled for bail, as such, he has concealed the very fact to get that order. Paragraphs 43(6) and (8) of the aforesaid judgement state that the anticipatory bail cannot be granted to an accused after submission of charge sheet:-

"(6) Where there exists a civil remedy but on the same set of allegations, civil wrong and criminal wrong both are made out and charge-sheet has been submitted only regarding the criminal wrong,

(8) Where the accused has unsuccessfully challenged the charge-sheet before this Court or any proceedings are pending before this Court regarding the charge sheet submitted against the accused;"

11. Learned counsel has also placed reliance on paragraph 45 (vi) of ***Shivam vs. State of U.P. and Another (supra)*** wherein it is opined that the clear pleading should be made in the anticipatory bail application that after submission of charge-sheet, the applicant has not approached any court and no such proceeding is pending.

12. Learned counsel has placed reliance on the judgement of the Apex Court passed in ***S.P. Chengalvaraya Naidu vs. Jagannath2***, wherein it has been held as under:-

"The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

13. Learned counsel has placed reliance on the judgement of the Apex

Court passed in ***A.V. Papayya Sastry & others vs. Governmnet of A.P. & Others3***, wherein it has been held as follows:-

"It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Even the Chief Justice Edward Coke proclaimed "Fraud avoids all judicial acts, ecclesiastical or temporal".

14. It was also opined in the said judgement that a judgement, decree or order obtained by fraud by the first Court or by the final court has to be treated as a nullity by every Court, superior or inferior. It can be challenged in any Court at any time, in appeal, revision, writ or even in collateral proceedings. Lord Denning had observed that in the leading case of *Lazarus Estates Ltd. v. Beasley, (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502, that "No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud."*

15. Learned counsel has placed reliance on the judgement of the judgement of the Apex Court passed in ***Puran vs. Rambilas and another4***,wherein it was held as under:-

"11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in Gurcharan Singh v. State (Delhi Admn.) reported in AIR 1978 SC 179. In that case the Court observed as under:-

"If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under S. 439 (2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court."

16. It was laid down in this judgement that even the complainant being an aggrieved person, can move the bail cancellation application. Learned counsel has stated that any party seeking relief from a court has to come with clean hands and as such, in light of the aforesaid judgements, any order garnered by playing fraud with it, has no sanctity in law and is thus, liable to be set aside.

17. Learned counsel has stated that as the second bail application was taken by playing fraud with it, and the third anticipatory bail application was based on

the second anticipatory bail, as such, said order dated 25.2.2022 is a nullity and is liable to be set aside.

CONTENTIONS ON BEHALF OF OPPOSITE PARTY NO. 2:

18. Learned counsel for the opposite party no. 2 has vehemently argued that the informant (applicant herein) should have brought the said fact of fraud, if any, to the notice of the court concerned and he has wrongly assailed the said order before this court.

19. Learned counsel has next stated that the prosecution was granted ample time and the impugned orders are detailed orders, as such, and have attained finality. The applicant has not misused the said orders granted to him. There is no criminal history of the applicant and no FIR or even NCR has been instituted against him subsequent to the said orders dated 1.11.2021 and 25.2.2022.

20. Learned counsel has stated that it was the duty of the prosecution to bring all the material facts before the Court. The prosecution itself has failed to bring to the notice of the Court the factum of the petition filed under Section 482 Cr.P.C. by the opposite party no. 2. Learned counsel has next stated that the bail cancellation application should have been moved by the State and the complainant cannot be allowed to initiate bail cancellation proceedings.

21. Learned counsel has also placed reliance on the judgement of the Apex Court passed in ***Satender Kumar Antil vs. Central Bureau of Investigation and another5***, wherein it has been opined that the court has ample powers to recall its orders, so the application should have been moved before the Sessions Judge, Allahabad itself.

22. Learned counsel has placed much reliance on the judgement of the Apex Court passed in ***Gurcharan Singh and others vs. State (Delhi Administration)6***, wherein it was held that ordinarily, the High Court will not use its discretion to interfere with an order of bail granted by Sessions Judge in favour of an accused. It has been held as under :-

"25. The question of cancellation of bail u/s. 439(2), Cr. P. C. of the new Code is certainly different from admission to bail u/s. 439(1), Cr. P. C. The decisions of the various High Courts cited before us are mainly with regard to the admission to bail by the High Court under section 498, Cr. P.C. (old). Power of the High Court or of the Sessions Judge to admit persons to bail under section 498, Cr. P.C. (old) was always held to be wide without any express limitations it], law. In considering the question of bail justice to both sides governs the judicious exercise of the court's judicial discretion. The only authority cited before us where this Court cancelled bail granted by the High Court is that of The State v. Captain Jagjit Singh(1). The Captain was prosecuted along with others for conspiracy and also under section 3 and 5 of the Indian Official Secrets Act, 1923 for passing on official secrets to a foreign agency. This Court found a basic error in the order of the High Court in treating the case as falling under section 5

of the Official Secrets Act which is a bailable offence when the High Court ought to have proceeded on the assumption that it was tinder section 3 of that Act which is a non-bailable offence. It is because of this basic error into which the High Court fell that this Court interfered with the order of bail granted by the High Court.

26. In the present case the Sessions Judge having admitted the appellants to bail by recording his reasons we will have to see whether that order was vitiated by any serious infirmity for which it was right and proper for the High Court, in the interest of justice, to interfere with his discretion in granting the bail.

27. Ordinarily the High Court will not exercise its discretion to interfere with an order of bail granted by the Sessions Judge. in favour of an accused."

23. Learned counsel has also placed reliance on the judgement of the Apex Court in the case of ***Nityanand Rai vs. State of Bihar and Another7***, wherein the bail cancellation order passed by the High Court was set aside by the Apex Court.

24. Learned counsel has further placed reliance on the judgement of the Apex Court in the case of ***Union of India vs. K.A. Najeeb8***, wherein it was opined that the liberty guaranteed by Article 21 read with Part III of the Constitution of Indian covers within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. The parameters for granting and cancelling of bail were distinguished in it, whereby it was stated that the bail once granted by the trial court may be cancelled by the same court only in case of new circumstances/evidence, failing which, it would be necessary to approach the higher court exercising appellate jurisdiction.

25. In the case of ***Manoj Kumar Khokhar vs. State of Rajasthan9***, it was opined by the Apex Court that the rights of the informant/victim are to a limited extent and they cannot be extended to overtake the State to challenge the bail order.

CONCLUSION:

26. The Supreme Court in ***Jagjeet Singh vs Ashish Mishra @ Monu10***, dealing with the question of the 'right of the victim' to be heard, has categorically expressed *"Victims certainly cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. It is the solemn duty of a court to deliver justice before the memory of an injustice eclipses."*

27. The Supreme Court in the case of ***Deepak Yadav vs State of U.P.11***, has dealt with the issue as follows:

"30.This Court has reiterated in several instances that bail once granted, should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during trial. Having said that, in case of cancellation of

bail, very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail (which was already granted). A two-Judge Bench of this Court in ***Dolat Ram And Others v. State of Haryana12*** laid down the grounds for cancellation of bail which are:-

(i) interference or attempt to interfere with the due course of administration of Justice

(ii) evasion or attempt to evade the due course of justice

(iii) abuse of the concession granted to the accused in any manner

(iv) Possibility of accused absconding

(v) Likelihood of/actual misuse of bail

(vi) Likelihood of the accused tampering with the evidence or threatening witnesses.

31. It is no doubt true that cancellation of bail cannot be limited to the occurrence of supervening circumstances. This Court certainly has the inherent powers and discretion to cancel the bail of an accused even in the absence of supervening circumstances. Following are the illustrative circumstances where the bail can be cancelled:-

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

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

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

d) Where bail has been granted on untenable grounds.

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

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

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

32. In ***Neeru Yadav v. State of Uttar Pradesh And Another 13*** the accused was granted bail by the High Court. In an appeal against the order of the High Court, a two-Judge Bench of this Court examined the precedents on the principles that guide grant of bail and observed as under :-

"12...It is well settled in law that cancellation of bail after it is granted because the accused has misconducted himself or of some supervening circumstances warranting such cancellation have occurred is in a different compartment altogether than an order granting bail which is unjustified, illegal and perverse. If in a case, the relevant factors which should have been taken into consideration while dealing with the

application for bail and have not been taken note of bail or it is founded on irrelevant considerations, indisputably the superior court can set aside the order of such a grant of bail. Such a case belongs to a different category and is in a separate realm. While dealing with a case of second nature, the Court does not dwell upon the violation of conditions by the accused or the supervening circumstances that have happened subsequently. It, on the contrary, delves into the justifiability and the soundness of the order passed by the Court"

13. We will be failing in our duty if we do not take note of the concept of liberty and its curtailment by law. It is an established fact that a crime though committed against an individual, in all cases it does not retain an individual character. It, on occasions and in certain offences, accentuates and causes harm to the society. The victim may be an individual, but in the ultimate eventuate, it is the society which is the victim. A crime, as is understood, creates a dent in the law and order situation. In a civilised society, a crime disturbs orderliness. It affects the peaceful life of the society. An individual can enjoy his liberty which is definitely of paramount value but he cannot be a law unto himself. He cannot cause harm to others. He cannot be a nuisance to the collective. He cannot be a terror to the society; and that is why Edmund Burke, the great English thinker, almost two centuries and a decade back eloquently spoke thus:

"Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere; and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters." [Alfred Howard, The Beauties of Burke (T. Davison, London) 109.]

.....

17. That apart, it has to be remembered that justice in its conceptual eventuality and connotative expanse engulfs the magnanimity of the sun, the sternness of mountain, the complexity of creation, the simplicity and humility of a saint and the austerity of a Spartan, but it always remains wedded to rule of law absolutely unshaken, unterrified, unperturbed and loyal.

.....

37. There is certainly no straight jacket formula which exists for courts to assess an application for grant or rejection of bail but the determination of whether a case is fit for the grant of bail involves balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of the involvement of the accused are important. This Court does not, normally interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with basic principles laid down in a catena of judgments by this Court.

28. The Apex Court in ***Mahipal v. Rajesh Kumar Alias Polia and Another14*** held that: -

"17. Where a court considering an application for bail fails to consider relevant factors, an appellate court may justifiably set aside the order granting bail. An appellate court is thus required to consider whether the order granting bail suffers from a non-application of mind or is not borne out from a prima facie view of the evidence on record. It is thus necessary for this Court to assess whether, on the basis of the evidentiary record, there existed a prima facie or reasonable ground to believe that the accused had committed the crime, also taking into account the seriousness of the crime and the severity of the punishment."

29. The clean hands doctrine states that one "who comes into equity must come with clean hands." This doctrine requires the court to deny equitable relief to a party having violated good faith with respect to the subject of the claim. The purpose of the doctrine, as elucidated in ***Colby Furniture Company, Inc. v. Belinda J. Overton15*** is to prevent a party from obtaining relief when that party's own wrongful conduct has made it such that granting the relief would be against equity and good conscience.

30. The clean hands doctrine is an affirmative defense that the defendant may claim as has been held in ***Holy Family Catholic School v. Boley16,*** that the plaintiff's abuse of the account necessitated a finding that the plaintiff had "unclean hands" and that requiring the defendant to continue granting relief would be against good conscience.

31. It is admitted to both the parties that the charge sheet was submitted in the case on 25.1.2021 and subsequently, the cognizance was taken by the trial court on 2.2.2021. The said final report (charge sheet) and the summoning order were challenged by the opposite party no. 2 by filing a petition under Section 482 Cr.P.C., which was dismissed by this Court on 6.10.2021. The anticipatory bail application of the opposite party no. 2 was allowed by the court subsequent to the dismissal of the petition under Section 482 Cr.P.C. on 1.11.2021. The said order was passed by the concerned court without being apprised of the fact of the final report (charge sheet) having been filed and the opposite party no. 2 (applicant therein) having failed in the petition under Section 482 Cr.P.C. Thus, it follows from the said order that the said order was not proper in light of the judgement of this Court passed in ***Shivam vs. State of U.P. and Another (supra)***, as the concerned court was kept in dark about the said facts referred above as it was mentioned in it that the anticipatory bail application is being allowed till the submission of report under Section 173 (2) Cr.P.C.

32. The third anticipatory bail application was allowed by the concerned court on 25.2.2022 by taking into consideration the fact that the applicant was on anticipatory bail till the submission of final report (charge sheet) and has not misused it. The third anticipatory bail itself being based on the second anticipatory bail order dated 1.11.2021 is itself bad in the

eyes of law, as such, it cannot be sustained. The said orders dated 1.11.2021 and 25.2.2022 are whimsical and perverse. Any order taken by suppressing facts is bad and cannot be sustained. As the very foundation is weak, any subsequent order based on it also cannot be accorded any sanctity and is also unsustainable. The judgements referred by learned counsel for the opposite party no. 2 do not apply to the present case as he has not come to the court with clean hands and has taken the orders by concealing the facts, as such, the order dated 25.2.2022 is set aside and quashed.

33. Accordingly, the instant bail cancellation application is ***allowed.***

34. However, two weeks' time from the date of pronouncement of this Judgment is granted to opposite party no. 2 to surrender before the concerned Trial Court and thereafter it will be open for opposite party no. 2 to pray for regular bail, which may be considered in accordance with law laid down by the Apex Court in the case of ***Satender Kumar Antil (supra).***

(2023) 6 ILRA 53
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Misc. Bail Cancellation Application No. 646 of 2022

Zeba Parveen ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Mrs. Zeba Parveen (In Person)

Counsel for the Opposite Parties:
G.A., Sri Rajrshi Gupta, Sri Raizwan Ahmad

A. Criminal Law - Code of Criminal Procedure, 1973 -Section 439(2) - Power to Cancel Bail - Criminal Misc. Bail Cancellation Application. Held: Bail, once granted, can only be cancelled where, subsequent to the grant of bail, the accused has misconducted himself, misused the liberty or protection available to him, or where new facts have surfaced that have an important bearing on the case. It can also be cancelled if the order is arbitrary, perverse, without jurisdiction, or is bad in law for some other reason of a similar nature. Though misuse of liberty is one of the grounds for cancellation of bail, the burden lies on the State or the party seeking it to prove this by bringing sufficient material before the court, or at least show that the allegations of misuse or misconduct have some substance. (Para 12)

B. In the instant case there was an allegation that the opposite party no. 2, during the period he was on interim bail/interim protection, threatened the victim, and she filed complaints on two occasions — i.e., before the Police Commissioner, Kanpur Nagar, and before the concerned Sessions Judge. *Held :* Filing of applications or even lodging an F.I.R. is not sufficient to conclude that the opposite party no. 2 actually threatened the victim or misconducted himself. The freedom granted by the bail cannot be taken away on inadequate grounds or mere assertions or allegations, the veracity of which remains to be tested. The liberty, even when on bail, is an important fundamental right, which cannot be taken away except by procedure established by law. Moreover, these facts occurred before the grant of anticipatory bail, and those facts had already been brought to the knowledge of

the Sessions Judge before he finally allowed the application. Applicant not able to substantiate the allegations that the opposite party no. 2 misused the liberty or misconducted himself. (Para 12)

Dismissed. (E-5)

List of Cases cited:

1. Abdul Basit @ Raju & ors. Vs Mohd. Abdul Kadir Chaudhary & anr., (2014) 10 SCC 754

2. Gurucharan Singh Vs State (Delhi Administration), (1978) 1 SCC 118

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

1. Heard Mrs. Zeba Parveen, applicant appears In-person, Sri Rajrshi Gupta and Sri Rizwan Ahmad, learned counsels for the first informant and Sri O.P. Mishra, learned A.G.A. for the State.

2. This bail cancellation application has been moved by the applicant/first informant- Zeba Parveen, with a prayer to cancel the anticipatory bail granted to opposite party no.2 by order dated 21.11.2022 arising out of Case Crime No.0082 of 2022, under sections- 328, 376, 506 I.P.C.

3. The facts relevant for the purpose of disposal of this bail cancellation application are as below:-

The first informant lodged an F.I.R. naming opposite party no.2 with the allegations that she got married to one Civil Engineer on 27.04.1985; her husband has been staying in Saudi Arab in relation to his job from 2014 to 2017; in 2015 her neighbour introduced her to the accused and they started meeting each other; her husband returned and began staying at Mumbai and she was staying at Kanpur. It is further alleged in the F.I.R. that on 12.02.2018, accused came to her house and administered her some drink laced with certain intoxicating substance; she became half conscious; taking advantage of such a situation, he committed rape on her; he also prepared a video of the act and thereafter assured her that he will marry her and that she should not disclose anything to anybody else. It is alleged in the F.I.R. that thereafter he committed rape on her several times extending threat to make the video viral; he forced her to take divorce from her husband by khula method of "Talaaq"; she obtained divorce on 21.09.2021; he took her to Germany on false assurance of getting married there. Later, he reclined and asked her to stay with him without formal marriage ceremony; she has been sexually exploited on false assurance of marriage, therefore F.I.R. was lodged.

On the basis of this F.I.R. (Case Crime No.0082 of 2022), investigation commenced; the opposite party no.2 moved an application for grant for anticipatory bail before the learned Sessions Judge, Kanpur Nagar and was granted the same on 21.11.2022; now the applicant/first informant is before this Court praying for cancellation of anticipatory bail to the opposite party no.2.

4. The contentions of the applicant in nutshell are as below:-

(I) The opposite party no.2 was granted interim bail/interim protection during the pendency of anticipatory bail application and during that period, on 09.11.2022 she was stalked by four persons who threatened her to stop approaching the

lower court; she complained of that incident to the Police Commissioner, Kanpur Nagar. The opposite party no.2 has been extending threats to her through various means to dissuade her from opposing his bail. Therefore, she made another complaint to police on 14.11.2022 and Case Crime No.136 of 2022, under sections- 341, 504, 506 I.P.C. has been lodged.

(II) The opposite party no.2 made a false promise of marriage to her; he kept on introducing her as his fiancee and to be wife to his friends and relatives all this while; thereafter he abruptly pulled out of such alignment and refused to sign the "Nikaahnama" in front of Kazi and witnesses. Whenever she raised the subject of marriage, he would begin threatening her; she lost her children as well as her former husband because of fraud played on her.

5. In the counter affidavit filed on behalf of the opposite party no.2, in brief it is said that all the allegations in the F.I.R. are absolutely false; the wife of opposite party no.2 filed a complaint against the first informant regarding threat to life and heavy demand made by her; the wife of opposite party no.2 specifically mentioned in her complaint that Zeba Parveen lured her husband to enter into physical relationship and got a video prepared of it; she has been using this incident to blackmail opposite party no.2 to fulfil her demand of illegal money; the opposite party no.2 is wholly innocent; reality is, relations between them were consensual in nature and the opposite party no.2 after sometime decided to withdraw from this relationship; therefore, the first informant lodged this mala fide and malicious F.I.R.; it is said in the counter affidavit that before entering into such relationship, it was decided between them that they will not bring their relations in public domain and that their relations should not disturb their respective families; the first informant was not happy with her first marriage, therefore she obtained divorce from him and the opposite party no.2 has nothing to do with this divorce; the first informant very well knew about the marital status of the opposite party no.2 and this F.I.R. has been lodged with an oblique motive; as far as the complaints filed by the first informant against the opposite party no.2 during the pendency of anticipatory bail application are concerned, the facts were placed before the learned Sessions Judge before final order was passed on his anticipatory bail.

6. Before proceeding to decide this bail cancellation application, it appears necessary to highlight the demarcation line drawn between the powers of the Court where same can be exercised for cancellation of bail from the powers of the Court, where the Court may sit in review of the impugned order granting bail and the limitations imposed on exercise of such powers.

7. In **Abdul Basit @ Raju and Others vs. Mohd. Abdul Kadir Chaudhary and Another, (2014) 10 SCC 754,** the Apex Court referred to its own observations in **Gurucharan Singh vs. State (Delhi Administration), (1978) 1 SCC 118** for the purpose of elucidating the positions of law, viz-a-viz of the Court granting and cancelling the bail. The Court observed in para-16 as below:-

"16. Section 439 of the new Code confers special powers on the High Court or Court of Session regarding bail. This was also the position under Section 498 CrPC of the old Code. That is to say, even

if a Magistrate refuses to grant bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly under Section 439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. In the old Code, Section 498(2) was worded in somewhat different language when it said that a High Court or Court of Session may cause any person who has been admitted to bail under sub-section (1) to be arrested and may commit him to custody. In other words, under Section 498(2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, is lifted in the new Code under Section 439(2). Under Section 439(2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any court including the Court of Session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody.When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-à-vis the High Court."

8. In the same judgement, the Apex Court referred from another judgement in **Puran vs. Rambilas, 2001 6 SCC 338,** in para-17 as below:-

***"17.** In this context, it is profitable to render reliance upon the decision of this Court in Puran v. Rambilas [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124] . In the said case, this Court held (SCC p. 345, para 11) that the concept of setting aside an unjustified, illegal or perverse order is absolutely different from cancelling an order of bail on the ground that the accused has misconducted himself or because of some supervening circumstances warranting such cancellation. In Narendra K. Amin v. State of Gujarat [(2008) 13 SCC 584 : (2009) 3 SCC (Cri) 813] , the three-Judge Bench of this Court has reiterated the aforesaid principle and further drawn the distinction between the two in respect of relief available in review or appeal. In this case, the High Court had cancelled the bail granted to the appellant in exercise of power under Section 439(2) of the Code. In appeal, it was contended before this Court that the High Court had erred by not appreciating the distinction between the parameters for grant of bail and cancellation of bail. The Bench while*

affirming the principle laid down in Puran case [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124] has observed that when irrelevant materials have been taken into consideration by the court granting order of bail, the same makes the said order vulnerable and subject to scrutiny by the appellate court and that no review would lie under Section 362 of the Code. In essence, this Court has opined that if the order of grant of bail is perverse, the same can be set at naught only by the superior court and has left no room for a review by the same court."

9. The Supreme Court observed that there is a clear cut distinction between the concept of setting aside an unjustified, illegal or perverse order from cancelling of an order of bail on the ground that the accused has misconducted himself or any new adverse fact having surfaced after the grant of bail. The Apex Court further observed that where the grant of bail is being challenged on the ground of gross misrepresentation of facts, misleading the court and indulging in fraud; in other words, the legality of the grant of bail is under challenge, such determination, though would entail cancelling of bail but such cancelling in effect is entirely different from a situation where the bail is sought to be cancelled on the ground of its misuse.

10. The Apex Court in para-14 of the same judgement enumerated the grounds for cancelling of bail which is as below:-

"14. Under Chapter XXXIII, Section 439(1) empowers the High Court as well as the Court of Session to direct any accused person to be released on bail. Section 439(2) empowers the High Court to direct any person who has been released on bail under Chapter XXXIII of the Code be arrested and committed to custody i.e. the power to cancel the bail granted to an accused person. Generally the grounds for cancellation of bail, broadly, are, (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution in not completing the investigation in sixty days after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. However, in the last mentioned case, one would expect very strong grounds indeed. (Raghubir Singh v. State of Bihar [(1986) 4 SCC 481 : 1986 SCC (Cri) 511 : 1987 Cri LJ 157] .)"

11. From perusal of the contentions raised by the petitioner, it becomes quite clear that cancellation has been sought on two premises. **Firstly**, that the facts and merits of the case were such that grant of bail was not at all justified. **Secondly**, on the premise that the opposite party no.2 misused the liberty granted to him during interim protection granted by the court concerned during pendency of anticipatory bail application.

12. Legally, the Court cannot sit like an appellate court/revisional court to review the order of the anticipatory bail. In this case, the first informant has applied for cancellation of bail. As is quite clear from the law on this point, the bail once granted can only be cancelled where subsequent to the grant of bail, the accused has misconducted himself or has misused the liberty or protection available to him or on the ground that some new fact has surfaced having important bearing on the case or where the order is arbitrary or perverse or without jurisdiction or is bad in law for some reason of like nature. In this case, though misuse of liberty is one of the grounds for cancellation of bail but at the same time, the burden lies on the State or the party seeking it to prove the same by bringing sufficient material before the Court or to atleast show that allegation as to misuse/misconduct has some substance in it. As far as the present case is concerned, there is an allegation that the opposite party no.2, during the period he was on interim bail/interim protection threatened the victim and she moved a complaint on two occasions i.e. before the Police Commissioner, Kanpur Nagar and before concerned Sessions Judge. In my view, moving of the applications or even filing of F.I.R. is not sufficient to draw the conclusion that infact he threatened the victim and that he misconducted himself. The freedom made available by grant of bail cannot be taken away on inadequate grounds or mere assertions or allegation, the veracity whereof remains to be tested. The liberty, even though on bail is an important fundamental right, which cannot be taken away except by procedure established by law. Moreover, these facts occurred before grant of anticipatory bail and those facts had already been brought to the knowledge of the Sessions Judge before he finally allowed the application. In my view, the applicant has not been able to substantiate the allegations that infact the opposite party no.2 misused the liberty or misconducted himself.

13. I do not find sufficient ground to interfere in the impugned order granting anticipatory bail to the opposite party no.2 and therefore this bail cancellation application is hereby **dismissed.**

(2023) 6 ILRA 58
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.05.2023

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Misc. Anticipatory Bail Application U/S 438 CR.P.C. No. 3107 of 2023

Dr. Kartikeya Sharma & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Surya Bhan Singh

Counsel for the Opposite Parties:
G.A., Sri Ajay Kumar Shukla

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 438 - Indian Penal Code, 1860-Sections 498-A, 323, 354, 504 & 506 - ¾ D.P. Act-Matrimonial dispute-In the present case since the offences alleged against the accused applicants were punishable with imprisonment for a maximum period of seven years, a notice under section 41-A Cr.P.C. was given to them by the Investigating Officer, which means that their custodial interrogation was not considered necessary by the Investigating Officer of the case and their personal liberty was protected till submission of

police report under section 173(2) Cr.P.C.- Even if the chargesheet is filed and cognizance is taken by the court against the accused, who has got an immunity from being arrested during the course of investigation either by way of order of a competent court protecting him by grant of anticipatory bail or by service of notice under section 41-A Cr.P.C. by the Investigating Officer, anticipatory bail application moved by him is legally maintainable and it can never be rejected on the ground that now charge-sheet has been filed and cognizance has been taken by the court concerned-Hence, the observation given by the learned Session Court while rejecting the anticipatory bail application of applicants is a misnomer and the settled legal position cannot be permitted to be contorted in any manner.(Para 1 to 25)

The bail application is allowed. (E-6)

List of Cases cited:

1. Prem Shankar Prasad Vs St. of Bih. & anr. (2021) SCC OnLine SC 955

2. Manish Yadav Vs St. of U.P. (2022) 0 Supreme (All) 629

3. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr.(2020) 5 SCC 1

4. Gurbaksh Singh Sibbia Vs St. of Punj. (1980) 2 SCC 565

5. Ravindra Saxena Vs St. of Raj. (2010) 1 SCC 684

6. Bharat Chadhary Vs St. of Bih.(2003) 8 SCC 77

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

1. Rejoinder affidavit filed today is taken on record.

2. Apprehending their arrest in criminal case no.29542 of 2022 arising out of case crime no.1306of 2021 under Sections 498-A, 323, 354, 504, 506 IPC and 3/4 Dowry Prohibition Act, Police Station Quarsi, District Aligarh, the applicants - **Dr. Kartikeya Sharma, Ajaya Kumar Sharma** and **Smt. Sangeeta Sharma** have moved this anticipatory bail application after submission of the charge-sheet before this Court.

3. The two anticipatory bail applications moved by the applicants have been rejected by the Court of Sessions Judge, Aligarh vide order dated 28.2.2023.

4. Heard Sri Surya Bhan Singh, learned counsel for the applicants, Sri Ajay Kumar Shukla, learned counsel for the complainant / opposite party no.2 and Sri Devesh Kumar Singh, learned A.G.A. for the State.

5. It is alleged in the F.I.R. that the informant Dr. Pallavi Sharma was married to applicant no.1 Dr. Kartikeya Sharma on 27.11.2015 and since after the marriage, the informant was being subjected to cruelty and harassment on account of demand of Rs.2 Crore as additional dowry and she was being mentally and physically exploited by her in-laws. Her father-in-law also used criminal force to her with intent to outrage her modesty. Accused applicant no.1 is the husband, applicant no.2 is the father-in-law and applicant no.3 is the mother-in-law of the informant / opposite party no.2. F.I.R. was lodged on 28.12.2021 and investigation started.

6. Learned counsel for the applicants submits that the applicants are innocent and they have apprehension of their arrest in the above-mentioned case, whereas there is no credible evidence against him. Allegations levelled against the applicants are false. It

is further submitted that the applicant no.1 and opposite party no.2 are well educated persons and doctor by profession. No dowry demand was ever made by the applicants and the informant / opposite party no.2 was never subjected to cruelty and harassment by them. Since the opposite party no.2 was pressurizing the applicant no.1 to leave his parents, she started to live separately with applicant no.1 and his son. Both husband and wife are working as Doctor and they have very good income. The opposite party no.2 was continuously pressurizing the applicant no.1 to settle at Aligarh and to manage the Nursing Home of her father leaving his old aged parents at Ghaziabad, but when the applicant no.1 was not ready to fulfill her demand, the present F.I.R. was lodged with false facts. It is further submitted that the applicant nos. 2 & 3 are senior citizens and are suffering from the diseases of old age and are also unable even to walk properly without any support. It is further submitted that the applicants have preferred criminal misc. writ petition no.1529 of 2022 before this Court and same was disposed of in view of the scope and objective of Section 41 and 41-A Cr.P.C. in the light of the decision of the Hon'ble Apex Court in Arnesh Kumar vs. State of Bihar and another, (2014) 8 SCC 273. It is further submitted that in this matter, the charge-sheet has been filed under Sections 498-A, 323, 354, 504, 506 IPC and 3/4 Dowry Prohibition Act wherein the maximum period of imprisonment is prescribed upto seven years. Under these circumstances, the applicants deserve for grant of anticipatory bail till end of the trial.

7. Per contra, learned A.G.A. as well as learned counsel for the informant vehemently opposing the anticipatory bail application have submitted that during the course of investigation, sufficient evidence has been collected against the accused applicants. It is further submitted that the applicants have moved an application u/s 482 Cr.P.C. No. - 35236 of 2022 before this Court, but the same was withdrawn and vide order dated 8.12.2022, this Court disposed of the aforesaid application as withdrawn with liberty given to them to appear before the court concerned and file appropriate application for bail. However, instead of moving bail application, another application u/s 482 Cr.P.C. No. - 42203 of 2022 was moved before this Court by the applicants but the same was dismissed vide order dated 28.1.2023. It is further submitted that after filing of the charge-sheet, several processes were issued against the accused applicants, but they deliberately avoided the service of the processes sent by the Court of Magistrate and subsequently, on 18.4.2022, the court of Magistrate at Aligarh passed an order to issue process under Section 82 Cr.P.C. against the accused applicants. Attention of the Court has drawn to the fact that the process of the court has not been honoured by the accused applicants. After filing of the charge-sheet, when process was issued to summon them, they did not appear before the court and the court then proceeded to issue non-bailable warrant against them and subsequently process under section 82 Cr.P.C. was also issued against them, which means that they have been declared proclaimed offenders by the court. It is further submitted that since the applicants are not obeying the orders passed by the court and they are in the category of proclaimed offenders, they are not entitled for any relief in the form of anticipatory bail.

8. Reliance has been placed on the decision of the Hon'ble Supreme Court in

Prem Shankar Prasad Versus State of Bihar and Another, 2021 SCC OnLine SC 955. In the facts of the aforesaid case, charge-sheet was filed under Sections 406, 420 IPC against the accused and thus it was explicit that a prima facie case against the accused was found. From the record, it revealed that the arrest warrant was issued by the Magistrate against the accused and thereafter proceedings under Sections 82, 83 Cr.P.C. had been initiated pursuant to the order passed by the Magistrate. Only thereafter the accused moved an application before the trial court for anticipatory bail, which was rejected by the Sessions Court. However, subsequently anticipatory bail was granted to the aforesaid accused by the High Court and when the matter came before the Hon'ble Apex Court, it was observed like this.

"19. Despite the above observations on merits and despite the fact that it was brought to the notice of the High Court that respondent No. 2 - accused is absconding and even the proceedings under sections 82-83 of Cr. P.C. have been initiated as far as back on 10.01.2019, the High Court has just ignored the aforesaid relevant aspects and has granted anticipatory bail to respondent No. 2 - accused by observing that the nature of accusation is arising out of a business transaction. The specific allegations of cheating, etc., which came to be considered by learned Additional Sessions Judge has not at all been considered by the High Court. Even the High Court has just ignored the factum of initiation of proceedings under sections 82-83 of Cr. P.C. by simply observing that "be that as it may". The aforesaid relevant aspect on grant of anticipatory bail ought not to have been ignored by the High Court and ought to have been considered by the High Court very seriously and not casually.

20. In the case of State of Madhya Pradesh v. Pradeep Sharma (Supra), it is observed and held by this court that if anyone is declared as an absconder/proclaimed offender in terms of section 82 of Cr. P.C., he is not entitled to relief of anticipatory bail."

9. In rejoinder, learned counsel for the applicants further submits that the present anticipatory bail application on behalf of the applicants has been filed before this Court prior to issuance of proclamation under section 82 Cr.P.C. The proclamation u/s 82 Cr.P.C. has been issued by the court concerned on 18.4.2022, as such, meaning thereby that when the present applicants filed this application u/s 438 Cr.P.C. on 18.3.2023, they were not declared as proclaimed offenders so the bar imposed by the Hon'ble Apex Court entertaining anticipatory bail of the proclaimed offender would not attract in the present case. In support of his contention, learned counsel for the applicants has placed reliance on the decision of this Court in **Manish Yadav Vs. State of U.P., 2022 0 Supreme (All) 629**. In that matter, anticipatory bail application was filed in the month of April, 2022 before the Sessions Court and was rejected on 30.4.2022 and proclamation under section 82 Cr.P.C. was issued by the court concerned on 9.5.2022 and it was held therein that after rejection of the anticipatory bail application, the aggrieved person has got a right to approach the High Court for such anticipatory bail and if in the interregnum period any proclamation under section 82 or section 83 Cr.P.C. is issued, it may be considered as a circumventive exercise being taken by the Investigating Officer. It was further held by the Division Bench of this Court that when

the application for anticipatory bail was filed before the Sessions Court, there was no proclamation under section 82 Cr.P.C. and such proclamation was issued after the rejection of anticipatory bail application. Hence it was held that the bar to entertain anticipatory bail application after issuance of proclamation under section 82 Cr.P.C. would not be attracted in that case.

10. In the present case, the anticipatory bail application was rejected by the Sessions Court on 28.2.2023 and a perusal of the rejection order reveals that since then no proceedings under section 82 or 83 Cr.P.C. were started against the accused applicants after rejection of the anticipatory bail application from the Sessions Court, on 18.3.2023 the present anticipatory bail application has been moved before this Court for anticipatory bail. It reveals from the perusal of the record that process under section 82 Cr.P.C. has been issued on 18.4.2022, which means that pending application for anticipatory bail before this Court, the said proclamation was made by the court concerned. Hence, it is clear that the present applicants were not proclaimed offenders at the time of making their application for anticipatory bail before this Court. So the bar imposed by the Hon'ble Supreme Court in Prem Shankar Prasad (supra) for not entertaining the anticipatory bail application of a proclaimed offender is not attracted in the present case.

11. The alleged offences are punishable with the imprisonment of maximum period of seven years. Admittedly, proclamation u/s 82 Cr.P.C. is issued after filing of the present anticipatory bail application u/s 438 Cr.P.C. Charge-sheet has been filed in the matter. Applicants have been cooperative during the course of investigation and there is nothing on record to show otherwise. The investigating officer did not find any ground to arrest them during the course of investigation. They have not misused the liberty granted to them. Their custodial interrogation was also considered as not required by the investigating officer.

12. In **Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC 1**, the Hon'ble Apex Court has settled the controversy finally by holding the anticipatory bail need not be of limited duration invariably. In appropriate case, it can continue upto conclusion of trial.

It has been further held therein that anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

It has been further held by the Hon'ble Apex Court that while considering an application for grant of anticipatory bail, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence including intimidating witnesses, likelihood of fleeing justice, such as leaving the country, etc. It has further been held that Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion.

13. Hence, considering the settled principles of law regarding anticipatory bail, submissions of the learned counsel for the parties, nature of accusation, role of

applicants and all attending facts and circumstances of the case, without expressing any opinion of the merits of the case, in my view, it is a fit case for anticipatory bail to the applicants till end of the trial in the matter.

14. The anticipatory bail application is **allowed.**

15. In the event of arrest of the applicants in the aforesaid case, they shall be released on anticipatory bail till end of the trial on their furnishing a personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the Court concerned with the following conditions :-

(i) The applicants shall make themselves available before the court concerned on the date fixed in the matter;

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

(iii) The applicants shall not leave India without the previous permission of the Court and if they have passport, the same shall be deposited by them before the S.S.P./S.P. concerned.

16. In case of default of any of the conditions, same may be a ground for cancellation of protection granted to the applicants.

17. Before parting, the Court owes it as its duty to remind the Sessions Courts as to what isthe actual scope of Section 438 Cr.P.C. and powers of the Sessions Court thereunder and the Court has moved into this direction, as the learned A.G.A. has drawn the attention of the Court to the anticipatory bail rejection order dated 28.2.2023 passed by the Sessions Court, Aligarh. At page 3 of the said rejection order, it is mentioned like this -

"अभियोजन पक्ष की ओर से अवगत कराया गया कि इस प्रकरण में आवेदकगण के विरुद्ध सक्षम न्यायालय में आरोपपत्र प्रेषित किया जा चुका है। आवेदकगण प्राथमिकी में नामजद है तथा मुख्य अभियुक्त हैं । आवेदकगण के विरुद्ध न्यायालय में आरोपपत्र प्रेषित किया जा चुका है जिस पर सक्षम न्यायालय द्वारा प्रसंज्ञान लिया गया है, अतः आरोपपत्र प्रेषित किए जाने व आरोपपत्र पर न्यायालय द्वारा प्रसंज्ञान लिये जाने के उपरान्त अग्रिम जमानत प्रार्थना पत्र पोषणीय न होने के कारण निरस्त किए जाने योग्य है। तदनुसार अभियुक्त / आवेदकगण डॉ. कार्तिकेय शर्मा, अजय शर्मा व संगीता शर्मा के अग्रिम जमानात प्रार्थना पत्र निरस्त किए जाते हैं।"

18. With utter surprise to this Court even after so many directions issued by the Hon'ble Apex Court with regard to the scope of anticipatory bail, it appears that still their exists a state of confusion amongst the Sessions Courts. Right from the renowned case of **Gurbaksh Singh Sibbia Vs. State of Punjab (1980) 2 SCC 565** upto the case of **Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC 1** and even in umpteen subsequent pronouncements, it has repeatedly been held and reiterated that filing of the charge-sheet into a criminal matter is never meant that the scope of anticipatory bail comes to an end.

19. The Hon'ble Supreme Court in Sushila Aggarwal (supra) case, considering the observations made by the Constitution Bench of Hon'ble Supreme Court in Gurbaksh Singh Sibbia (supra) case held as hereinunder.

"We are of the opinion that the conditions can be imposed by the

concerned court while granting pre-arrest bail order including limiting the operation of the order in relation to a period of time if the circumstances so warrant, more particularly the stage at which the "anticipatory bail" application is moved, namely, whether the same is at the stage before the FIR is filed or at the stage when the FIR is filed and the investigation is in progress or at the stage when the investigation is complete and the charge-sheet is filed. However, as observed hereinabove, the normal rule should be not to limit the order in relation to a period of time."

It was also held in the aforesaid case that to lay down strict, inflexible and rigid rules for exercise of such discretion under section 438 Cr.P.C. by limiting the period for which an order under section 438 Cr.P.C. could be granted, is unreasonable and the courts should not impose restrictions on the ambit and scope of section 438 Cr.P.C. which are not envisaged by the legislature. The Court cannot rewrite the provision of the statute in the garb of interpreting it.

20. It is to be reminded that following questions had been referred to the Larger Bench of five Judges in Sushila Aggarwal (supra) case.

(1) Whether the protection granted to a person under Section 438 Cr. PC should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.

(2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.

Regarding first question, it was concluded that the protection granted under section 438 Cr.P.C. should not always or ordinarily be limited to a fixed period; it should ensure in favour of the accused without any restriction as to time. However, usual or standard conditions under section 437 (3) read with section 438 (2) may be imposed having regard to the peculiar features of a particular case.

The second question, which is pertinent for the matter in hand was answered by holding that the life of an anticipatory bail does not end generally at the time and stage when the accused is summoned by the court, or after framing of charges, but can also continue till the end of the trial. However, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

It was further held explicitly that "anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial. Also orders of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence." and the legal dictum is more specific when it pronounces that "anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge-sheet till end of trial."

21. The same principle echoes in **Ravindra Saxena Vs. State of Rajasthan, 2010 (1) SCC 684**, wherein the Hon'ble Supreme Court reiterating the verdict of the Constitutional Bench in **Gurbaksh Singh Sibbia** (supra) case held that "anticipatory bail can be granted at any time so long as the applicant has not been arrested. When

application is made to High Court or Court of Sessions, it must apply its own mind on the question and decide when the case is made out for granting such relief. The High Court ought not to have left the matter to Magistrate only on the ground that challan has now been presented.....Salutary provision contained in Section 438 was introduced to enable the court to prevent deprivation of personal liberty. It cannot be permitted to be jettisoned on technicalities such as the challan having been presented, anticipatory bail cannot be granted."

22. Earlier in **Bharat Chadhary Vs. State of Bihar, (2003) 8 SCC 77**, it was specifically held by the Hon'ble Supreme Court that "The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the courts concerned while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of a charge sheet cannot by itself be construed as a prohibition against the grant of anticipatory bail. The courts i.e. the Court of Session, High Court or Supreme Court have the necessary power vested in them to grant anticipatory bail in non-bailable offences under Section 438 Cr.P.C. even when cognizance is taken or a charge sheet is filed provided the facts of the case require the court to do so."

23. So far as the present case is concerned, since the offences alleged against the accused applicants were punishable with imprisonment for a maximum period of seven years, a notice under Section 41-A Cr.P.C. was given to them by the Investigating Officer, which means that their custodial interrogation was not considered necessary by the Investigating Officer of the case and their personal liberty was protected till submission of police report under Section 173 (2) Cr.P.C.

24. The legal consequences ensue the same, whether an accused is granted anticipatory bail till filing of police report under Section 173 (2) Cr.P.C. by the Court or a notice under section 41-A Cr.P.C. is given to him by the Investigating Officer, that the accused is not going to be arrested during the course of investigation subject to the conditions imposed upon him by the Court or terms embodied in the said notice.

25. From the above, it is explicitly clear that even if the charge-sheet is filed and cognizance is taken by the court against the accused, who has got an immunity from being arrested during the course of investigation either by way of order of a competent court protecting him by grant of anticipatory bail or by service of notice under Section 41-A Cr.P.C. by the Investigating Officer, anticipatory bail application moved by him is legally maintainable and it can never be rejected on the ground that now charge-sheet has been filed and cognizance has been taken by the court concerned. Hence, the observation given by the learned Sessions Court while rejecting the anticipatory bail application of the applicants vide order dated 28.2.2023 is a misnomer and the settled legal position cannot be permitted to be contorted in any manner.

26. Registry is directed to send a copy of this order to the court concerned.

(2023) 6 ILRA 66
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2023

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Criminal Misc. First Bail Application No. 30712 of 2021

Jay Kant Bajpai @ Jay ...Applicant
Versus
State of U.P. ...Opposite Parties

Counsel for the Applicant:
Sri Deepak Singh, Sri Nazrul Islam Jafri (Senior Adv.), Sri Shiva Kant Dixit

Counsel for the Opposite Parties:
G.A.

A. Criminal Law – Bail – The Criminal Law Amendment Act - Section 7 -The Explosive Substance Act, 1908 - Section ¾ - The Evidence Act, 1872 - Section 32(3) - The totality of the material gathered by the investigating agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document/evidence would be a matter for trial. The Court must look at the contents of the document and take such document into account as it is. (Para 18)

St.ments u/s 161 of Cr.P.C. may not be admissible in evidence but are relevant in considering the prima facie case against an accused in an application for grant of bail in a case of grave offence. (Para 20)

B. Section 32 of Evidence Act makes it clear that the St.ment made by a dead person has been legally recognized and can be used in evidence even though it does not relate to the cause of his death. It is to be kept in mind that a final decision cannot be taken at this stage since it will be considered by the trial court when making appreciation of evidence available on record. (Para 25)

Therefore, the St.ment made by main accused Vikas Dubey will be considered prima facie to indicate the involvement of the present applicant in the Vikroo massacre. (Para 26)

C. While granting bail must focus on the role of the accused in deciding the aspect of parity. Parity cannot be the sole ground to decide the bail application and the case of each and every accused is to be examined in accordance with the facts circumstances of the case. Merely observing that another accused who was granted bail was armed with a similar weapon is not sufficient to determine whether a case for the grant of bail on the basis of parity has been established. In deciding the aspect of parity, the role attached to the accused, their position in relation to the incident and to the victims is of utmost importance. (Para 16, 34)

In the present case and the complicity of the accused about his involvement in the crime, the present applicant is not entitled for releasing him on bail on the ground of parity. (Para 35)

D. Criminal antecedents of the accused cannot be ignored while deciding bail application, discretionary powers of Courts to grant bail must be exercised in a judicious manner in case of a habitual offender. (Para 39, 40)

The applicant has criminal history of as much as 14 cases to his credit from the year 2010 including the cases of the nature of heinous offences including Ss. 395, 302, 307 I.P.C., Gangster Act, Explosive Act and N.S.A. had also been imposed against the applicant. It demonstrates that the applicant has been involved in certain heinous offences and he is a hardened criminal. If he is released on bail it will give him an opportunity to temper the witnesses. The criminal history of the applicant is to be taken into consideration while releasing him on bail. (Para 37, 42)

The co-accused Sushil Kumar Tiwari against whom the present applicant is claiming the parity had criminal history of four cases while the applicant has a criminal history of 14 cases to his credit. Therefore, the applicant cannot claim parity on this score also. (Para 41)

E. U.P. Dacoity Affected Areas Act, 1983: Section 10 - No person accused or convicted of a scheduled offence shall, if in custody be released on bail or on his own bonds unless (a) The prosecution has been given an opportunity to oppose the application for bail, and (b) Where the prosecution opposes the application for bail, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence....."

It is clear that the nature of the offence and amount of culpability is serious and heinous. The applicant has criminal history of cases of heinous nature to his credit. The applicant is actively involved in the incident in which eight police personnel including the Circle Officer, Bilhore, were done to death mercilessly and seven others police personnel received grievous injury. The applicant actually assisted the main accused Vikas Dubey by providing him Rs. 2 lakh and 25 cartridges to be used in the incident. Further, the applicant also promised and provided vehicles to slain accused Vikas Dubey for his safe journey to his next destination after committing one of the most heinous crimes. Therefore, no sufficient reason has been found to allow the bail application of the present applicant. (Para 45)

Bail application rejected. (E-4)

<u>Precedent followed</u>:

1. Manish Vs St. of U.P., 2022 SCC OnLine All 429 (Para 16)

2. Kripa Shanker Singh Vs St. of U.P., 2017 SCC OnLine All 852 (Para 16)

3. National Investigation Agency Vs Zahoor Ahmad Shah Watali, (2019) 5 SCC Page 1 (Para 18)

4. Indresh Kumar Vs St. of U.P. & anr. (Para 20)

5. Kalyan Chandra Sarkar Vs Rajesh Ranjan @ Pappu Yadav & anr., (2004) 7 SCC 528 (Para 22)

6. Ramesh Bhavan Rathod Vs Vishanbhai Hirabhai Makwana, 2021 SCC online SC 353 (Para 34)

7. Neeru Yadav Vs St. of U.P. & anr., (2015) 3 SCC 527 (Para 39)

8. Neeraj Yadav Vs St. of U.P., (2016) 15 SCC 422 (Para 40)

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

1. Heard Sri Nazrul Islam Jafri (Senior Advocate) assisted by Sri Deepak Singh and Sri Shiva Kant Dixit, learned counsel for the applicant, Sri Manish Goyal, learned Additional Advocate General assisted by Sri Abhijeet Mukherjee for the State.

2. Perused the record.

3. Present bail application has been filed on behalf of the applicant Jay Kant Bajpai @ Jay in Case Crime No. 192 of 2020, under Sections 147, 148, 149, 332, 353, 333, 307, 302, 396, 412, 120-B, 34, 504, 506 of I.P.C.; Section 7 of the Criminal Law Amendment Act and Section 3/4 of Explosive Substance Act, Police Station Chaubeypur, District Kanpur Nagar with the prayer to enlarge him on bail during the trial.

4. As per the version of the prosecution, case crime No. 191/2020 u/s 147,148,504,323,364,342,307 IPC and Section 7 Criminal Law Amendment Act was registered at Police Station Chaubepur, District Kanpur Outer on 02.07.2020 at 23:52 PM against Vikas Dubey and 4 other named accused on the basis of First

Information Report lodged by one Rahul Tiwari. He alleged that on 01.07.2020 at 12:30 PM, the accused beat him up. The accused kidnapped him and confined him in a room. He somehow escaped from there. When he reached Vikroo turn, Bela road, Vikas Dubey fired upon him indiscriminately. He did not sustain any injury.

5. In order to arrest the named accused in the aforesaid FIR, the police party led by SHO Chaubepur, Vinay Kumar Tiwari, reached Vikroo. When they reached at the gate of the house of accused Vikas Dubey, named and unnamed accused in the present F.I.R. fired indiscriminately upon the police officers with firearm weapons. In this heart wrenching incident, 8 police personnel were brutally done to death including Circle officer and 7 police personnel got serious injuries. Accused persons looted the arms from the police personnel. The first information report of the incident was lodged by Sub Inspector Vinay Kumar Tiwari, the then SHO, P.S. Chaubepur, District Kanpur Outer on 03.07.2020 at 5:30 AM against 21 named and 60-70 unnamed accused.

6. During the course of the investigation, on the basis of the statement of the main accused Vikas Dubey, it was revealed that the applicant was present in a meeting with Vikas Dubey and other accused persons in the evening of 02.07.2020 to carve out a plan to commit the murder of police persons who were scheduled to approach the slain leader Vikas Dubey to arrest him. The applicant had provided money and ammunition to the main accused Vikas Dubey. To provide safe passage to slain accused Vikas Dubey to perform journey, the applicant promised to provide vehicles after killing the police party.

7. These facts were narrated by Vikas Dubey, the main accused of Vikroo massacre, when he was being brought to Kanpur Nagar from Ujjain, where he was arrested by the Madhya Pradesh Police. He was interrogated by the Investigating Officer during his journey from Ujjain to Kanpur Nagar. The statement of Vikas Dubey was noted in the case diary by the investigating officer. Apart from this, co-accused Prashant Kumar Shukla and Vipul Dubey also stated active involvement of the present applicant in the Vikroo massacare. The statement of the applicant was also recorded by the investigating officer in which he admitted that he had provided money and ammunitions to Vikas Dubey. He also provided vehicle to him for his safe journey after the incident.

8. It has been argued by the learned counsel for the applicant that he is innocent and he has been falsely implicated in the present case. The applicant is not named in the first information report. None of the witness referred the involvement of the applicant in the incident that happened on 02.07.2020 at Vikroo. The applicant has been made accused in the present case only on the basis of his confessional statement and the statement of co-accused Prashant Shukla which were recorded in police custody. The statements of applicant and co-accused Prashant Shukla are not admissible in evidence and they cannot be used against the applicant.

9. It is further contended that the applicant was not physically present at the place of where the incident took place. Instead he was in an engagement party in a hotel in Kanpur. When he came to know about the incident through T.V. and other sources, he himself called the police. The applicant also provided the video footage

of the party to the police. The applicant had met Vikas Dubey only once or twice in parties. Apart from this he had no relation with him. It is further submitted that the applicant is a political and social worker and he did tremendous work during COVID-19 induced lockdown. Due to local rivalry, the enemies of the applicant had introduced the name of the applicant to police and applicant has been made a scapegoat in the present case.

10. It is further urged that there is no evidence available on record that the applicant entered into a conspiracy or provided any assistance to the main accused Vikas Dubey. The applicant never provided money and ammunition for Vikroo incident. There is no eye witness account to prove this fact that the applicant had gone to the house of co-accused Vikas Dubey or participated in any meeting prior to the alleged incident dated 02.07.2020. It is further submitted that nothing has been recovered either from the possession or from pointing out of the applicant relating to the aforesaid incident.

11. It is further submitted that the charge sheet against the applicant has been submitted on 01.10.2020. The applicant has criminal history of 11 cases which have been described and properly explained in para-32 of the affidavit filed in support of the bail application. Five cases were lodged by the police against the applicant after the alleged incident. It is further submitted that identically placed co-accused Sushil Kumar Tiwari, who was also not named in the first information report, has already been granted bail by the co-ordinate Bench of this Court vide order dated 01.11.2022 passed in Criminal Misc. Bail Application No. 4093 of 2021. There is no cogent evidence against the applicant available on record, therefore, he is also entitled to be released on bail on the ground of parity. It is further submitted that applicant is languishing in jail since 20.07.2020 and that in case he is released on bail, he will not misuse the liberty of bail and will cooperate in trial.

12. Per contra, Sri Manish Goyal, learned Additional Advocate General assisted by Sri Abhijeet Mukherjee for the State has opposed the prayer for grant of bail to the present accused/applicant and argued that the historic incident is known as “Vikroo incident” in which eight police personnel were shot dead and seven received grievous injuries. The official arms were also looted in this incident. The name of the present applicant being one of the accused in the present case, surfaced in the statement of one Prashant Kumar Shukla who informed that the applicant was having cordial relation with the main accused Vikas Dubey. On his dictate the accused/ applicant visited the house of the accused Vikas Dubey in the evening of 02.07.2020 where the accused-applicant provided financial help amounting to Rs. 2 lakhs and gave 25 cartridges of the fire-arms in front of co-accused Prashant Kumar Shukla. The applicant also assured Vikas Dubey to provide vehicle for his safe journey after the incident. The accused-applicant parked his vehicle near Shivli which was intercepted by the police and one car with fabricated pass of the assembly pasted on it was recovered. The accused-applicant had full knowledge of the plan of the main accused for the commission of heinous offence to attack the police party in the intervening night of 2/3.07.2020 in village Vikroo in which 8 police personnel including Circle officer, Bilhaur were mercilessly shot dead and 7 police personnel received grievous injuries.

13. It is further contended that after the arrest of the accused-applicant, he confessed his guilt that he had relation with the main accused Vikas Dubey and also one day before the incident i.e. on 01.07.2020, he gave Rs. 2 lakhs to him. He also gave arms and ammunitions and provided vehicle for his safe journey to his destination. This fact is also supported with the confessional statement of co-accused Prashant Kumar Shukla. It is further contended that the applicant is a habitual offender. After the investigation a charge sheet came to be filed against him.

14. It is also contended that bail applications of other co-accused namely Rekha Agnihotri and Khushi Dubey have already been rejected by this Court vide orders dated 16.07.2021 passed in Criminal Revision No. 113 of 2021 and order dated 04.10.2021 passed in Criminal Misc. Bail Application No. 14950 of 2021 respectively. It is also contended that the statement of Vikas Dubey which was recorded during his journey from Ujjain to Kanpur Nagar has also been considered in the aforesaid bail orders. It is further contended that the history of the applicant itself demonstrates that he is consistently committing heinous offences, therefore, he is not entitled for any sympathy from this Court. The accused-applicant is a hardened criminal and there is every likelihood that if the applicant is enlarged on bail, he may indulge in commission of crime and shall make his best efforts to pressurize the witnesses to depose in his favour.

15. It is further contended that so far as the bail of co-accused Sushil Kumar Tiwari is concerned, he has criminal history of four cases to his credit and he did not have any previous criminal history whereas the present accused-applicant is having criminal history since 2010 and therefore, he is not entitled to any bail on grounds of parity with the bail order passed in favour of co-accused Sushil Kumar Tiwari. It is relevant to note that parity alone would not be a ground for any accused. The accused-applicant has played different role in commission of crime as compared to the co-accused Sushil Kumar Tiwari. It is also contended that bail applications of co-accused Vinay Kumar Tiwari, K. K. Sharma and Uma Shankar Yadav @ Tanke have been rejected by this Court vide orders dated 21.09.2021 passed in Criminal Misc. Bail Application No. 48444 of 2020 and Criminal Misc. Bail Application No. 49354 of 2020 and vide order dated 30.09.2022 passed in Criminal Misc. Bail No. 44196 of 2022 respectively. It is also submitted that this Court while dealing with the Crl. Misc. Bail Application No. 48444 of 2020 observed that the statement of main accused Vikas Dubey is an admissible evidence under Section 32 (2) of the Indian Evidence Act in which he discloses the name and the active role of the present accused-applicant in commission of the aforesaid crime.

16. It is also argued by the learned Additional Advocate General that parity can not be a sole ground to decide the bail application and the case of each and every accused is to be examined in accordance with the facts and circumstances of the case. He relied upon **Manish Vs. State of U.P., 2022 SCC OnLine All 429 and Kripa Shnker Singh Vs. State of U.P. 2017 SCC OnLine All 852.**

17. The learned counsel for the applicant rebutted the aforesaid arguments by stating that the Investigating officer did not collect the location of applicant which could prove the fact that on the evening of

02.07.2020, the applicant had given Rs. 2 lakh and 25 cartridges of fire-arm to the co-accused Vikas Dubey. It is totally wrong to allege that the applicant had any prior knowledge of planning of the incident dated 02.07.2020. So far as the fabricated assembly pass pasted on the vehicle is concerned, this pass was pasted on the vehicle by the police after incident. It is further submitted that the co-accused Vishnu Kashyap having identical role, has already been granted bail by the co-ordinate bench of this Court vide order dated 06.05.2022 passed in Criminal Misc. Bail Application No. 45567 of 2021. It is further submitted that the criminal antecedents of the applicant were divided into two parts: eight cases registered against him after 02.07.2020 and other cases prior to the incident dated 02.07.2020. N.S.A. proceedings were very well challenged by the applicant by filing proper objection substantiated by material evidence before the N.S.A. Committee. However, the malicious act of the State has been nullified due to lapse of time.

18. The Hon'ble Supreme Court in **National Investigation Agency Vs. Zahoor Ahmad Shah Watali (2019) 5 SCC Page 1** has laid down matters to be considered for deciding an application for bail as follows:-

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

(ii) nature and gravity of the charge;

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

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

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

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being tampered with; and

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

The Hon'ble Apex Court further observed that:-

"23. By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar special provisions in TADA and Mcoca. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to the offences under the 1967 Act as well. Notably, under the special enactments such as TADA, Mcoca and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is "not guilty" of the alleged offence. There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is "not guilty" of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is "prima facie" true. By its very nature, the expression "prima facie true" would mean that the materials/evidence collated by the investigating agency in reference to the accusation against the accused concerned in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such

accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is "prima facie true", as compared to the opinion of the accused "not guilty" of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under UAPA."

The Hon'ble Apex Court further observed that:-

"27. For that, the totality of the material gathered by the investigating agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document/evidence would be a matter for trial. The Court must look at the contents of the document and take such document into account as it is."

19. The learned counsel for the applicant argued that the statements of present applicant and other co-accused namely main accused Vikas Dubey, Prashant Shukla and Vipul Dubey were made before the police, therefore, they are not admissible evidence.

20. The Hon'ble Apex Court in **Indresh Kumar Vs. State of Uttar Pradesh and Another** while cancelling the bail order passed by the High Court has observed that:-

"The High Court has ignored the material on record including incriminating statements of witnesses under Section 164/161 Cr.P.C. Statements under Section 161 of Cr.p.C. may not be admissible in evidence but are relevant in considering the prima facie case against an accused in an application for grant of bail in a case of grave offence."

21. The learned A.A.G. Sri Manish Goyal while referring the above observation made by the Hon'ble Apex Court submitted that the statement recorded under Section 161 Cr.P.C. prima facie discloses the active role of present applicant in the Vikroo massacre.

22. So far as the arguments of learned counsel for the applicant that the statement of Vikas Dubey cannot be read against the applicant, because firstly it is made before a police officer and secondly the person who made such statement cannot be found to be produced in Court since he is dead, is concerned, the learned A.A.G. relied upon the observation made by Hon'ble Apex Court in **Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another (2004) 7 SCC 528**. The Hon'ble Apex Court observed that:-

"The next argument of learned counsel for the respondent is that prima facie the prosecution has failed to produce any material to implicate the respondent in the crime of conspiracy. In this regard he submitted that most of the witnesses have already turned hostile. The only other

evidence available to the prosecution to connect the respondent with the crime is an alleged confession of the co-accused which according to the learned counsel was inadmissible in evidence. Therefore, he contended that the High Court was justified in granting bail since the prosecution has failed to establish even a prima facie case against the respondent. From the High Court order we do not find this as a good ground for granting bail. Be that as it may, we think this argument is too premature for us to accept. The admissibility or otherwise of the confessional statement and the effect of evidence already adduced by the prosecution and the merit of the evidence that may be adduced hereinafter including that of the witnesses said to be recalled are all matters to be considered at the stage of the trial."

23. Further, learned A.A.G. contended that the statement of the main accused Vikas Dubey is a statement of a dead person who cannot be found for giving evidence. Therefore, his statement is to be considered against the present applicant under Section 32 (3) of the Evidence Act, 1872.

24. Section 32 of Evidence Act, 1872 is quoted below:-

"32- Cases in which statement of relevant fact by person who is dead or cannot be found, etc ., is relevant. — Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

1. when it relates to cause of death. —When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

2. or is made in course of business. —When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

3 or against interest of maker. — When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

4. or gives opinion as to public right or custom, or matters of general interest. —When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

5. or relates to existence of relationship. —When the statement relates to the existence of any relationship 25 [by blood, marriage or adoption] between persons as to whose relationship 25 [by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

6. or is made in will or deed relating to family affairs. —When the statement relates to the existence of any relationship25[by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

7. or in document relating to transaction mentioned in section 13, clause (a). —When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a).

8. or is made by several persons, and expresses feelings relevant to matter in question. —When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question."

25. Therefore, upon reading the Section 32 of Evidence Act, it is clear that the statement made by a dead person has been legally recognized and can be used in evidence even though it does not relate to the cause of his death. It is to be kept in mind that a final decision cannot be taken at this stage since it will be considered by the trial court when making appreciation of evidence available on record.

26. In view of the above observations and legal propositions, the statement made by main accused Vikas Dubey will be considered prima facie to indicate the involvement of the present applicant in the Vikroo massacre.

27. The statement of main accused Vikas Dubey, as recorded by the Investigating Officer during transit when Vikas Dubey was arrested in Ujjain and he was being brought to Kanpur Nagar, is available in the case diary which is reproduced here-in-below:-

"मैनें अपने नजदीकी घर की औरतों रेखा अग्नीहोत्री, क्षमा पत्नी संजय दुबे उर्फ संजू, खुशी पत्नी अमर दुबे शांति देवी पत्नी रमेश को पुलिस को चोर डकैत कहकर चिल्लाने व गांव वालों को इकट्ठा करने के लिये लगा रखा था। मेरे मामा की बहु मनु पाण्डेय पत्नी सोनू पाण्डेय को भी प्लानिंग की पूरी जानकारी थी तथा फोन से सबको सजग कराने व सूचना देने के लिये मैनें बता रखा था। इसके बाद मैं भागकर शिवली चला गया था इस दौरान मेरे अति नजदीकी जयकान्त उर्फ जय बाजपेई पुत्र लक्ष्मीकान्त बाजपेई नि० ब्रह्मनगर और प्रशान्त शुक्ला उर्फ डब्बू नि० आर्य नगर कोहना ने गाडी व पैसा देकर मेरी मदद की उन्हें भी मेरी प्लानिंग की कुछ कुछ जानकारी थी। जय वाजपेई से मैनें कारतूस भी लिया था। वहां से फिर बचते बचाते उज्जैन महाकाल मन्दिर आ गया था। सड़क पर जे०सी०बी०लगाकर जाम करने के लिये मैनें सुल्तान अहमद नि० कस्बा चौबेपुर की जे०सी०बी० जो मेरे यहां करीब डेढ़ माह से काम कर रही थी को रात में करीब 12 बजे अपने मामा राजाराम उर्फ रामकुमार पाण्डेय को भेजकर ड्राइवर राहुल पाल से मंगवाया था और सड़क पर खड़ी करके सड़क अवरुद्ध करा दिया था ताकि पुलिस एका एक हमारे घर तक ना आ सके।"

28. The statement of the co-accused Prashant Shukla, who specifically stated about the involvement of the present applicant in the incident dated 02.07.2020, recorded by the Investigating Officer is reproduced here-in-below:-

"ब्यान अभियुक्त प्रशान्त शुकला उर्फ डब्बू पुत्र श्रीकृष्ण कान्त शुक्ला निवासी *8/119* आर्य नगर थाना कोहना कानपुर नगर उम्र करीब *47* वर्ष ने पूछने पर बताया कि साहब वर्ष *2005* में मेरी शादी ग्राम विकरू में ओम प्रकाश दुबे की पुत्री रंजना दुबे से हुई तभी से मेरी जान पहचान विकास दुबे से हो गई थी क्योकि विकास दुबे मेरी पत्नी के परिवार का ही है विकास दुबे कई बार जेल गया तो मैनें इसकी मदद की दिनांक *02.07.2020* को वाट्स अप काल द्वारा विकास दुबे ने मुझे बताया कि मुझे पुलिस वालों को ठिकाने लगाना है तुम मेरी मदद करो तथा जयकान्त वाजयपेयी को अपने साथ लेकर मेरे गांव आ जाओ तो मैं जयकान्त बाजपेयी को लेकर दिनांक *02.07.2020* को शाम के समय ग्राम विकरु गया था वहां पर जयकान्त बाजपेयी ने विकास दुबे 2 लाख रूपये व 25 कारतूस दिये थे मैनें भी अपने पास से 50 हजार रूपये विकास दुबे को दिये थे ताकि जरूरत पड़ने पर मुकदमा आदि में वकील आदि को देने में काम आ सके, विकास दुबे ने हम बताया था कि पुलिस वालों ने मुझे पकड़ने का प्लान बनाया है परन्तु जैसे ही पुलिस वाले मेरे घर पर आयेगे मैं उनको मौत की नींद सुला दूंगा एक को भी जिंदा नहीं जाने दूंगा तब मैनें कहा था कि ठीक रहेगा हम से जो मदद होगी हम करेगे तो विकास दुबे ने कहा कि जब मैं खबर भेजूंगा तो जयकान्त बाजपेयी की तीनों गाडियां लेकर जहां मैं बताऊगा वहां आ जाना हमनें कहा कि ठीक है हम आ जायेगे। इसके बाद हम लोग वहां से चले आये थे। अगले दिन सुबह खबर मिली थी कि विकास दुबे ने 8 पुलिस वालों के मौत के घाट उतार दिया है उसके बाद दिनांक 04.07.2020 को मुझे सूचना मिली थी विकास दुबे ने जयकान्त वाजपेयी की गाड़ियां शिवली में मंगाई है तो मैनें जयकान्त बाजपेयी को पूरी बात बताई जयकान्त बाजपेयी गाड़ियां लेकर विकास दुबे व उसके गैंग को लेने जा रहा था कि पुलिस की सक्रियता के चलते वह गाडी कानपुर नगर से बाहर नही ले जा पाया तथा गाड़ियों को डर के मारे काकादेव क्षेत्र में छोड़कर चला आया था साहब गलती हो गयी जो मैनें विकास दुबे का षडयन्त्र में साथ दिया।"

29. Further the statement of the co-accused Vipul Dubey was also noted down by the investigating officer about the active involvement of the present applicant in the aforesaid incident. The statement of co-accused Vipul Dubey is reproduced here-in-below:-

" विकास दुबे हमारे खानदान के थे. मीटिंग में तय योजना के अनुसार विकास दुबे ने असलाह कारतूस व बमों की व्यवस्था की व हम सभी लोगों को असलाह कारतूस उपलब्ध कराये गये मैनें विकास दुबे से मिलते हुये व काररतूस असलाह व पैसे देते हुये विकास पण्डित जी के परिचित जयकान्त वाजपेयी, प्रशान्त शुक्ला, अरविन्द त्रिवेदी उर्फ गुड्डन व सुशील तिवारी योजना में शामिल रहे। असलाह व पैसे व कारतूस उपलब्ध कराये तथा भविष्य में भी पुरी सहायता करने का वचन दिया था। अक्सर जयकान्त वाजपेयी, प्रशान्त शुक्ला, अरविन्द त्रिवेदी उर्फ गुड्डन व सुशील तिवारी विकास दुबे के पास आया करते थे तथा यह चारों लोग विकास दुबे के रूपयों को ब्याज पर लोगों को दिया करते थे। इन चारों लोगों की विकास दुबे से बहुत अधिक घनिष्ठता थी। यह चारों लोग उस समय मौजूद नही थे जब हम लोगों द्वारा पुलिस वालों पर फायरिंग की जा रही थी।"

30. The confessional statement of the applicant is reproduced here as under:-

"ब्यान अभियुक्त जयकान्त बाजपेयी पुत्र स्व० लक्ष्मीकान्त बाजपेयी निवासी 111/478 ब्रह्मा नगर थाना नजीराबाद जनपद कानपुर नगर उम्र करीब 37 वर्ष ने पूछने पर बताया कि हम 05 भाई है मेरे माता पिता का स्वर्गवास हो गया है मेरा मो०नं० 9336249793 है मेरे पास रिवाल्वर का लाइसेन्स है जो मैनें 2008 में लिया था। मेरे पिता जी के हिस्से में 06 बीघा जमीन आती है। पहले मैं टायर पेन्चर की दुकान करता था वर्ष 2013 में मेरी मुलाकात प्रशान्त शुक्ला उर्फ डब्बू के माध्यम विकास दुबे से हो गई थी विकास दुबे ने मुझे कुछ पैसा देकर ब्याज पर पैसे देने काम शुरु करा दिया था, विकास दुबे को मैं 3 प्रतिशत पर ब्याज देते था तथा लोगों से 10 प्रतिशत का ब्याज लेते था इसके बाद मैनें कमेटी डालनी शुरु कर दी थी जिससे मेरा काम ठीक ठाक चल निकला जिससे मैनें 04 मकान अशोक नगर में खरीदे तथा जिसके अलावा मेरे करीब 56 प्लाट है जो करीब डेढ़ करोड की कीमत से ज्याद के है उसके बाद मेरा विकास दुबे से लगातार मिलना जुलना रहा हम लोग फोन से भी आपस में बात करते थे परन्तु वाट्सकाल या चैट से ज्यादा बाते करते थे दिनांक 01.07.2020 को विकास दुबे का मेरे पास फोन आया कि कुछ पैसे व कारतूस लेकर मेरे पास आ जाओ मैं दिनांक 02.07.2020 को प्रशान्त शुक्ला उर्फ डब्बू के साथ ग्राम विकरु गया था जहां पर विकास दुबे हमे मिला विकास दुबे ने हमें बताया कि पुलिस मुझे बहुत परेशान कर रही है मुझे पुलिस का काम तमाम करना है तो हमने कहा कि ठीक रहेगा। एक बार पुलिस से भिड गये तो फिर हमारी दबंगई पूरे जिले में चलेगी। तो मैनें विकास दुबे को 2 लाख रूपये नगद व 25 कारतूस रिवाल्वर के दिये थे उसी दौरान विकास दुबे ने मुझे व डब्बू को बताया था कि आप दोनों को घटना

के बाद जब भी मैं सूचना भेजूगा अपनी गाडी भेजनी होगी ताकि हम सुरक्षित निकल सके मेरे पास एक गाड़ी ऑडी जिसका नम्बर UP 78FY 9555जो मैंने प्रमोद कुमार पुत्र कन्हैया लाल विश्वकर्मा निवासी 16/18 न्यू ईदगाह कालोनी थाना नवाबगंज के नाम से निकाली थी तथा दूसरी गाड़ी फार्चूनर नं० UP 78 EW 7070 है जो मैनें राहुल पुत्र इन्द्रपाल नि० 193/243 सकरपुर चक (किसान नगर) थाना सचेण्डी कानपुर नगर के नाम से निकाली थी तथा तीसरी गाडी वरना जिसका नम्बर UP 78 FC 7070 है जो मैनें कपिल सिंह चौहान पुत्र चन्द्रभान सिंह नि० 111ए/24 अशोक नगर थाना नजीराबाद के नाम से निकाली थी तीनों गाड़ियों की किश्त मैं स्वयं भरता हूँ तथा तीनों मेरे पास ही रहती है। इन गाड़ियों से विकास दुबे अक्सर घटना में जाया करता था घटना के बाद दिनांक 04.07.2020 को डब्बू के माध्यम से मेरे पास सूचना आई थी कि विकास दुबे व उसके साथियों को शिवली से दिल्ली तक छोड़ना है जिसका कारण मैं इन गाड़ियों को अपने ड्राइवर से चलवाकर विकास दुबे के पास ले जा रहा था कि पुलिस की सक्रियता देखकर मैं घबरा गया तथा जल्दबाजी में मैनें तीनों गाडियों काकादेव क्षेत्र में विजय नगर चौराहा के पास नम्बर प्लेट पलट करके लगा दी थी ताकी कोई गाड़ियों को पहचान न पाये साहब मुझे इस घटना की पूरी जानकारी थी मैनें इस कार्य में विकास दुबे की मदद की है मुझसे गलती हो गई है।"

31. Perusal of the statement given by the main accused Vikas Dubey to the Investigating Officer during his journey from Ujjain to Kanpur Nagar discloses that Vikas Dubey referred the present applicant as his close associate who provided money and vehicles to assist him to commit the incident dated 02.07.2020. Similarly, the statement of co-accused Prashant Shukal also reveals that Vikas Dubey sought his assistance and asked him to come to his village along with the present applicant Jai kant Vajpayee. He reached village Vikroo accompanied by the present applicant in the evening of 02.07.2020 where the present applicant gave Rs. 2 lakh and 25 cartridges to Vikas Dubey. Vikas Dubey directed that the vehicles of present applicant be made available after the incident. The co-accused Vipul Dubey also stated before the Investigating Officer that the present applicant along with Prashant Shukla, Arvind Trivedi @ Guddan and Sushil Tiwari were involved in the planning of the incident. Money and ammunitions were provided by them. The present applicant was a frequent visitor of Vikas Dubey in relation to money lending business. All these four accused persons were very close to accused Vikas Dubey.

32. On the basis of the aforesaid statements, prima facie it transpires that the present applicant was well known and was a trusted person of Vikas Dubey. The main accused Vikas Dubey invited him along with the other accused to attend a meeting in the evening of 02.07.2020 for committing conspiracy and to further plan to commit the incident known as Vikroo massacre. During this meeting, the present applicant provided money amounting to Rs. 2 lakh and 25 cartridges to the main accused Vikas Dubey to be used in the crime. Further the present applicant promised Vikas Dubey he would be available outside his house to provide him vehicles for his safe passage after the incident to his next destination.

33. The learned counsel for the applicant submitted that since the role of the applicant is identical to the co-accused Sushil Kumar Tiwari who has been granted bail vide order dated 01.11.2022 by this Court passed in Criminal Misc. Bail Application No. 4903 of 2021, therefore the applicant is also entitled to be released on bail on the grounds of parity. It is submitted that the co-accused Sushil Kumar Tiwari was also not named in the F.I.R. and he was also not present physically at the place of occurrence at the time of incident.

34. In **Ramesh Bhavan Rathod v. Vishanbhai Hirabhai Makwana, 2021 SCC onLine SC 353**, a two judge Bench of

Supreme Court has held that the High Court while granting bail must focus on the role of the accused in deciding the aspect of parity. This Court observed:

"26.…The High Court has evidently misunderstood the central aspect of what is meant by parity. Parity while granting bail must focus upon the role of the accused. Merely observing that another accused who was granted bail was armed with a similar weapon is not sufficient to determine whether a case for the grant of bail on the basis of parity has been established. In deciding the aspect of parity, the role attached to the accused, their position in relation to the incident and to the victims is of utmost importance. The High Court has proceeded on the basis of parity on a simplistic assessment as noted above, which again cannot pass muster under the law."

35. In view of the above observations made by the Hon'ble Apex Court and keeping in view the fact and circumstances of the case and the complicity of the accused about his involvement in the crime, the present applicant is not entitled for releasing him on bail on the ground of parity.

36. Learned counsel for the applicant vehemently argued that so far as criminal history of the present applicant is concerned, it is explained through rejoinder affidavit that in some of the cases the applicant has been granted bail, in one case final report has been submitted and some matters are still pending consideration before the court concerned.

37. Learned A.A.G. Sri Manish Goyal has submitted that applicant has criminal history of as much as 14 cases to his credit from the year 2010 including the cases of the nature of heinous offences including Section 395, 302, 307 I.P.C., Gangster Act, Explosive Act and N.S.A. had also been imposed against the applicant. It demonstrates that the applicant has been involved in certain heinous offences and he is a hardened criminal. If he is released on bail it will give him an opportunity to temper the witnesses . The criminal history of the applicant is to be taken into consideration while releasing him on bail.

38. Criminal history of the present applicant is brought on record through a supplementary counter affidavit by the State which is reported by Inspector of Police, PS Chaubepur Commissionerate, District Kanpur Nagar

39. In view of judgment of Hon'ble the Apex Court in the case of **Neeru Yadav vs. State of U.P. and another (2015) 3 SCC 527**, criminal antecedents of the accused cannot be ignored while deciding bail application, discretionary powers of Courts to grant bail must be exercised in a judicious manner in case of a habitual offender.

40. In **Neeraj Yadav Vs. State of U.P. (2016) 15 SCC 422**, the Hon'ble Apex Court has held as under:-

"15.This being the position of law, it is clear as cloudless sky that the High Court has totally ignored the criminal antecedents of the accused. What has weighed with the High Court is the doctrine of parity. A historysheeter involved in the nature of crime which we have reproduced hereinabove, are not minor offences so that he is not to be retained in custody, but the crimes are of heinous nature and such crimes, by no stretch of imagination, can be

regarded as jejune. Such cases do create a thunder and lightening having the effect potentiality of torrential rain in an analytical mind. The law expects the judiciary to be alert while admitting these kind of accused persons to be at large and, therefore, the emphasis is on exercise of discretion judiciously and not in a whimsical manner."

41. It is argued on behalf of State that the co-accused Sushil Kumar Tiwari against whom the present applicant is claiming the parity had criminal history of four cases while the applicant has a criminal history of 14 cases to his credit. Therefore, the applicant cannot claim parity on this score also.

42. In view of the above, the criminal history of the applicant, which includes the offenses of heinous nature, is also taken into consideration.

43. Learned A.A.G. Sri Manish Goyal submitted that the Vikroo massacre took place within the limits of notified area under the U.P. Dacoity Affected Area Act and the provision under Section 10 of the Act be also taken into consideration.

44. The relevant portion of the Act is quoted below:-

"10.Special provisions regarding bail- *Notwithstanding anything contend in the code of criminal procedure, 1973, no person accused or convicted of a scheduled offence shall, if in custody be released on bail or on his own bonds unless*

(a) The prosecution has given an opportunity to oppose the application for bail, and (b) Where the prosecution opposes the application for bail, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence……"

45. Therefore, it is concluded that on the basis of above discussion, it is clear that the nature of the offence and amount of culpability is serious and heinous. The applicant has criminal history of cases of heinous nature to his credit. The applicant is actively involved in the incident in which eight police personnel including the Circle Officer, Bilhore, were done to death mercilessly and seven others police personnel received grievous injury. The applicant actually assisted the main accused Vikas Dubey by providing him Rs. 2 lakh and 25 cartridges to be used in the incident. Further, the applicant also promised and provided vehicles to slain accused Vikas Dubey for his safe journey to his next destination after committing one of the most heinous crimes. Therefore, I do not find any sufficient reason to allow the bail application of the present applicant. The bail application of the present applicant Jay Kant Bajpai @ Jay is **rejected.**

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

(2023) 6 ILRA 78
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.05.2023

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Appeal No. 1513 of 2021

Abhishek Singh & Anr. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:

Rahul Srivastava, Amit Kumar Awasthi, Ipsha Mishra, Sushil Kumar Singh, Vivek Tiwari

Counsel for the Respondents:
G.A., Dileep Kumar Yadav, Suresh Kumar Yadav

Criminal Law - Indian Penal Code, 1860 - Sections 304, 326, 323 & 506 - Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 - Sections 3(2)(V) - Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 - Rules 7(2) - Appeal against rejection of default bail - FIR was lodged against four accused persons including appellants - Appellants were arrested on 26.06.2021, produced before Court on same day, remanded to judicial custody, sent to jail - According to appellants, period of 60 days as provided in Rule 7(2) of Rules, 1995 was completed on 25.08.2021 and by that date, no police report was submitted - Therefore, on 26.08.2021, appellants moved application, seeking default bail on ground that investigation was not concluded within said period - Rejected - Impugned order - Held, an inference that provision contained in Rule 7(2), whereby Investigating Officer is expected to conclude investigation within 60 days irrespective of nature of offence and punishment, has an overriding effect over provision contained in Section 167(2), and in absence of any provision contained in Act, 1989 or Rules, 1995 which excludes application of provision contained in Section 167, especially Section 167(2) can't be drawn because such inference would be against Act, 1989 & Rules, 1995 - Therefore, period for concluding investigation would be 90 days according to Section 167(2) - Appeal lacks merit, dismissed. (Para 4, 18, 20)

Criminal Appeal dismissed. (E-13)

List of Cases cited:

1. M. Ravindran Vs Intelligence Officer, Directorate of Revenue Intelligence, AIR 2020 SC 5245

2. Gyanendra Maurya Vs U.O.I. & ors., 2023 SCC Online All 46, (Para 22 to 27)

3. Bhavnagar University Vs Palitana Sugar Mill Pvt. Ltd. & ors., AIR 2003 SC 511

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard Sri Amit Kumar Awasthi, learned counsel for the appellants, Sri Dileep Kumar Yadav, learned counsel for the opposite party no.2, Sri Alok Saran, learned A.G.A. for the State and Sri S.S. Rajawat Advocate and Sri Saksham Agarwal, Advocates, who have also addressed this Court on the question of law involved in this case.

2. The instant Criminal Appeal is filed under Section 14 A(2) of The Scheduled Castes and the Scheduled and Tribes (Prevention of Atrocities) Act, 1989 *(hereinafter referred to as 'Act, 1989')* to assail the order dated 10.09.2021 passed by learned Special / A.D.J., S.C./S.T. Act, Lakhimpur Kheri in Bail Application under Section 167 of Code for default bail read with Rule 7(2) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 *(hereinafter referred to as 'Rules, 1995')* dated 26.08.2021 in Crime No.566/2021, under Sections 304, 326, 323, 506 I.P.C. and Section 3(2)(V) of Act, 1989, Police Station Kotwali Sadar, District Lakhimpur Kheri.

3. The only short question, which fell for consideration, is whether the period provided for completion of investigation relating to offence(s) under Act, 1989 shall

be governed by the Rule 7(2) of Rules, 1995 and in the event of non-submission of police report under Section 173(2) of Code within 60 days as provided in Rule 7(2) of Rules, 1995, irrespective of nature of offence(s) and punishment provided therefor, an accused/appellant shall be entitled to be released on default bail as provided in Section 167(2) of Code of Criminal Procedure *(hereinafter referred to as 'Code')* ?

4. Brief facts leading to this criminal appeal are that a first information report bearing Case Crime No.0566 of 2021 came to be lodged against four accused persons including the present appellants. The appellants were arrested on 26.06.2021 and were produced before the learned Court concerned on the same day. Thereafter, they were remanded to judicial custody and were sent to jail. According to the present appellants, the period of 60 days as provided in Rule 7(2) of Rules 1995 came to be completed on 25.08.2021 and by that date, no police report under Section 173(2) of Code was submitted before the learned Special Court concerned. Therefore, on 26.08.2021, the present appellants moved an application, seeking default bail as provided in Section 167(2) of Code before the learned Special Court concerned on the ground that the investigation was not concluded within the period of 60 days as provided in Rule 7(2) Rules, 1995 and no charge sheet came to be submitted within the period of 60 days, therefore, the appellants were entitled to default bail as provided in Section 167(2) of Code. It also appears from the perusal of memo of instant appeal that according to the present appellants, the charge sheet came to be submitted against the present appellants on 26.08.2021. However, ultimately the application seeking default bail under Section 167(2) of Code came to be rejected by means of impugned order dated 10.09.2021.

5. It is submitted by learned counsel for the appellants that the impugned order is patently illegal insofar as the same has been passed without due application of judicial mind and in utter violation of provision contained in Rule 7(2) of Rules, 1995.

6. His further submission is that the impugned order dated 10.09.2021 itself reveals the fact that in this matter charge sheet came to be filed in the learned trial court on the 61st day. Learned trial court took cognizance of the matter and proceeded accordingly, however, by means of impugned order dated 10.09.2021, learned trial court rejected the application moved by the appellants seeking default bail which, according to learned counsel for the appellants, the appellants were entitled to, in view of provision contained in Section 7(2) of Rules, 1995. He has also submitted that learned trial court fell in error in holding that since it is a case of default bail, it shall necessarily be governed by the provision contained in Section 167(2) of Code and the period prescribed for concluding the investigation would be 90 days having regard to the punishment provided for the offence under Section 304 & 326 I.P.C.

7. He further submits that having regard to the fact that the investigation in this matter relates to offences under Act, 1989 also and this being special Act, provisions contained thereunder in form of Rule 7(2) of Rules, 1995 shall have overriding effect over the provisions contained in Section 167(2) of Code, therefore, their application seeking default

bail ought to have been allowed by the learned trial Court.

8. In order to substantiate the aforesaid submissions, reliance has been placed on judgment rendered by Hon'ble the Supreme Court in the case of **M. Ravindran Vs. Intelligence Officer, Directorate of Revenue Intelligence1** wherein it has been held that in case, an accused has already applied for default bail, the prosecution cannot defeat enforcement of its indefeasible right by subsequently filing final report/additional complaint or report seeking extension of time.

9. Per contra Sri Dileep Kumar Yadav, learned counsel for the opposite party nos.2 and Sri Alok Saran, learned A.G.A. for the State have vehemently opposed the prayer by submitting that the object behind incorporating Rule 7(2) Rules 1995 is nothing but to ensure the speedy and time bound conclusion of investigation of offence(s) pertaining to Act, 1989. Their submission is that there is no specific provision for default bail in Act, 1989 or the Rules, 1995, therefore, as default bail was being sought under 167(2) of Code, it necessarily had to be dealt with in accordance with the provision contained in Section 167(2) of Code and the period prescribed for conclusion of investigation regarding various offence(s) in Section 167(2) of Code would necessarily apply in this case also. They, therefore, submit that in this view of the matter, the impugned order is a reasoned and well discussed order wherein no interference by this Court is warranted.

10. Sri S.S. Rajawat and Sri Saksham Agarwal, Advocates have also submitted that there is no provision either in Act, 1989 or in Rules, 1995 which expressly excludes the provision contained in Section 167 of Code. Their further submission is that a Division Bench of this Court in the case of **Gyanendra Maurya vs. Union of India and others2** has held that unless expressly barred, the provisions of Code shall be applicable while trying the cases under the Act, 1989. Therefore, their submission is that the learned trial Court has rightly rejected the application seeking default bail on account of applicability of Section 167 of Code.

11. They have also submitted that in absence of any explicit provision like Section 36-A (4) of Narcotic Drugs and Psychotropic Substances Act, 1985 *(hereinafter referred to as 'N.D.P.S. Act')* which has provided for extended period for concluding investigation in certain cases under N.D.P.S. Act, the provision contained in Section 167 of Code shall have application in respect of investigation concerning offence(s) under Act, 1989.

12. So far as the issue of applicability of Code of Criminal Procedure before the Exclusive/Special Court created under Act, 1989 is concerned, a Division Bench of this Court in the case of **Gyanendra Maurya (supra)** in paragraph nos.22 to 27 has held as under :-

"22. In the Act 1989 or the Rules of 1995, the procedure to be followed by these Courts under the Act 1989 has not been prescribed. Such procedure has been prescribed in the Code 1973 which contains the general law relating to criminal procedure.

23. In this context it is relevant to refer to Section 4 of the Code 1973 which reads as under:

"4. Trial of offences under the Penal Code, 1860 and other laws. (1) All

offences under the Penal Code, 1860 (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."

24. Section 5 of the Code 1973 reads as under:

"5. Saving. Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

25. As per Sections 4 and 5 of Code 1973 all offences under any other law (which shall include the Act, 1989) shall be investigated, inquired, tried and otherwise dealt with according to the Code of Criminal Procedure subject to there being any enactment on the subject containing a specific provision to the contrary. We find that certain provisions of the Code 1973 have specifically been excluded from their application to the proceedings under the Act, 1989. Section 18 of the Act 1989 excludes the application of Section 438 of Code 1973 regarding anticipatory bail. Sections 18 and 18A of the Act 1989 exclude any preliminary inquiry before registration of a First Information Report contrary to the provisions contained in Sections 154 and 156 of Code 1973 Section 19 excludes applicability of Section 360 of the Code 1973. The applicability of other provisions of the Code 1973 have not been excluded specifically or generally, therefore, it leads us to reasonably infer that other provisions of the Code 1973 will apply to the Courts established and specified under the Act, 1989, subject to Section 20 thereof.

26. Section 20 of the Act 1989 provides as under:

"20. Act to override other laws.— Save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law."

27. As per Section 20 of the Act 1989 save as otherwise provided in the Act, 1989, the provisions of the said Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law. Thus, subject to any inconsistency between the Act 1989 and the Code 1973, the said Code 1973 would apply unless it has been otherwise provided in the Act 1989 itself. This would obviously refer to the exclusion from applicability of Section 438 of Code 1973, etc. as referred in Sections 18, 18A and 19 of the Act, 1989. ***Apart from these three provisions, there is no other provision in the Act 1989 excluding the applicability of the Code 1973 to the proceedings under the Act 1989 which is also indicative of applicability of other provisions of the Code 1973*** *including Section 156(3) of Code 1973, to proceedings under the Act, 1989. Sections 4(2) and 5 of the Code 1973 support this reasoning."*

(emphasis supplied)

13. Hon'ble Supreme Court in the case of **Bhavnagar University vs. Palitana**

Sugar Mill Pvt. Ltd. and others3 has held that it is the basic principle of construction of statute that the same should be read as a whole, then chapter by chapter, section by section and words by words. Recourse to construction or interpretation of statute is necessary when there is ambiguity, obscurity or inconsistency therein and not otherwise. An effort must be made to give effect to all parts of statute and unless absolutely necessary, no part thereof shall be rendered surplusage or redundant. True meaning of a provision of law has to be determined on the basis of what is provided by its clear language, with due regard to the scheme of law. Scope of the legislation on the intention of the legislature cannot be enlarged when the language of the provision is plain and unambiguous. In other words, statutory enactments must ordinarily be construed according to its plain meaning and no words shall be added, altered or modified unless it is plainly necessary to do so to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute.

14. In order to appreciate the scope of provision contained in Rule 7(2) of Rules, 1995, it is useful to refer to Rule 7(2) & 7 (2A) of Rules, 1995, which are quoted hereinbelow :-

"(2) The investigating officer so appointed under sub-rule (1) shall complete the investigation on top priority basis within thirty days and submit the report to the Superintendent of Police who in turn will immediately forward the report to the Director General of Police or Commissioner of Police of the State Government, and the officer-in-charge of the concerned police station shall file the charge-sheet in the Special Court of the Exclusive Court within a period of sixty days (the period is inclusive of investigation and filing of charge-sheet)

(2A) The delay, if any, in investigation of filing of charge-sheet in accordance with sub-rule (2) shall be explained in writing by the investigating officer."

(emphasis supplied)

15. If read conjointly, the above provisions would indicate that they were incorporated in the Rules, 1995 to facilitate a prompt and efficient investigation of the matter related to the Act, 1989. In the event of any delay, instead of having a provision akin to Section 167(2) of Code, there is a provision in the form of Rule 7 (2A) in the Rules, 1995 that requires the Investigating Officer to explain cause for such delay in writing.

16. Section 167(2) of Code provides as under :-

"(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in

custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;"

(emphasis supplied)

17. A survey of entire scheme of Act, 1989 and Rules, 1995 reveals that there is no provision akin to provision contained in Section 36-A (4) of N.D.P.S. Act which provides that in respect of persons accused of an offence punishable under Section 19 or Section 24 or Section 27-A or for offence(s) involving commercial quantity the references in sub-section (2) of Section 167 of Code thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days". It also provides that if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

18. Thus, an inference that the provision contained in Rule 7(2) of Rules 1995, whereby the Investigating Officer is expected to conclude the investigation within 60 days irrespective of nature of offence and punishment prescribed therefor, has an overriding effect over provision contained in Section 167(2) of Code, and that too in absence of any provision contained in the Act, 1989 or in the Rules, 1995 which excludes application of provision contained in Section 167 of Code, especially Section 167(2) of Code cannot be drawn because such inference would be against the scheme of Act, 1989 & Rules, 1995.

19. Had it been the legislative intent, the legislature should have explicitly provided for default bail in Act, 1989 or in Rules, 1995 or in alternative there should have been some provision in Act, 1989 or in Rules, 1995 which excludes the provision contained in Section 167(2) of Code. In absence of any provision akin to provision contained in Section 36-A(4) of N.D.P.S. Act, in the considered opinion of this Court, provision contained in Section 167 of Code would apply to the investigation of offence(s) under Act, 1989 also.

20. Adverting to the case at hand, admittedly the appellants were arrested on 26.06.2021 and charge sheet came to be submitted against the present appellants on 26.08.2021, which is annexed as annexure No.15 to the instant criminal appeal, under Sections 326, 304, 323, 506 I.P.C. and 3(2)5 SC/ST Act. The offence under Sections 304 & 326 I.P.C. are punishable with life imprisonment or imprisonment of 10 years, therefore, the period for concluding the investigation in this case would be 90 days according to Section 167(2) of Code. Therefore, having regard to the law laid down by Division Bench of

this Court in **Gyanendra Maurya (Supra)** as the applicability of Section 167 of Code has not been specifically excluded or barred by any provision contained in the Act, 1989 or in the Rules, 1995, therefore, Section 167 of Code would apply in this case. Reckoned accordingly, the charge sheet came to be submitted on 61th day, well within the stipulated period of 90 days, as stated above.

21. In view of the above, no indefeasible right to seek default bail accrued in favour of the present appellants. Therefore, law laid down by Hon'ble Supreme Court in **M. Ravindran (supra)**, in the humble opinion of this Court, is not applicable in the facts of the case at hand.

22. The upshot of the aforesaid overall discussion is that the learned trial Court has rightly rejected the application moved by the present appellants seeking default bail under Section 167(2) of Code, which was moved on the ground that charge sheet was not submitted within 60 days as stipulated under Rule 7(2) of Rules 1995 and since no indefeasible right accrued in favour of the present appellants, therefore, rejection of application moved by the present appellants seeking default bail under Section 167(2) Code by learned Special Court cannot be faulted with.

23. Before parting, this Court places on record its appreciation for valuable and erudite assistance rendered by Sri S.S. Rajawat and Sri Saksham Agarwal, Advocates.

24. In view of the aforesaid discussion and for the reasons aforestated, this Court does not find any illegality or irregularity with the impugned order dated 10.09.2021, which may warrant interference by this Court. Therefore, the instant criminal appeal lacks merit, which deserves to be dismissed and the same is **dismissed**, accordingly.

(2023) 6 ILRA 85
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.05.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 2207 of 2016

Guddu Verma ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Ramesh Chandra Mishra, Sri Dinesh Kumar Pandey, Sri Manu Sharma, Sri Prem Sagar Gupta

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 302/34 & 201 - Punishment for murder - Appeal against conviction - Rigorous Life imprisonment - Code of Criminal Procedure, 1973 - Sections 161, 313 - Indian Evidence Act, 1872 - Section 106 - Circumstantial Evidence - P.W.1 filed written report alleging that his daughter committed suicide by hanging herself and no fault of her in-laws, requested to give him dead body for last rites - After investigation, charge-sheet submitted - Charges framed - During trial co-accused died - Held, from testimony of P.W.-1, P.W.-6 and P.W.-8 (reside in other village), it was clear that P.W.-6 and P.W.-8 was informed by deceased and P.W.-1 was informed by his wife P.W.6 that appellant and his mother used to make allegation against deceased of having

illicit relationship with her father-in-law, they tortured her, ultimately killed her and to hide said murder, they hanged her on a bamboo stick by tying a rope around her neck, but this has not been proved by P.W.2, P.W.-3 and P.W.4, who are relatives of P.W.-1 and resident of same village, where in-laws of his daughter resides with appellant - Not proved by another witnesses of said village - Death of deceased was homicidal, appellant can't be convicted on basis of testimony of interested witnesses, no one has seen the crime - St.ments of P.W.-1 to P.W.-6 and P.W-8 .have not been properly analysed - Impugned order set aside. (Para 2, 3, 45, 52)

Jail Appeal allowed. (E-13)

List of Cases cited:

1. Sharad Birdhichand Sarda Vs St. of Mah. reported in (1984) 4 SCC 116, (Para 152 to 154)

2. Ram Niwas Vs St. of Har. reported in 2022 SCC On Line SC 1007

3. Nagendra Sah Vs the St. of Bihar reported in (2021) 10 SCC 725

4. Sabitri Samantaray Vs St. of Odisha reported in AIR 2022 SC 2591, (Para 18 and 19)

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

1. This criminal appeal is directed against the impugned judgment dated 14.04.2016 passed by Additional Sessions Judge, Court No.1, Maharajganj in Sessions Trial No. 26 of 1998 (State Vs. Guddu Verma), arising out of Case Crime No. 112 of 1998, under Sections 302/34, 201 I.P.C., Police Station Paniyara, District Maharajganj, whereby accused-appellant Guddu Verma has been convicted of offence under Section 302/34 I.P.C. and has been sentenced to rigorous life imprisonment alongwith Rs.20,000/- fine for commissioning of offence under Section 302/34 I.P.C.; in default of payment in fine to further undergo one year additional imprisonment and three years rigorous imprisonment along with fine of Rs.3000/-, under Section 201 I.P.C.; in default of payment in fine to further undergo three months additional imprisonment.

2. Brief facts of the case are that on 13.04.1998 complainant/P.W.1, namely, Janardan son of Adhare, resident of Village Barvafahim, P.S. Kotwali, District Maharajganj had filed a written report alleging therein that he solemnized the marriage of his daughter Sangita with the accused-appellant Guddu son of Kedar about seven years ago, his daughter committed suicide tonight by hanging herself. It is further alleged that there was no fault of her in-laws in suicide of his daughter. He was informing to take necessary action. He also requested to give him the dead body of his daughter for the last rites. On the aforesaid written complaint of the complainant, a case was registered being Case Crime No. 112 of 1998, under Sections 302, 201 I.P.C., Police Station Paniyara, District Maharajganj.

3. When the Investigating Officer collected the evidence during investigation, it came to light from the evidence of the witnesses that the accused Mrs. Partapi and Guddu Verma falsely making allegation of Sangeeta's character,grabbed her face and got her back side head hit to the wall forcefully due to which she sustained injuries and died on the spot. To hide the crime both the accused tied her neck with rope and hanged the dead body on a

bamboo stick near the ceiling so that the onlookers might be considered the said crime of murder as suicide.

4. After lodging of the FIR on the written report of the informant/P.W.-1, Sub-Inspector Brij Mohan Singh (P.W.-10) reached the place of occurrence and got the inquest of the deceased prepared (Exhibit-ka/3) in the presence of inquest witnesses appointed by him. After getting the dead body sealed and completing all necessary formalities P.W.10 got the dead body sent to the Mortuary. No definite opinion has been given by the inquest witnesses. Each of the inquest witnesses has given different opinion as to the death of the deceased.

5. The post mortem of the body of the deceased Sangeeta was conducted on 14.4.1998 at 5:00 p.m. by Dr. Noor Ahmed (P.W.-7) and in the autopsy report (Ex.Ka-1), P.W.-7 has opined that the cause of death of the deceased is due to coma as a result of ante mortem injuries:

"1. Mark of ligature present on left side neck-it is post murder.

2. Contusion 6 cm x 4 cm on right side face.

3. Contused swelling 6 cm x 4 cm on back part of head. On opening-occipital bone broken- haematoma present."

6. The investigation was conducted by the Inspector Arun Kumar Singh (P.W.-11). He has recorded the statements of witnesses and prepared the site plan. He has also collected the rope and prepared the recovery memo. He has also arrested the accused Partapi and Guddu and recorded their statements in the Case Diary. After conclusions of the statutory investigation under Chapter XII Cr.P.C.. P.W.-11 has submitted the charge-sheet against the accused-appellants under Sections 302/34 and 201 I.P.C.

7. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried on 10th June, 1998. On 24th September, 1998, the concerned Court framed charges under Sections 302/34 and 201 I.P.C. against the accused Partapi and Guddu. The charges were read out and explained to the accused-appellant, who denied the accusation and demanded trial.

8. During trial co-accused Smt. Partapi had died and the case of co-accused Smt. Partapi was abated by the order of the Session Court dated 12.03.2003. Thus in this case the trial of only accused-appellant Guddu Verma was completed.

9. The trial started and the prosecution has examined seven witnesses, who are as follows:-

1	Janardan (complainant)	PW1
2	Chauthi	PW2
3	Smt. Bachchi	PW3
4	Rammilan	PW4
5	Santraj	PW5
6	Subhawati	PW6

7	Dr. Noor Ahmad	PW7
8	Shambhusharan Varma	PW8
9	Ramdavan	PW9
10	SI Brijmohan Singh	PW10
11	Arun Kumar Singh, Inspector	PW11

10. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

1	Written report dated 13.4.1998	Ex.Ka.-2
2	Recovery memo of Rope dated 13.4.1998	Ex.Ka.-8
3	Panchayatnama dated 13.4.1998	Ex. Ka.-3
4	Post mortem report dated 14.4.1998	Ex.Ka.-1
5	Site plan with index dated 17.4.1998	Ex.Ka.-9
6	Charge sheet mool dated 4.5.1998	Ex. Ka.-10

11. After completion of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. The accused-appellant denied the prosecution version and stated that the witnesses gave false evidence under the influence of some people. Two witnesses namely, Yogendra Kumar, DW-1 and Ramakant, DW-2 were examined by the accused in his defence.

12. On the basis of above evidence adduced during the course of trial, the court below after relying various case laws has recorded findings that the Hon'ble Supreme Court has expressed the view that the law does not cast an onus on the prosecution to produce that evidence which is impossible for the prosecution to produce. It is the duty of the prosecution to present evidence in such cases in relation to the facts and circumstances of which it can collect evidence. In the case in hand, the deceased Sangeeta died in the house of the accused Guddu and the allegation of causing the murder of the deceased has been made against the accused persons including the accused-appellant, therefore, the initial burden of proof lies on the accused to prove the cause of death of the deceased and that they have not committed the murder of the deceased and if the fact is disclosed on behalf of the accused that the deceased has committed suicide, then the purpose of committing suicide and the aggravating circumstances in which the deceased was forced to commit suicide have to be naturally and satisfactorily explained by the accused. In the case in hand, the murder of the deceased has taken place in the house of the accused, and the accused were unable to disclose about the exact cause and manner in which the deceased could commit suicide and not saying anything about the same indicates that the deceased was killed by them only. The trial court has observed that the case laws cited in its judgment were applicable and opined that proper discharge of the burden of proof has been shifted on the accused, which they have failed to prove.

13. The trial court has further recorded that although no specific error in the investigation could be pointed out in the

case and the prosecution statements cannot be doubted because of any minor error occurred therein. The arguments advanced by the defense have also no substance.

14. On the basis of the above exhaustive analysis of the evidence, the trial court has come to the definite conclusion that all the arguments advanced by the defence have no force. On the basis of the above evidence, it has been proved beyond reasonable doubt that at some unknown time on the night of 12/13.04.1998, the accused Smt. Partapi Devi (who died during the trial) and Guddu Verma in fulfilment of their common intention had killed Sangeeta, who was the wife of accused-appellant by causing injuries in their house and in order to avoid the crime of murder they tried to make the said murder, projected to be a case of suicide by getting a rope tied around her neck, which has been proved by the prosecution beyond reasonable doubt by its relevant cogent evidence, therefore the offence under Section 302 read with Section 34 and Section 201 of the Indian Penal Code against the accused Guddu Verma is proved beyond reasonable doubt, accordingly, it seems fully justified to convict him for the offencee under the above sections. The trial court has accordingly convicted the accused-appellant under Section 302 read with Section 34 and Section 201 of the Indian Penal Code and sentenced him life imprisonment with fine of Rs. 20, 000/- for the offence under Sections 302/34 I.P.C. and three years rigorous imprisonment with fine of Rs.3,000/- for the offence under Section 201 I.P.C.

15. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the accused-appellant has preferred the present jail appeal.

16. The submission of the learned counsel for the accused-appellant is that there is no direct evidence connecting the accused with the commissioning of the crime; the motive is absolutely weak as admittedly the accused-appellant; the prosecution case rests on circumstantial evidence in which the accused-appellant has been implicated only on the basis of suspicion and no evidence exist to hold the accused-appellant guilty.

17. It is further submitted that there is no complaint regarding cruelty against the accused-appellant or any other family members including the co-accused Partapi (now deceased) made by the deceased before the incident in question and after the incident. The first informant/P.W.-1 has roped the accused-appellant and his mother (co-accused) in the present case, only in order to harass and torture them. The accused-appellant had performed his duties as husband satisfactorily with the deceased during her life after marriage. It is also submitted that in the night of 12th April, 1998 being the loose temper lady, the wife of the accused-appellant i.e. deceased committed suicide by hanging herself due to petty dispute between the husband and wife and the said fact has been established from the statements of the prosecution witnesses. It is also stated that number of prosecution witnesses declared hostile during the course of trial but the trial court merely on the basis of testimony of interested witnesses, convicted the accused-appellant. It is also submitted that the conviction and sentence passed by the trial court against the accused-appellant without

considering the evidence available on record is too severe. It is next submitted that the accused-appellant has no criminal antecedents to his credit except the present and he was on bail during the course of trial.

18. On the cumulative strength of the aforesaid, learned counsel appearing for the appellants submits that in view of the inconsistency in the statements of the prosecution witnesses; the prosecution has failed to establish the guilt of accused-appellant beyond reasonable doubt based on circumstantial evidence. As such the sentence is excessive and ought not be sustained and the order of sentence must be modified taking lenient view in the matter.

19. Per contra, Mr. N.K. Sharma, learned A.G.A. for the State, supporting the judgment and order of conviction, submits that the first information report has been lodged promptly naming the accused persons; there is clinching evidence to support the prosecution's case; the incident in which the deceased, who was wife of accused-appellant is alleged to have been murdered by the accused persons including the appellant occurred in the house of the accused persons and burden under Section 106 of the Evidence Act to discharge as to under which circumstances and how the deceased died is upon the accused-appellant which he has failed to discharge on his part. There is strong motive for the accused-persons, as the deceased had illicit relationship with her father-in-law i.e. father of the accused-appellant. It is no doubt true that the present case is based on circumstantial evidence in which chain of events has been completed by the prosecution. The prosecution case has also been supported by the medical evidence. The place of occurrence has not been disputed by the defence; and the accused-appellants have strong motive or intention and the same has also been explained by the evidence of prosecution. Therefore, the prosecution has proved the charge levelled against the accused-appellants beyond reasonable doubt.

On the cumulative strength of the aforesaid, learned A.G.A. urges that in the circumstances the conviction and sentence awarded to the accused-appellant, by the court below merits no interference.

20. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the lower court records.

21. The only question requires to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable in law and suffers from no infirmity and perversity.

22. Before entering into the merits of the case set up by the learned counsel for the accused-appellant and the learned A.G.A. qua impugned judgment and order of conviction passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses.

23. P.W.-1/informant, Janardan who happens to be the father of the deceased

Sangeeta, has stated in his examination-in-chief that the mother-in-law and husband of his daughter, namely, Partapi and Guddi respectively used to quarrel with his daughter and that quarrel was being informed by her to her mother. Due to illicit relationship between the deceased and her father-in-law, her mother-in-law Partapi used to quarrel with her and her husband in collusion of his mother also used to quarrel with her. He has further stated that the information about the death of the deceased was received by him on Monday when he was cutting wheat crops on his field and the said information was given to him by one Ram Milan resident of Kamta not on his field but on the way that his daughter Sangeeta had died. After that he went to place of in-laws of his daughter at Kamta along with brother Shambhu and Ram Milan, where he saw the dead body of the deceased, which was kept in north-south direction and the preparation for cremation was going on. The dead body was lying outside the house and he saw the face of the deceased and he also saw mark on her neck.

24. This witness has further stated that he did not go to the Police Station for giving written report. His brother went to the place of Pradhan, where it was come to know that his daughter committed suicide, therefore, he did not go to Police Station for giving written report. In the cross-examination, this witness has further stated that after marriage when the deceased came to her parental house for the first time, she told her mother about the quarrel between her and her husband and mother-in-law and she did not tell him. His wife Subhawati (P.W.-6) informed the informant/P.W.-1 that the in-laws of the deceased used to torture her. This witness has further stated that his wife i.e. P.W.6 has also told him that in-laws of the deceased used to threat to leave her and on that very matter, he after convincing her, sent her and no panchayat was held regarding the said matter. When the deceased came back to her maternal home for the second time, she did not complain about her in-laws. This witness has further stated that his daughter (deceased) told him about illicit relationship between her and her father-in-law. This witness has further stated that after reaching the spot, no one from Kamta i.e. the place of in-laws of his daughter (deceased) did not tel him that his daughter was murdered due to illicit relationship between Sangeeta's father-in-law and herself and this fact has also not told by him to the Inspector. This witness has also stated that Ram Milan (P.W.-4) had told him about the murder. Chauthi (P.W.-2) had sent Ram Milan to go to the place of this witness and call him so that these people could not burn the dead body. Sister of this witness, namely, Bacchi (P.W.-3) is married to Chauthi (P.W.-2) and Ram Milan is brother Chauthi. Ram Milan did not tell him that Guddu accused-appellant and Partapi (now deceased) had come to his house on 14.4.98 saying that they had killed Sangeeta.

Perusal of the testimony of the informant/P.W.-1 will go to show that he is a hear-say and interested witness of the incident. The testimony of this witness is contradictory. He has admitted that as per the information given by the Pradhan of the village concerned, his daughter committed suicide, therefore, he did not go to Police Station for giving written report. As per report given by him to the Police Station concerned, his daughter Sangeeta committed suicide and has alleged that

there was no fault of her in-laws in suicide of his daughter. The illicit relationship in between his daughter Sangeeta and her father-in-law Kedar Verma has also not been proved by the testimony of this witness.

25. P.W.-2 Chauthi, who happens to be the parental uncle of the deceased (Phupha) and sister's husband of P.W.-1 has stated in examination-in-chief that the accused-appellant Guddu was married to Sangeeta i.e. the daughter of informant/P.W.1, and they were married ten years before the date of incident. Sangeeta died at her in-laws' place i.e. village Kamta. He could not know as to how Sangeeta died. After coming to know that Sangeeta died, he went and saw that the dead body was lying at the door. This witness has further stated that the informant/P.W.-1 is his brother-in-law and his wife is Bachi (P.W.-3), who is sister of informant. Kedar Verma is father of the accused-appellant and father-in-law of the deceased, who belongs to his village and same fraternity. His relations with Kedar Verma have deteriorated after the death of Sangeeta.

26. This witness has further stated that Sangeeta was about 20 years old at the time of her death. Kedar Verma used to run a shop on the banks of canal and street and used to sleep there as well. The accused-appellant Guddu and Paratapi used to live at home. He did not know that accused-appellant Guddu and Paratapi used to make allegation qua Sangeeta's character. He also did not know whether her father-in-law Kedar Verma had an illicit relationship with Sangeeta or not. Sangeeta did not die due to any disease.

27. This witness has denied that he did not go to see the dead body of the deceased Sangeeta because of her illicit relationship. He also could not tell whether Sangeeta died due to hanging or not. The accused-appellant Guddu and Paratapi did not go to his house on the date of incident nor did they apologize for their mistake in front of him.

From perusal of the aforesaid testimony of P.W.-2, it is crystal clear that neither he saw the incident with his own eyes nor did he know about the alleged illicit relationship between Sangeeta and her father-in-law Kedar, when as a matter of fact, he is also living in the same village and is Phupha of the deceased. He is a hear-say and interested witness.

28. P.W.-3 Bachchi wife of P.W.-2, who happens to be the parental aunt of the deceased (Bua) and sister of informant/P.W.1 has stated in her examination-in-chief that the accused-appellant Guddu and Sangeeta got married ten years ago in her village. She did not know as to how her niece Sangeeta died. After coming to know about Sangeeta's death, she went to see her dead body. Since this witness was pregnant so she fainted before reaching Sangeeta's house. Sangeeta's father-in-law Kedar Verma is not from her Pattidaari but belongs to same fraternity. After the death of Sangeeta, her relation with Kedar Verma was not good. After Sangeeta's death, her husband sent his brother Ram Milan to call Sangeeta's father Janardan Verma. This witness did not know how Sangeeta died even after the incident. The accused-appellant Guddu and Partapi did not tell her about the death of Sangeeta.

29. In the cross-examination, this witness has stated that she did not know whether the accused-appellant Guddu and Paratapi used to allege about Sangeeta's character and that Sangeeta had illicit relations with her father-in-law Kedar Verma or not. She also did not know as to whether Sangeeta died due to illness or someone murdered her. This witness has clearly denied that the accused-appellant Guddu and Paratapi after grabbing the face of her niece, pushed her head on the wall due to which she sustained injury and died. She has also denied that after the incident accused-appellant Guddu and Paratapi came to her house and told that they have killed Sangeeta. She has also stated that she did not give any statement to the Inspector.

Testimony of this witness also goes to show that she did not see the incident with her own eyes nor did she came to know about the alleged illicit relationship between Sangeeta and her father-in-law Kedar, even though she is also living in the same village with her husband i.e. Phupha of the deceased. She is a hear-say and an interested witness.

30. P.W.-4 Ram Milan, who happens to be the brother of P.W.-2 and brother-in-law of P.W.-3, has stated in his examination-in-chief that villagers asked him to go to the place of informant/P.W.-1 Janardan to inform about the death of Sangeeta on which he went to Janardan's house by bicycle and told him to see her daughter as she died. He has further stated that there was an uproar in the village that she had been killed. He has also stated that P.W.-2 Chauthi is his brother and his brother did not ask him to go to informant's place for informing him about the death of Sangeeta, whereas the villagers asked him to go. He has also stated that he did not see the dead body of the deceased before the incident or after the incident. This witness has further stated that though the villagers had asked him to go to informant's place for informing him that his daughter died but he did not tell the same to the informant instead he told that his daughter was not well. This witness has also stated that he did not give any statement to the Inspector. In his entire testimony, this witness has not stated any single word about the alleged illicit relationship of the deceased and her father-in-law Kedar Verma.

From the testimony of this witness, it is apparently clear that this witness has not seen the incident with his own eyes. He is only a hear-say and an interested witness.

31. In his examination-in-chief, Santraj P.W.-5, who happens to be resident of village of accused-appellant i.e. Kamta Bujurg has stated that the informant/P.W.-1 is resident of village Barwa Faheem and his marriage was solemnized with the daughter of real uncle of the informant in village Barwa Faheem. Since her father-in-law had no son except his wife, the entire property of his father-in-law was in the name of his wife, therefore, he used to reside in his in-laws place. He occasionally went to village Kamta.

32. This witness has further stated that when Sangeeta died at her in-laws house at village Kamta, he was at village Barwa Faheem. On coming to know about the death of Sangeeta, he went to see her at village Kamta Bujurg, where he came to know that she committed suicide by hanging herself. This witness has further stated that he has not spoken to anyone about the incident even later. He did not try to find out as how Sangeeta died and in which manner.

33. This witness has stated in his cross-examination that the father of informant/P.W.-1 and his father-in-law are real brothers. He has also stated that he has not seen that the accused-appellant Guddu and Partapi killed Sangeeta. He heard that they had beaten her. On various occasions the quarrel took place between them. He has disclosed the said incident of quarrel for the first time before the trial court. He did not tell about the same to the informant/P.W.-1. The informant/P.W.-1 is his brother-in-law.

34. In the cross-examination, this witness has stated that on the asking of the Inspector he went to the Police Station after 4 to 5 days of the incident where he has not told as to whether the accused-appellant Guddu i.e. husband of the deceased and Pratapi killed Sangeeta or not. He has also stated that the character of Sangeeta was good and she did not had bad character.

35. Subhawati, wife of informant/P.W.1, who happens to be the mother of the deceased Sangeeta has been adduced as P.W.-6, who has stated in her examination-in-chief that her daughter Sangeeta was married to accused-appellant Guddu son of Kedar resident of village Kamta Bujurg. She has further stated that after five years of her marriage when her daughter Sangeeta went to her in-laws house after leaving her parental house, the accused Pratapi and accused-appellant Guddu used to accuse her daughter that she had an illicit relationship with her father-in-law Kedar. When her daughter Sangeeta came to her parental house, she disclosed the same to her mother i.e. P.W.-6 that she had illicit relationship with her father-in-law and due to the said fact, her mother-in-law and husband used to torture and threat her to kill.

36. This witness has further stated that about about 8 to 9 years ago, her husband Guddu and mother-in-law Partapi together killed her girl and to hide their crime, accused Pratapi and Guddu hanged her by tying a rope around her neck. She has further stated that after killing her daughter, the accused Partapi and Guddu went to place of her sister and brother-in-laws, namely, Bachchi and Chauthi, where they apologized their crime and prayed to save them and then fled from there, whereas P.W.-2 Chauthi as well as P.W.-3 Bachchi have stated in their testimony that they did not know whether her father-in-law Kedar Verma had illicit relationship with the deceased Sangeeta or not. They have also stated that the accused-appellant Guddu and accused Partapi did not go to their house on the date of incident nor did they apologize for their mistake in front of them.

37. Dr. Noor Ahmad, who conducted the autopsy of the deceased has been adduced as P.W.-7. He has stated in his examination-in-chief that during the examination he found the following facts on analysis of the dead body of deceased Sangeeta:

"1. The age of the deceased was about 18 years. The body was folded, the eyes and mouth were open and closed. The tongue had protruded a little. The stage of Rigor Mortis had passed. There was a mark of hanging on left side of her neck.

2. Swelling on right side of face 6 cm x 4 cm was present.

3. Swelling 6 X 4 cm was present on the back side of head of the deceased. When the head was opened the occipital bone was found to be broken and the blood clot was present.

Head - blood clot swollen membranes

Chest-lungs were swollen

The heart chamber was full.

Stomach- there was gas in the small intestine and the large intestine was full.

Liver- the liver was two pounds full.

Childbirth- there was a dead child of full stage. The death was about a day old. Death was due to injuries inflicted before death."

38. In the cross-examination, this witness has stated as under:

"Injury no. 1 is on the neck of the deceased.

Injury no. 2 is on the face.

Injury no. 3 is on the back of the head. Injury no. 2 was contusion mark, whereas injury no.3 was contusion with swelling.

Injury nos. 1 and 2 are simple in nature nature. "

39. This witness has opined that injury no.3 could come, if a person falls on the back of head on a hard object. The death of the deceased happened only after coming into coma. He has further opined that if injury no.3 had been properly treated, she would not have died. A difference of two to four hours is possible in the period of death.

40. Shambhu Sharan Verma, who happens to be the brother of the informant/P.W.-1 and uncle of the deceased, has been adduced as P.W.-8. He has stated in his examination-in-chief that Sangeeta told them that her husband and mother-in-law used to demand a transistor and for not fulfilling the said demand, they used to torture her on which they including this witness sent Sangeeta to her in-laws' place with transistor (radio). After two to four days, on calling of Sangeeta, this witness went to her in-laws' place where she told him that her husband and mother-in-law were troubling her in different ways. Sangeeta told him that Sangeeta's husband falsely accused her of having illicit relationship with his father. She told that her mother-in-law also made such false allegations against her. Sangeeta was pregnant at that time. Sangeeta also told that her husband and mother-in-law were threatening to kill her. This witness came to his house and disclosed the entire fact to his elder brother i.e. informant/P.W.-1. On the next day his sister's brother-in-law Rammilan informed him at his house that Sangeeta was dead. After getting the information, his elder brother i.e. informant/P.W.-1, his wife and two to four people of the village went to Sangeeta's in-laws' house. As soon as he went out to go to Paniyara Police Station, accused-appellant Guddu and his mother caught hold of her leg and started crying saying that he in his boyhood had committed the crime by mistaken. They also prayed not to lodge the FIR against them for the said crime. He has further stated that when they reached Sangeeta's in-laws house, accused-

appellant Guddu and his family members were present and they told that Sangeeta had died by hanging herself.

41. In the cross-examination, this witness has stated that when he asked the villagers about Sangeeta's death, he came to know that accused-appellant and his mother killed Sangeeta and to hide the crime, they coloured the said murder as suicide. He has further stated that when the accused felt that the post-mortem would reveal the exact cause of death of Sangeeta, they went to the place of his sister (P.W.-8) and brother-in-law (Behnoi) and said that the incident was true and accepted their crime.

42. In the cross-examination this witness has admitted that in the report which has been given by the informant/P.W.-1 to the Police, he has stated that the deceased had committed suicide by hanging herself and the in-laws of his daughter were not responsible for the same.

Though this witness has also claimed that he was informed by the deceased that the accused-appellant Guddu and his mother used to torture her making allegation of her having illicit relationship with her father-in-law and because of the same they killed her, but he has not seen the incident with his own eyes. He is also a hear-say and an interested witness.

43. Ramdawan has been adduced as P.W.-9 and is a inquest witness and has proved the same in the Court. Sub-Inspector Brij Mohan Singh has been adduced as P.W.10, who got prepared the inquest of the deceased and after necessary formalities he sent the dead body of the deceased to Mortuary. This witness has clearly stated that neither in the report which has been given to Police nor at the time of preparation of the inquest, the informant/P.W.-1 has disclosed that the accused-appellant and his family members had killed the deceased. Mr. Arun Kumar Singh Inspector has been adduced as P.W.-11. This witness has investigated the case and after preparing site plan, recording statements of witnesses and completing necessary formalities, he has submitted the charge-sheet against the accused.

44. Kedar Verma, father-in-law of the deceased Sangeeta on whom allegation of illicit relationship with the deceased, were alleged to have been made by the accused-appellant Guddu and his mother Partapi, as per the version of the prosecution witnesses i.e P.W.-1, P.W.-6 and P.W.-8, has not been produced neither by the prosecution nor by the defence.

45. On deeper scrutiny of the testimony of the prosecution witnesses specially P.W.-1, P.W.-6 and P.W.-8, this Court finds that P.W.-6 and P.W.-8 was informed by the deceased and P.W.-1 was informed by his wife P.W.6 that the accused-appellant Guddu and his mother Partapi used to make allegation against the deceased of having illicit relationship with her father-in-law and because of said allegation, they used to torture her and ultimately killed her and to hide the said murder, they hanged her on a bamboo stick by tying a rople around her neck but the said fact has not been proved by other witnesses i.e. P.W.2, P.W.-3 and P.W.4, who are none other than the brother-in-law, sister and sister's brother-in-law

respectively of the informant/P.W.-1 and are also resident of same village, where in-laws of his daughter resides including the accused-appellant. P.W.-2, P.W.-3 and P.W.-4 have completely denied the said fact of illicit relationship of the deceased with her father-in-law. It is impossible to believe that the persons, who are residing at the same place and are also relatives, do not know about the illicit relationship of the deceased with her father-in-law, whereas the persons who reside in other village i.e. P.W.-1, P.W.6 and P.W.8 had knowledge about the same but they never made any complaint before the Police or any other authority including the Panchayat and their relatives, who are residents of the same village. The said fact has also not been proved by another witnesses of the said village.

46. We are, therefore, of the considered view that this is a case of circumstantial evidence and not direct evidence as all the prosecution witnesses are hear-say witnesses, no one has seen the incident with his/her own eyes. In the chain of circumstantial evidence, the motive, which is the strongest link of prosecution evidence in this case rendered weak and unreliable. The motive as alleged by the prosecution cannot be relied upon on the basis of evidence led by the prosecution during the course of trial. Apart from the alleged motive no other circumstance has been proved against the accused persons including the appellant. We otherwise find that chain of events in a case of circumstantial evidence which is required to be completed by the prosecution is left incomplete.

47. Since this is a case of circumstantial evidence and the law on the point is well settled that the prosecution must prove the complete chain of events which points exclusively to the hypothesis of guilt attributed to the accused appellant. It is also the requirement of law that the prosecution must show that alternative hypothesis does not exist on facts.

48. In **Sharad Birdhichand Sarda vs. State of Maharashtra** reported in (1984) 4 SCC 116, the Apex Court evolved five tests to be established by the prosecution in order to prove the guilt of accused based on circumstantial evidence. Five golden principles have been enumerated in paragraph nos. 152 to 154, which are reproduced hereinafter:

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

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused.

Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground far a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. V. State of Maharashtra, where the following observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

49. Judgment of the Supreme Court in the case of **Sharad Birdhichand Sarda (Supra)** has consistently been followed and reiterated recently by the Court in the case of **Ram Niwas Vs. State of Haryana** reported in *2022 SCC On Line SC 1007.*

50. When we analyse the evidence on record on the above touchstone, we have no hesitation in arriving at the conclusion that the prosecution has failed to prove the guilt of the accused appellant beyond reasonable doubt. It has not been proved by the prosecution that chain of events in the present case leads only to the hypothesis of guilt on part of the accused appellant and an alternative hypothesis cannot be ruled out.

51. There is also a considerable delay between the time when the informant gave a report to the Police stating therein that his daughter has committed suicide by hanging herself and the family members of her in-

laws were not involved or responsible in occurring of the said death and the time when the Police has recorded their statements under Section 161 Cr.P.C. during the course of investigation stating therein that the accused-appellant Guddu and his mother Partapi had killed the deceased and to hide the crime, they hanged her by tying a rope around her neck as they suspected that she had illicit relationship with her father-in-law. An alternative hypothesis supporting the innocence of the accused-appellant, therefore, cannot be ruled out.

52. We also cannot lose sight of the fact that as per the statement of the Autopsy Surgeon Dr. Noor Ahmad (P.W.-7) and the autopsy report, it is crystal clear that the death of the deceased is homicidal, as she was caused injuries on her head and face and due to injuries sustained by her on her head, she has done to death. However, in the said homicidal death of the deceased, the accused-appellant cannot be convicted only on the basis of testimony of interested and hearsay witnesses and also on the basis of chain of circumstantial evidence, which has not been completed as held above, even otherwise, no one has seen that the accused-appellant and his mother (died) had killed the deceased and to hide the crime, they hanged her on a bamboo stick by tying rope around her neck. It was the duty of the Investigating Agency to find out the culprit who has committed the offence of murder of the deceased.

53. On analysing the evidence led by the prosecution in the context of above deliberation and discussions, we find that the court below has not examined the evidence of prosecution in correct perspective and the findings returned by it that the prosecution has succeeded in proving its case beyond reasonable doubt cannot be sustained. The statements of P.W.-1, P.W.2, P.W.3, P.W.4, P.W.-5, P.W.-6 and P.W-8 .have not been properly analysed. The statements of P.W.1, P.W.-6 and P.W.-8 have not been supported by P.W.2, P.W.-3 and P.W.-4, who are none other than their relatives and reside in the same village where in-laws of the deceased reside. Even otherwise, in the testimony of P.W.1, P.W.-6 and P.W.-8, there are major variations and contradictions, which cannot be relied upon. The prosecution has therefore failed to establish the guilt of the accused-appellant on the basis of evidence led at the stage of trial. The conviction and sentence of accused-appellant is consequently reversed while granting him benefit of doubt. It has also been reported to us that the accused-appellant was on bail during the course of trial and has no criminal antecedents to his credit except the present one.

54. So far as the inference drawn by the trial court while passing the impugned judgment of conviction that since the death of the deceased has occurred in the house of the accused-appellant, which is homicidal, the burden of proof under Section 106 of the Indian Evidence Act lies upon him and he had to discharge his burden as to under which circumstances and what manner the deceased has done to death, which he has failed to discharge the same, is concerned, it is settled law that Section 106 of the Indian Evidence Act cannot be attracted unless the initial burden of establishing the guilt of the accused is prima facie discharged by the prosecution. We therefore, hold that provisions of Section 106 of the Indian Evidence Act has

no application to the facts of the instant case because initial burden of proving the facts that accused-appellant had committed the murder of his wife is not discharged by the prosecution. The prosecution has completely failed to discharge its initial burden in proving the guilt of the accused-appellant beyond reasonable doubt.

55. In the case of **Nagendra Sah Vs. the State of Bihar reported in (2021) 10 SCC 725** in the Apex Court has held that when a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in the discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances that are required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, the falsity of the defense is no ground to convict the accused, a Division Bench of Justices **Ajay Rastogi** and **Abhay S Oka held**. The relevant portion whereof reads as follows:

"……Under Section 101 of the Evidence Act, whoever desires any Court to give a judgment as to a liability dependent on the existence of facts, he must prove that those facts exist. Therefore, the burden is always on the prosecution to bring home the guilt of the accused beyond a reasonable doubt. Thus, Section 106 constitutes an exception to Section 101.

…….

We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, ***the burden is on the prosecution and never shifts."*** *(emphasis added)"*

56. In the recent judgment of the Apex Court in the case of **Sabitri Samantaray Vs. State of Odisha** reported in AIR 2022 SC 2591, it has been observed as follows:

"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]"

57. In view of the discussions and deliberations held above, the present jail appeal succeeds and is allowed. The judgment and order dated 14.04.2016 passed by Additional Sessions Judge, Court No.1, Maharajganj in Sessions Trial No. 26 of 1998 (State Vs. Guddu Verma), arising out of Case Crime No. 112 of 1998, under Sections 302/34, 201 I.P.C., Police Station Paniyara, District Maharajganj, against the accused appellant, is hereby set aside.

58. The accused appellant-Guddu Verma, who is in jail from 13th April, 2016 shall be released forthwith, unless he is wanted in any other case on compliance of Section 437-A Cr.P.C.

59. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Maharajganj henceforth, for necessary compliance.

(2023) 6 ILRA 101
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 2989 of 2010

Gajendra Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri P.K. Singh, Sri Anupam Laloriya

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Indian Penal Code, 1860 - Sections 302 & 506 - Punishment for murder - Appeal against conviction - Life imprisonment - Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 - Section 3(2) (v) - Code of Criminal Procedure, 1973 - Sections 174, 313 - Indian Evidence Act, 1872 - Section 106 - Direct Evidence - Daughter of deceased moved written complaint stating that in absence of his father accused often visit her house - In spite being forbidden by her father, her mother used to meet him - On 07.01.2006 her father had dinner, fell unconscious - Thereafter accused and her mother put some inflammable substance in room where her father was sleeping and died - Charge-sheet submitted - Charges framed - St. argued that P.W.-3 as real brother of co-accused and he can't falsely implicate his sister - Explained as to how and in which circumstances his brother-in-law was killed by his real sister in connivance with appellant - Held, regarding delay in lodging FIR was satisfactorily explained, accused persons had threatened to kill

them also as their father had been killed - From evidence of fire fighting officer and PM doctor and oral evidence of PW-1 and PW-2 established that neither deceased committed suicide nor he died due to electrocution on account of short circuit but set ablaze by putting inflammable material on his body - Evidence of PW-1 that after death of deceased, co-accused solemnized marriage with appellant also goes against her - Appeal lacks merit, dismissed. (Para 5, 22, 36, 51, 52, 59, 61, 62, 66, 70)

Criminal Appeal dismissed. (E-13)

List of Cases cited:

1. Tara Singh & ors. Vs St. of Pun., 1991 SCC (Crl) 710

2. Ravinder Kumar & anr. Vs St. of Pun., (2001) 7 SCC 690

3. Amar Singh Vs Balwinder Singh & ors., (2003) 2 SCC 518

4. Sahebrao & anr. Vs St. of Mah., (2006) 9 SCC 794

5. Bhookan Vs St. of U.P., (2020) 110 ACC 729

6. Mukesh Vs St. for NCT of Delhi & ors., AIR 2017 SC 2161

7. Podda Narayan Vs St. of Andhra Pradesh, (1975) 4 SCC 153

8. George Vs St. of Kerala, AIR 1998 SC 1376

9. Brahma Swaroop Vs St. of U.P., AIR 2011 SC 280

10. Radha Mohan Singh @ Lal Saheb Vs St. of U.P., 2006 (54) ACC 862 (SC)

11. Chimanbhai Ukabhai Vs St. of Guj., AIR 1983 SC 484

12. St. of U.P. Vs Mohd. Iqram, (2011) 3 SCC (Cri) 354

13. Ramakant Rai Vs Madan Ra, 2005 SCCrR 1126 (SC)

14. Vijay Pal Vs St. (Government of NCT of Delhi), (2015) 4 SCC 749

15. Mallela Shyamsunder Vs St. of Andhra Pradesh, (2015) 2 SCC 115

16. Saddik @ Gulam Hussein Shaikh & ors. Vs St. of Guj., (2016) 10 SCC 663

17. Bhim Singh & anr. Vs St. of Uttarakhand, (2015) 4 SCC 281

18. Dasin Bai @ Shanti Bai Vs St. of Chhattisgarh, 2015 (89) ACC 337 (SC)

19. Sanjeev Vs. St. of Har., (2015) 4 SCC 387, (Para 16)

20. Bhagwan Jagannath Markad Vs St. of Mah., (2016) 10 SCC 537

21. Chhotanney Vs St. of U.P., AIR 2009 SC 2013

22. Gangadhar Behera Vs St. of Orissa, (2002) 8 SCC 381

23. Vijayee Singh Vs St. of U.P., (1990) 3 SCC 190

24. Ramesh Harijan Vs St. of U.P., (2012) 5 SCC 777

25. Such Singh Vs St. of Punj., (2003) 7 SCC 643

26. St. of U.P. Vs Ashok Kumar Srivastava, AIR 1992 SC 840

27. Inder Singh Vs St. of Delhi Administration, AIR 1978 SC 1091

28. Jose @ Pappachan Vs Sub-Inspector of Police, Koyilandy & anr., (2016) 10 SCC 519

29. Gurbachan Singh Vs Satpal Singh, AIR 1990 SC 209

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

1. Heard Sri P.K. Singh, learned counsel for the appellant, Sri Vikas Goswami, learned AGA for the State and perused the record.

2. This appeal has been preferred against the impunged judgment and order dated 11.03.2010 passed by Special Judge (SC/ST Act), Kanpur Nagar, in Sessions Trial No.1210 of 2006 (State Vs. Maya Verma and another) arising out of Case Crime No.226 of 2006, under Sections 302, 506 IPC and Section 3(2)(v) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (for short 'SC/ST Act'), Police Station Barra, District Kanpur Nagar by which the appellant has been convicted and sentenced for life imprisonment under Section 302 IPC alongwith fine of Rs.1,00,000/- and in default of payment of fine to undergo rigorous imprisonment for one year and further to undergo rigorous imprisonment for one year under Section 506 IPC.

3. By the same judgment co-accused Maya Verma was also convicted and sentenced similarly but during her incarceration, she was granted remission by the State Government and was set free. On account of that, the Division Bench disposed of her appeal i.e. Criminal Appeal No.2318 of 2010 (Smt. Maya Verma Vs. State of UP) on 23.03.2023.

4. The appellant-Gajendra Singh has taken ground that the conviction is against the weight of evidence on record; the incident occurred accidentally; proper information was made to the authorities; fire brigade was informed on intervening night of 07/08.01.2006 at 01:15 a.m. and the witness has also stated that in the night hearing the hue and cry, he went to the spot and extinguished fire; the son, daughters and house-holdings were taken out from the house and the place of occurrence, therefore, the appeal be allowed and the impugned judgment be set aside.

5. In brief, facts of the case are that the informant, Kumari Rama Verma, daughter of the deceased Ravindra Kumar Verma, moved a written complaint stating that her father who was posted as Bank Manager at Bank of Baroda, Chaure Bazar, District Faizabad, generally used to come home on Saturday evening and in his absence neighbour Gajendra Singh Chauhan used to often visit her house. In spite being forbidden by her father, her mother used to meet Gajendra Singh. On 07.01.2006 her father came to house, her mother served the dinner all by herself. As soon as her father had the dinner, he fell unconscious. The remaining dinner was consumed by her younger brother who thereafter also fell unconscious. On the same night at around 12:00 p.m. someone knocked the door, her mother opened the door and Gajendra Singh entered in the house. Both of them after conversation and hatching a conspiracy in order to remove the obstacle in their way, put some inflammable substance in the room where her father was sleeping. Everything started burning in the house. Gajendra Singh Chauhan and her mother threatened her that if she tells anyone about this incident, they would also face the same consequence. Her father died on the spot and Gejendra Singh fled away.

6. The informant further stated that she came down after saving the lives of her

younger brother and sister. In such a situation, she could not tell the truth to the people. In the morning *postmortem* of the dead body of her father was conducted. They are three siblings. She is the elder sister. Her younger brother Prashant Verma was aged about 16 years and younger sister Harshita Verma was aged about 14 years. As a result of this her mother married Gajendra Singh Chauhan and they lived together. They have been left helpless for about five months and they often kept wandering here and there. Now her mother's intention is to grab the money and house of her father and attempts were being made to kill them also. Gajendra Singh Chauhan and her mother had conspired and killed her father.

7. On 24.07.2006, the FIR was somehow lodged at Crime No.226 of 2006, under Section 302/506 IPC. The Investigating Officer (IO) started the investigation. The inquest and *postmortem* reports had already been prepared. The spot map Ex.Ka-9 was prepared later on during the course of investigation on the pointing of the informant. Some documents such as report of fire brigade Department were also collected. Statements of the witnesses of fact and formal witnesses were recorded by the IO. Statements of the accused persons were also recorded and after finding that a case under Section 302/506 IPC has been caused by the appellant, the charge sheet Ex.Ka-10 was submitted on 29.09.2006 against the appellant upon which cognizance was taken on 12.10.2006. Accused were summoned and after framing of charge trial started.

8. On 06.02.2007, charge under Sections 302, 506 IPC and Section 3(2)(v) SC/ST Act was framed by the trial Judge against the accused-appellant which they denied and claimed trial thereafter following witnesses were examined:-

PW-1	Kumari Rama Verma, informant and witness of fact, elder daughter of the deceased and accused Maya Verma, who has proved written complaint Ex.Ka-1.
PW-2	Kumari Harshita @ Hansa Verma, witness of fact, younger daughter of the deceased and accused Maya Verma and younger sister of the informant.
PW-3	Rajendra Kumar - real brother of the accused Maya Verma.
PW-4	Sudhir, cousin brother of the accused Maya Verma (witness of fact).
PW-5	Shivdaras Prasad, Fire Fighting Officer, Mariyampur, Kanpur Nagar who has proved Ex.Ka-2.
PW-6	HC 118, Radhey Shyam Pandey, Police Station Naubasta, Kanpur Nagar who has proved chik FIR Ex.Ka-3 and carbon copy GD Ex.Ka-4.
PW-7	Dr. Santosh Narayan Shukla who has proved the *postmortem* report Ex.Ka-5.
PW-8	Ramsharan Verma, SI has proved inquest report Ex.Ka-6 and has also proved material Exs.7 to 12.
PW-9	Virendra Singh, SI, the then Constable Clerk, Police Station

	Barra who has proved information submitted by the accused Maya Verma regarding death of the deceased on account of short circuit which was entered in the GD rapat no.4 at 02:20 a.m. on 08.01.2006 as Ex.Ka-7 and its carbon copy GD as Ex.Ka-8.
PW-10	SSI Bankey Bihari, SHO/IO who has proved map Ex.Ka-9.
PW-11	Om Prakash Singh DSP/CO City, Firozabad, IO of the case who has proved charge sheet Ex.Ka-10 and photographs of the place of occurrence as material Exs.1-6.

9. Following documentary evidences had been relied on by the prosecution:-

Written report	Ex.Ka-1
Report of Fire Fighting Officer	Ex.Ka-2
Chik FIR/FIR	Ex.Ka-3
Carbon copy GD	Ex.Ka-4
Postmortem report	Ex.Ka-5
Panchayatnama	Ex.Ka-6
GD rapat no.4	Ex.Ka-7
Carbon copy GD	Ex.Ka-8
Map	Ex.Ka-9
Charge sheet	Ex.Ka-10
Photographs of place of occurrence Material	Exs.1-6
Clothes and watch of the deceased Material	Exs.7-12

10. Statements of the accused persons were recorded under Section 313 CrPC on 16.09.2008 in which Maya Verma denied the allegations, charge and evidence produced from the side of the prosecution and has stated that the information was given to the police station that due to short circuit her husband had died. The fire was extinguished by the fire brigade. After recovering his daughter and brother false statements have been recorded. Accused Gajendra Singh Chauhan has also denied the allegations, evidence and has said that he helped Maya Devi in learning to drive a car, therefore, he has also been falsely implicated.

11. After hearing the argument, the trial court found that the charges under Sections 302, 506 IPC have been proved beyond reasonable doubt, hence accused-appellant was convicted and sentenced as noted above and was exonerated under the charge of Section 3(2)(v) SC/ST Act.

12. In brief, statements of the witnesses are being reproduced hereinafter.

13. PW-1, Kumari Rama Verma, daughter of the deceased and accused Maya Verma has deposed in favour of the

prosecution that during the course of learning to drive the car, her mother and Gajendra Singh came very close and became intimate. Gajendra Singh started visiting her house in absence of her father and illicit relation arose between the two. She herself had seen it 1-2 times and had informed her father upon which her father directed her mother not to meet Gajendra Singh and also restricted entry of Gajendra Singh in the house but Gajendra Singh did not follow the same and visited the house any time in absence of her father, either it is day or night. When she used to come to the house from school, he was found to be inside the house. When her younger brother and sister used to make objection, they were scolded by her mother and the illicit relationship remained intact. Her mother used to meet him in the car.

14. About the main incident PW-1 has deposed that lastly at about 10:30 p.m. on 07.01.2006 (Saturday) her father had come to the house. He took off his pant as he had upset stomach, he kept looking for slippers and when he could not find slippers, he went bearing shoes (in bathroom) and after getting fresh her father sat down for dinner at the dining table. Her mother had served food to her father. She used to cook the food but that day the food was cooked by her mother. After dinner her father fainted, he sat on the floor. For a while mother and father sat with her thereafter she went to another room to study. After studying as soon as she was going to sleep, there was a sound of knocking on the door, she saw that Gajendra Singh had come. He had a white coloured plastic bag in his hand in which some inflammable substance was there and after arrival of Gajendra Singh her mother also talked to him for a while. After that Gajendra Singh threw the inflammable material brought in the box towards her father and threw it from the door towards their (children's) room and her mother lit the fire by match. The fire spread severely to her father's room and in their room also. Due to this fire her father died on the spot. When the fire spread in her room she woke up her younger brother and sister shouting loudly then her mother and Gajendra Singh Chauhan had seen them that they had witnessed them setting fire. Her mother and Gajendra Singh threatened them that if they tell the fact to anyone, all the three of them will be in the same condition as their father. They locked them in the room and threw inflammable material in their room with the intention to burn them to death. After her father's death, mother Maya Verma and Gajendra Singh dragged the dead body together and put it near the TV switch board, her mother took off the shoes from the dead body and threw them away. When he died, accused Gajendra Singh stayed with her mother for a while and then left. On the information of the local people, the fire brigade came and extinguished the fire.

15. Her mother and Gejendra Singh had an illicit relationship and she used to love Gajendra Singh. They were obstacles in their path that is why accused persons killed their father and also tried to kill them.

16. At the end of February, 2006 at 11:30 p.m. she received a call from Gajendra Singh Chauhan that her mother had met with an accident near Gujaini Bridge, you all three should go there, they were alone at home and they suspected that an attempt could be made to kill them that is why they did not go there but called and told Sudhir, their maternal uncle (mama)

about the same who went to Gujaini Bridge and found that there was no accident and informed them accordingly. Her father had already died, her hair and her sister's hair were scorched and her feet and clothes were burnt. The witness recognized her signature at the written complaint Ex.Ka-1 and proved it.

17. Regarding delay in lodging the FIR this witness had deposed that they were young, her father had been killed, only mother was their support, if mother is jailed, they would have been helpless but her conscience forced her that the murderers should be punished. About another incident this witness has deposed that before killing her father her mother had locked up Sarvesh Dixit, the tutor who used to come to the house, and got him beaten up by goons, seeing this they were very scared of her mother. There was also fear that they might be killed by her mother somewhere else. When she came to know that her mother had been sent to jail in the case of Sarvesh Dixit, then they overcame their fear and she gave a letter to SSP. The witness has also deposed that her statement was recorded by the IO and CO police. She also recognized the photo relating to the incident.

18. In the cross-examination the witness has remained intact and has also deposed that sometimes there used to be a fight on this point between her parents. Her father used to remain tense. Her mother was an active politician from the Congress party. The maruti car was purchased in December, 2002. She had informed the matter to her maternal uncle and aunt (mausi). She deposed that wherever inflammable material was thrown, it was burnt. Chair, table were burnt. Nothing was visible in her father's room. His room was completely arsoned and the door started burning gradually. Some part of her bed was also burnt. When the fire broke out, first her younger brother and sister were picked up. The room was not burning so much. Accused Gajendra Singh and Maya Verma had threatened that what happened with their father would happen with them too if it is told to the inspector. They did not cry or shout because they were scared. There was fire all over her father's body. There was slight fire in his leg. The whole body was not burnt. The body was scorched and turned black. The pajama was burnt at the bottom. The neighbours extinguished the fire. She had seen her mother and Gajendra Singh setting fire to the house. She could not raise noise while the fire was lit up or the kerosene was thrown as all of this happened suddenly. They (children) had came out after 5-7 minutes of fire, father's screams and shout was not heard. He died in front of them. He was alive for 2-3 minutes. When she came back home, her father's dead body was kept and the policemen were present there. (After the incident, the informant and rest two children were shifted at the neighbour's home).

19. This witness has further deposed in cross-examination that the burnt bed was shown to the CO but he did not take it in his possession. He himself had inspected the rooms. She could not go to save her father in his room because her room had also caught fire. Her father could not scream, even though his body was on fire. Gajendra and Maya Verma were standing at a little distance in the same room 3-4 steps away from her father. Gajendra Singh and her mother dragged him and put near the

switch board. According to this witness, after 3-4 months of the death of her father, her mother had withdrawn about one and a half lac rupees (Rs.1,50,000/-) from his fund. She wanted to grab her father's money. She denied that there was any enmity regarding fund money of her father and the house between her mother and her maternal uncle. The witness further deposed that when she came to the house nothing was there, all the household articles were lost.

20. PW-2, Kumari Harshita @ Hansa Verma has given a similar statement to that of PW-1. This witness has also deposed that there were illicit relations between her mother and accused Gajendra Singh which was informed to her father. There is no dissimilarity, contradiction and variation between the evidence of this witness and that of PW-1. This witness has also deposed that her mother and Gajendra Singh were present at the scene of occurrence. In Gajendra's hands there was a white plastic bag containing inflammable material. Since they had seen the incident, hence the accused had threatened them that what happened with their father would happen with them if they tell anyone about the incident. They were very scared because of threats. She admits that her hair and skirt were burnt and her sister's kurta was also burnt. After tendering threat the accused persons had grabbed her father by the hands and put him near the switch board. His father had died on the spot. After the incident, her mother had sent them to the neighbour's house. Her father was killed by her mother for having an illicit relationship with Gajendra Singh in which her father was an obstruction. This witness has also given similar statement regarding call by the accused Gajendra Singh at about 11:30 p.m. at the end of February, 2006 regarding a fake accident of her mother. She has also given similar statement regarding maltreatment with tutor Sarvesh Dixit.

21. PW-3, Rajendra Kumar, maternal uncle, real brother of accused Maya Verma has deposed in support of the prosecution. He has deposed that about 3-4 months before the incident, his brother-in-law, Ravindra Kumar Verma had called him, he reached Kanpur with his elder sister, Vimla. His brother-in-law told him that he was very upset. There is very serious problem as Maya Verma had stolen all the jewelleries and had given all the money to one Gajendra Singh who kept coming to his house from time to time. He has an illicit relationship with Maya. When brother-in-law tried to make her understand, Maya did not realize the same and bent on fighting. He and Vimla also tried to convince her. They came to know that there was a very intimate relationship between the two and she could do anything. Thereafter he heard about the death of his brother-in-law. At that time his nephew and nieces did not tell anything as they were very scared and he brought them Bharatpur and left them back to Kanpur after a few days. After a month and a half Rama Verma called him on the phone, he reached Kanpur. The children were very scared. The police arrested his sister Maya Verma. His nephew and nieces informed that their mother and Gajendra Singh had killed their father by setting him on fire. They were also called at Gujaini Bridge in the night by Gajendra Singh on the pretext of her mother's accident but due to wisdom of Rama Verma they were saved otherwise all the three children would have been killed. He deposed that he was of the considered belief that his brother-in-law was killed by Gajendra and Maya Verma

together because of his obstruction in their illicit relationship. Since the nephew and nieces had seen the incident, there was a plan to kill them too. Gajendra and Maya took away all the belongings from his brother-in-law's house and money. This witness has given similar statement even in cross-examination and in favour of the prosecution.

22. Learned AGA argued that this witness is the real brother of the accused Maya Verma and there was no reason to falsely implicate his sister that is why his evidence is quite material which explains as to how and in which circumstances his brother-in-law was killed by his real sister in connivance with her lover Gajendra Singh.

23. PW-4, Sudhir is the cousin of accused Maya Verma. According to him, her children used to call him uncle (mama). After the death of Ravindra Verma he used to come to her house to take care of the children. When he used to visit their house, Maya Verma's children had told him and their real maternal uncle that their father was burnt to death by her mother and Gajendra Chauhan and they also threatened them to kill. On February, 2006 at around 11:30 p.m. Maya Verma's daughter Rama Verma called and told him that Gajendra has called that her mother had met with an accident near Gujaini and they all three had been called there. They were scared to go there. Then he went to their house, the children told him the matter and after hearing, he went to Gujaini Bridge where he came to know that no such accident had taken place there. He called Maya Verma who informed that she was in Priya Nursing Home, when he reached, Maya Verma and Gajendra Singh and 2-3 other persons were there, shops were closed. Seeing him Gajendra and the other persons left the place and he came to the house with Maya from which it became clear that Maya Verma and Gajendra Singh Chauhan were planning to kill the children. After this the children had called their real maternal uncle from Bharatpur and on his arrival they went with him to Bharatpur. This witness has given similar statement in cross-examination.

24. PW-5, Shivdaras Prasad, Fire Fighting Officer has deposed that on 07/08.01.2006 at 01:15 a.m. an information from a wireless set was received that House No.H-1-103, Vishwakarma Bank, Barra has been set on fire. On this information he reached there with his colleagues and found that the fire was burning on the first floor of the said building and the local people were trying to extinguish the fire. They extinguished the fire and went inside the house and found that kitchen was safe and three pet dogs were hidding in the bathroom, they were taken out, in another room a person was sitting cross-legged near the TV and telephone wire had fallen upon him. The window was open. A person was sitting and one side of his body was scorched by fire. That person was Sri Ravindra Kumar aged about 42 years who was declared dead by the police. The police started investigation of the incident questioning land-lady. On questioning about the fire, land-lady could not give a clear and satisfactory answer about the cause of fire. Sonu Dixit and B.K. Tiwari who had already extinguished the fire told that all the three children were put out from the fire through the escape route. On being asked they said that fire spread to both the rooms in no time. The article kept in the

room were safe, only the door and bed were burnt. This witness was of the view that the fire did not start due to short circuit rather it was planted by pouring inflammable material that is why he had written other reason as the source of fire in his report that is why he had marked the cause of fire as suspicious. When he was talking to Maya Verma about the fire, her daughter cried and said that "mummy you have killed our father". Then Maya Verma shut her mouth. His report was also counter-signed by CFO and it was submitted to Deputy Inspector General of Police, Fire Services, UP, Lucknow in original and its copies were also sent to the other authorities. The witness has proved his report Ex.Ka-2.

25. In cross-examination also this witness has given intact evidence and has deposed that there was smell of burning in the room, he found it suspicious because the kitchen and cylinder were safe. A live wire had fallen on Ravindra Verma and it was not connected to anything (circuit). There was no blast on the TV screen but it was intact. The wire inside the room was not intact as it was spoiled to some extent due to fire.

26. PW-6, HC 118, Radhey Shyam Pandey has proved chik FIR Ex.Ka-1 and carbon copy GD Ex.Ka-4.

27. PW-7, Dr. Santosh Narayan Shukla who conducted autopsy of the deceased has deposed that the deceased was burnt about 65%. The hair on the head was scorched. There was a line of redness in burnt parts of the dead body. Brain and membranes were congested. The deceased had died due to shock and hemorrhage on account of *antemortem* burn injuries. According to this witness the death is possible due to fire on the night of 07/08.01.2006 at around 12:00 o'clock and the death has not occurred due to electrocution. It is not possible that the deceased also caught fire due to electrical short circuit. It is not possible to start a fire even with a blast. It was not a suicidal death. The witness denied the suggestion that the deceased's burning was possible from a short circuit.

28. PW-8, SI Ramsaran Verma has proved the inquest. This witness has also proved the material Exs.7-12 which were the clothes and watch of the deceased. This witness denied that the deceased had died due to short circuit.

29. PW-9, SI Virendra Singh, the then Constable Clerk has proved the application Ex.Ka-7 moved by the accused Maya Verma and carbon copy GD Ex.Ka-8.

30. PW-10, SSI Bankey Bihari, IO has deposed that after lodging the FIR, he started investigation. Maya Verma had reported that her husband had died due to electric sparking. He arrested the accused Maya Verma and interrogated her in which she accepted the illicit relation with co-accused Gajendra Singh Chauhan and also accepted that since her husband was an obstacle in their relationship, therefore, they killed him. The witness recorded the statement of the deceased's son Prashant Verma and daughter Kumari Harshita Verma and prepared the map on the pointing of Kumari Rama Verma, recorded the statement of Jitendra and Prem Singh, collected panchayatnama and *postmortem* report, report of Fire Fighting Officer,

arrested Gajendra Singh Chauhan and recorded his statement in District Jail, Kanpur Nagar in which he admitted his illicit relationship with accused Maya Verma and also accepted that he had borrowed Rs.35,000/- from the deceased Ravindra Kumar Verma for her wife's treatment. He also confessed that after making a conspiracy they killed the deceased in a planned way. Since the deceased belonged to scheduled caste, hence adding Section 3(2)(v) of SC/ST Act, the investigation was transferred to CO Police. He admits that he had not recorded the statement of neighbours Jagdish Narayan, Chandra and Virendra Tiwari.

31. PW-11, DSP Om Prakash Singh, the then CO City, Govind Nagar has deposed that when he visited the spot, the children were with his maternal uncle at Bharatpur. Maya Verma was in jail. He recorded the statement of Smt. Guddi and tried to record the statement of other persons but they did not come forward. When Rama Verma appeared with other persons before him he recorded statements of Rama Verma, Rajendra Kumar, Vimla Devi and Prashant Verma. There was no need to sketch and another site plan. After inspection of place of occurrence, the incident was confirmed from the statement of the informant and the photographs attached with CD and it had also been confirmed that the deceased was set ablaze after pouring inflammable material upon him. There was no sign of fire due to short circuit. He recorded statement of Kumari Harshita Verma and Sudhir Kumar, Suresh Chandra, Shyam Chandra, Pappu, Satish and Raghuvir Singh and Fire Fighting Officer-Shivdaras Prasad and the doctor who did the autopsy. On the basis of evidence a commission of offence under Sections 302, 506 IPC and Section 3(2)(v) SC/ST Act was proved against Maya Verma and Gajendra Singh Chauhan, therefore, charge sheet Ex.Ka-10 was submitted accordingly. This witness has also proved photographs material Exs.1 to 6.

32. DW-1 Shivratan neighbour has been examined in defence. He has deposed that at about 11-12 o'clock on the night of 07.06.2006 when he was arriving at his house, he heard a noise, when he reached the house of the deceased, many people had gathered. Everyone was putting out the fire. They went inside the house and took out the children. When he reached the spot Gajendra Singh was not present there. Gajendra Singh had not threatened the children. This witness had denied the illicit relation between Gajendra Singh and Maya Verma and accepted that the house of Gajendra Singh would be 300 yards away from that of Maya Verma. The fire started from the electric short circuit. He did not see the fire. Those who reached earlier were telling. The witness denied that Gajendra Singh and Maya Verma set the house on fire planting inflammable material.

33. After perusal of the oral and documentary evidence adduced on behalf of the prosecution and after hearing the arguments accused-appellant was convicted and sentenced as noted above.

34. The appeal is decided as under:

(I) FIR:

35. Learned counsel for the appellant argued that there is undue delay in lodging the FIR. The incident had occurred on the

night of 07.01.2006 and the FIR was lodged on 24.07.2006 for which no explanation has been given.

36. In the facts and circumstances of this case, it cannot be said that there is unreasonable, undue and unexplained delay in lodging the FIR. In this case the informant was a girl of tender age, rest two children i.e. son Prashant and daughter Harshita were minor. The accused persons had threatened to kill them also as their father had been killed. Being scared they were not in a position to lodge the FIR. They were taken to Bharatpur. The children were aware about the killing of their father but they were not in position to approach the police. Later on anyhow the informant moved an application on 29.06.2006 but the FIR could be lodged only on 24.07.2006.

37. He further argued that even when there was no sign of fire on account of electric short circuit and there was no positive report of Fire Fighting Officer in this regard and the whole incident was doubtful, it was duty of the concerned police station to lodge the FIR and proceed to investigate the case.

38. Though the FIR should be lodged at the earliest after the incident but in this case on the above ground it was not possible for the informant to lodge the FIR just after the incident as they were dependent upon her mother.

39. In Chapter XXXVI CrPC limitation for taking cognizance of offences has been enumerated. In cases of Sections 302 and 506 IPC, there is no limitation regarding taking cognizence. Hence, if the proceeding initiated after a lapse of six months, it cannot be said that the present proceeding is barred by limitation. So far as the delay in lodging the FIR is concerned, it has been held by the Apex Court that if causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending the copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by its reliable evidence.

40. In **Tara Singh and others Vs. State of Punjab, 1991 SCC (Crl) 710** the Apex Court held that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are, we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested

witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay.

41. In **Ravinder Kumar and another Vs. State of Punjab, (2001) 7 SCC 690** it was held that the attack on prosecution cases on the ground of delay in lodging the FIR has almost bogged down as a stereotyped redundancy in criminal cases. It is a recurring feature in most of the criminal cases that there would be some delay in furnishing the first information to the police. It has to be remembered that law has not fixed any time for lodging the FIR. Hence, a delayed FIR is not illegal. Of course a prompt and immediate lodging of FIR is the ideal as that would give the prosecution a twin advantage. First is that it affords commencement of the investigation without any time lapse. Second is that it expels the opportunity for any possible concoction of a false version. Barring these two plus points for a promptly lodged FIR the demerits of the delayed FIR cannot operate as fatal to any prosecution case. It cannot be overlooked that even a promptly lodged FIR is not an unreserved guarantee for the genuineness of the version incorporated therein.

42. In **Amar Singh Vs. Balwinder Singh and others, (2003) 2 SCC 518** the Supreme Court held that there is no hard and fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR.

43. In **Sahebrao and another Vs. State of Maharashtra, (2006) 9 SCC 794** it was held that the delay in lodging the FIR cannot be a ground to doubt the prosecution case and discard it. The delay in lodging the FIR would put the Court on its guard to search if any plausible explanation has been offered and if offered whether it is satisfactory.

44. In **Bhookan Vs. State of UP, (2020) 110 ACC 729** it was held that so far as the question of delay in lodging FIR is concerned, it is well settled, if delay in lodging FIR has been explained from the evidence on record, no adverse inference can be drawn against prosecution merely on the ground that the FIR was lodged with delay. There is no hard and fast rule that any length of delay in lodging FIR would automatically render the prosecution case doubtful.

45. In **Mukesh Vs. State for NCT of Delhi and others, AIR 2017 SC 2161 (three-Judge Bench)** it was held that if

causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging the FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending the copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by its reliable evidence.

46. On the basis of above discussion and in view of the statement and surrounding circumstances in which the informant could lodge the FIR anyhow, this Court is of the view that though there is delay in lodging the FIR but the delay has been satisfactorily explained, therefore, the argument regarding delay in lodging the FIR from the side of defence is not tenable, hence rejected.

(II) Inqust:

47. Since it was an unnatural death of a young man aged about 42 years, hence after the incident, the inquest proceeding was conducted by the concerned police station which has been proved by PW-8, Ram Charan Verma. This witness has refused that the inquest has wrongly been filled up and it was ante-timed. This witness deposed that prior permission of District Magistrate was necessary in conducting the inquest during the night hours, hence it could not be conducted in the night. In **Podda Narayan Vs. State of Andhra Pradesh, (1975) 4 SCC 153** the purpose of inquest report under Section 174(1) CrPC has been discussed. In the said case the Apex Court held that the whole purpose of preparing an inquest report under Section 174(1) CrPC is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating in what manner, or by what weapon or instrument, if any, such woulds appear to have been inflicted. In other words, for the purpose of holding the inquest it is neither necessary nor obligatory on the part of the IO to investigate into or ascertain who were the persons responsible for the death.

48. In **George Vs. State of Kerala, AIR 1998 SC 1376** it has been held that the object of the inquest proceedings thereunder is merely to ascertain whether a person died under suspicious cause. According to Supreme Court the question regarding the details how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings. With the above observation Supreme Court held that the High Court was right (in that case) that the ommissions in the inquest report were not sufficient to put the prosecution out of Court.

49. In **Brahma Swaroop Vs. State of UP, AIR 2011 SC 280** it was held that the inquest report is not substantive evidence. But it may be utilized for contradicting witnesses of inquest. Any omission to mention crime number, names of accused penal provisions under which offences have been committed are not fatal to prosecution case. Such omission do not lead to inference that FIR is ante-timed and evidence of eye-witnesses cannot be discarded if their names do not figure in inquest report. The whole purpose of preparing an inquest report under Section

174 CrPC is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating as in what manner or by what weapon or instrument such wounds appear to have been inflicted. For the purpose of holding the inquest it is neither necessary nor obligatory on the part of the IO to investigate into or ascertain who were the persons responsible for the death. the object of the proceedings under Section 174 CrPC is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and if so what its apparent cause was. the question regarding the details of how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedigns i.e. the inquest report is not the statement of any person wherein all the names of the persons accused must be mentioned. Omissions in the inquest report are not sufficient to put the prosecution out of court. The basic purpose of holding inquest is to report regarding the apparent cause of death namely whether it is suicidal, homicidal, accidental or by some machinery itc. It is therefore not necessary to enter all the details of the overt acts in the inquest report. Evidence of eye-witnesseses cannot be discarded if their names do not figure in the inquest report prepared at the earliest point of time.

50. In **Radha Mohan Singh @ Lal Saheb Vs. State of UP, 2006 (54) ACC 862 (SC) (three-Judge Bench)** it was held that the arguments advanced regarding omissions, discrepancies, overwriting, contradiction in inquest report should not be entertained unless attention of author thereof is drawn to the said fact and opportunity is given to him to explain when he is examined as a witness. Necessary contents of an inquest report prepared under Section 174 CrPC and the investigation for that purpose is limited in scope and is confined to ascertainment of apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal or caused by animal, and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. Details of overt acts need not be recorded in inquest report. Question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who were the witnesses of the assault is foreign to the ambit and scope of proceedings under Section 174 CrPC. There is no requirement in law to mention details of FIR, names of accused or the names of eye-witnesses or the gist of their statements in inquest report, nor is the said report required to be signed by any eye-witness.

51. On the basis of above, this Court is of the view that there is no discrepancy or ante-timing in preparing the inquest report. It is also noteworthy that except an information prior to the inquest no FIR had been lodged against the appellant and if Maya Verma or the other appellant had any objection regarding the inquest, it ought to have been raised earlier.

(III) Postmortem:

52. Since a report regarding accident and fire due to short circuit had been given by the accused Maya Verma, the inquest

and *postmortem* of the dead body of the deceased was conducted in due course. After *postmortem*, a report Ex.Ka-5 had been prepared by PW-7, Dr Santosh Narayan Shukla in which he has clearly concluded that there was possibility of death of the deceased at the alleged date and time of occurrence by fire and not by electric short circuit. This witness has clearly deposed that such pattern of fire may occur only due to kerosene oil or any other inflammable material. It is neither possible through suicidal burn nor due to electric short circuit. Thus from the *postmortem* report and the evidence of this witness it has been established beyond any doubt that the deceased was set ablaze by another person and not by himself or due to electric short circuit.

53. The evidence of medical expert is merely an opinion which lends corroboration to the direct evidence. In **Chimanbhai Ukabhai Vs. State of Gujarat, AIR 1983 SC 484** it is was held that ordinarily the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence makes of the medical evidence, is to prove that the injuries could not possibily have been caused in the manner alleged and thereby discredit the eye-witnesses.

54. In *antemortem* burn injuries with following characteristix are normally found:-

(I) A line of redness involving the whole true skin is formed, around the injured part.

(II) Vesication occurs which contains a serous fluid and has a red inflamed base.

(III) The skin surrounding vesication area is of a bright red of copper colour.

(IV) Reparative process, such as sign of inflammation formation of granulation tissue pus may appear in the burn injury.

(V) Carbon particles are found in respiratory vessel.

(IV) Postmortem repot and its evidentiary value:

55. In **State of UP Vs. Mohd. Iqram, (2011) 3 SCC (Cri) 354** it was held that *postmortem* report is not substantive piece of evidence. Substantive piece of evidence is that statement which is given by witness in court. If the *postmortem* repot is proved but that does not mean that its each and every content thereof also proved or can be held admissible.

(V) Ocular Evidence Vs. Medical Evidence:

56. Explaining the evidentiary value of ocular evidence the Supreme Court in **Ramakant Rai Vs. Madan Ra, 2005 SCCrR 1126 (SC)** held that it is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said are the eyes and ears of justice. Hence the importance and primacy of the quallity of the trial process. Eye-witnesses' account would require a careful

independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance in the witness box; their power of observation etc. then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

(VI) Death by burning - Homicidal or accidental or suicidal:

57. In **Vijay Pal Vs. State (Government of NCT of Delhi), (2015) 4 SCC 749** superficial to deep burn injury over all the body surface area including scalp was found by the doctor conducting the *postmortem* of the deceased. Her ten years old daughter stated that when her mother was trying to light the stove, she caught fire. Held that presence of the kerosene oil residues in the scalp hair of the deceased clearly showed that death was not an accidental death, but circumstances reveal that the kerosene oil was poured on the skull of the deceased.

58. In **Mallela Shyamsunder Vs. State of Andhra Pradesh, (2015) 2 SCC 115** the accused was charged for murder of his wife by pouring kerosene oil and then burning her. The doctor who attended the deceased stated that the injuries were self inflicted. The husband took the plea of suicidal death by deceased, but that plea was rejected on the following grounds:-

(a) The accused and his wife were living in a small rented accommodation, there was an LPG connection, so there was no need for having kerosene in such quantity as averted by defence.

(b) *Antemortem* dermo epidermal burns were over lower half of face, neck and then down the body to the legs of the victim. If one is to pour kerosene on oneself, it is normal human conduct to put it over the head and in any case not to pour it on the face sparing the head.

(c) The appellant did not take prompt action to move the deceased to the hospital.

59. In this case there is no variation and dissimilarity between the ocular and medical evidence, the evidence of fire fighting officer and the PM doctor and from the oral evidence of PWs-1 and 2 it has clearly been established that neither the deceased committed suicide nor he died due to electrocution on account of short circuit but he was set ablaze by putting inflammable material on his body. Hence, the PM report is in conformity with the oral evidence and the prosecution case as well.

(VII) Compliance of Section 157 CrPC:

60. In this case no argument has been advanced regarding non-compliance of Section 157 CrPC.

(VIII) Motive:

61. From the evidence of informant PW-1 and witnesses of fact PWs-2, 3 and 4 it has been established beyond reasonable doubt that accused Maya Verma had illicit relation with co-accused Gajendra Singh Chauhan, Maya Verma was forbidden by her deceased husband to meet and have relation with Gajendra Singh Chauhan. Hence, his existence was priking to both the accused persons, therefore, a motive was formed by both of them, *mens rea* arose in their mind, they both conspired and planned the murder of the deceased and killed him in the manner as noted above. Since it is a case of direct evidence, therefore, there is no need to prove the motive behind the crime but not only the daughters of the accused Maya Verma but also her real brother PW-3 Rajendra Kumar and cousin PW-4 Sudhir have also deposed against her and against the appellant. They both have deposed about the illicit relationship between the appellant and Maya Verma, and PW-3 has also deposed that Maya Verma was not ready to break up the relation with co-accused Gajendra Singh. If the occurrence would have been false, a real brother would not depose against his real sister. In this case from the oral, documentary and medical evidence it has been proved beyond reasonable doubt that the appellant in connivance with Maya Verma killed the deceased to continue their illicit relationship and when the case is proved beyond reasonable doubt especially a case based on oral evidence, the prosecution is not obliged/bound to prove the motive. Even in cases based on circumstantial evidence if chain of the circumstances are not broken, proof of motive is immaterial as held in **Saddik @ Gulam Hussein Shaikh and others Vs. State of Gujarat, (2016) 10 SCC 663, Bhim Singh and another Vs. State of Uttarakhand, (2015) 4 SCC 281 (paragraph 21), Dasin Bai @ Shanti Bai Vs. State of Chhattisgarh, 2015 (89) ACC 337 (SC) similar principles have been laid down in Sanjeev Vs. State of Haryana, (2015) 4 SCC 387 (paragraph 16).**

(IX) Post conduct of accused persons:

62. In this case post conduct of the appellant is also material. It has been established by oral evidence that after death of the deceased when the informant and the children wanted to raise alarm and objection, they were threatened to be killed in the same manner as their father had been killed by the accused appellant. Hence, they abstained from lodging the FIR and they were taken by their maternal uncle to Bharatpur. This fact has also been proved from the evidence of PWs-1, 2 and 4 (Sudhir) that in the end of February, 2006, the children were called to reach at Ghujaini Bridge on the pretext of accident of their mother where they did not go but when PW-4 reached there, no such accident had been occurred with any person and particularly with Maya Devi and when he was informed that she was in Priya Nursing Home, Maya Devi was found there in the company of co-accused Gajendra Singh Chauhan and some other unknown persons. From the report and evidence of fire fighting officer Shivdaras Prasad and PW-7 PM doctor it is proved that it was not a case of electrocution even then Maya Verma presented a false information to the concerned police station which has been proved to be false in view of the oral,

technical and medical evidence. Evidence of PW-1 that after death of the deceased, Maya Verma solemnized marriage with co-accused Gajendra Singh Chauhan also goes against her. She removed all the belongings of the house and painted the house for concealing the evidence relating to the alleged occurrence. On the basis of above, this Court is of the considered view that from the post conduct of the accused appellant it is established that the deceased was an obstacle in their life, therefore, they removed the same by committing the alleged offence.

(X) Burden of proof and reasonable doubt:

63. Certainly the burden of proof lies on the shoulder of prosecution. It is upon the prosecution to discharge the burden by producing oral, documentary and medical evidence against the accused appellant. Benefit of reasonable doubt has been discussed in several cases by the Apex Court. In **Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537; Chhotanney Vs. State of UP, AIR 2009 SC 2013; Gangadhar Behera Vs. State of Orissa, (2002) 8 SCC 381 and Vijayee Singh Vs. State of UP, (1990) 3 SCC 190** it was held that doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favorite other than truth. To constitute reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. the concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units costitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of poof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice. Exaggeration of the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape.

64. In **Ramesh Harijan Vs. State of UP, (2012) 5 SCC 777; Such Singh Vs. State of Punjab, (2003) 7 SCC 643; State of UP Vs. Ashok Kumar Srivastava, AIR 1992 SC 840 and Inder Singh Vs. State of Delhi Administration, AIR 1978 SC 1091** it was held that a reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial, if a case has some inevitable flaws because human beings are prone to err; it is argued that it is too imperfect. Vague hunches cannot take the place of judicial evaluation.

65. In **Bhagwan Jagannath Markad (supra); Jose @ Pappachan Vs. Sub-Inspector of Police, Koyilandy and**

another, (2016) 10 SCC 519 and Gurbachan Singh Vs. Satpal Singh, AIR 1990 SC 209 it was held that exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicious and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice accoding to law.

66. Hence, this Court is of the view that the prosecution has successfully discharged the burden and the defence has failed in creating reasonable doubt about innocence of accused in the judicial mind of the Court. From the above discussion, it has been proved that it is a case of murder of the husband in presence of the accused wife and her lover inside the house. Hence, Section 106 of the Act, 1872 would play role which is of general application which reads as under:-

"106. Burden of proving fact especially within knowledge.—*When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations*

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

67. Learned AGA argued that Section 106 of the Act, 1872 not only applies in case of dowry death but it also applies in case of Section 302 IPC and it would also apply without prejudice to the gender if a wife dies in mysterious circumstances inside the house under the custody and control of her husband, Section 106 would come into picture. Similarly, if a husband dies in mysterious circumstances inside the house and his wife has been charged for murder of her husband, it is to be seen as to whether any burden can be shifted upon such wife for explaining the circumstances of as to how her husband had died.

68. In this case though the accused-appellant have put a defence that the deceased died due to electrocution but from the report and evidence of fire fighting officer and PM doctor and also from the ocular evidence it has been proved that it was not an incident of electrocution. Hence, it is concluded that the accused-appellant have been failed in discharging the burden under Section 106 of the Act, 1872. Since from the evidence it has been established that at the time of occurrence accused Gajendra Singh Chauhan was also present inside the house, hence burden of Section 106 would also be on his shoulder. He could not explain that on the alleged date and time of occurrence how and why he was in the house of the deceased and it is also material that he has not taken a plea of alibi.

69. So far as the evidence of DW-1 is concerned, it is not reliable as he reached late. According to him, when he reached on the spot, several other persons were already gathered there and were trying to put out the fire and he alongwith other persons took the children out of the house. According to him, at that time Gajendra

Singh was not there. At this juncture, evidence of PWs-1 and 2 is material who deposed that just after the incident Gajendra Singh had left their house. Hence, there was no occasion for this witness to see Gajendra Singh. It is also a material fact that if all the neighbourers gathered there and were trying to put out the fire, why Gajendra Singh whose house is situated only three houses away from the house in question and who was teaching Maya Devi to drive the car did not reach on the spot. Meaning thereby his role had been completed and he was disguising his appearance before the people on the spot. It is also not the case that when Gajendra Singh had threatened the children of the deceased, the witness DW-1, Shivratan was there. Generally nobody would threaten before any witness, hence the evidence of this witness that no threatening was tendered by Gajendra Singh to the children of the deceased is not trustworthy. It is also material that no injury was caused to Maya Verma and Gajendra Singh. Generally, if a husband comes after a week and the wife is not sleeping with the children, would normally sleep on the same bed with her husband. In this case it has been proved from the evidence that children used to live and sleep in separate room and wife and husband had a separate living room, in such a condition why even no burn injury was found on the person of Maya Devi, is material and no injury to her discloses the truth that the deceased was killed in isolation. Even in inquest it has been written by the IO that as per panchas the deceased was set ablaze to death.

70. On the basis of above discussion, this Court is of the considered view that the deceased was set ablaze by pouring inflammable material by the accused-appellant. It was not a case of electrocution or short circuit fire injury. Hence, the trial court has rightly convicted the accused-appellant under Section 302 IPC.

71. From the evidence of PWs-1 and 2 it has been proved that both the accused-appellant threatened to kill the informant and other children in the same manner as their father had been killed. Hence, the charge under Section 506 IPC is also proved beyond reasonable doubt against the accused-appellant.

72. On the basis of above discussion, this Court is of the considered view that the impugned judgment and order of conviction and sentencing passed by the trial court is not liable to be interfeared with. The appeal lacks merit and is liable to be dismissed.

ORDER

73. Accordingly, this appeal is **dismissed.**

74. The accused-appellant, Gajendra Singh is reported to be in jail.

75. Let the original records be sent back to the trial court alongwith a copy of this judgment for consignment and also for necessary compliance.

FURTHER ORDER

76. The accused-appellant would be entitled for remission after he is

incarcerated 14 years as per the policy of Government as the death cannot be said to be so gruesome that he will have to serve life in jail.

(2023) 6 ILRA 122
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.05.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 3963 of 2013
with
Criminal Appeal No. 4249 of 2013

Jai Kishan @ Bablu ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri D.S. Pandey, Sri Gajendra Kumar Gautam, Sri K.K. Srivastava, Sri Mohammad Arshad Khan, Sri Saurabh Gour, Sri R.V. Pandey, Sri Sanjay Kumar Yadav, Sri Vikash Chandra Tiwari

Counsel for the Respondent:
Govt. Advocate, Sri Sunil Kumar Dubey

Criminal Law - Indian Penal Code, 1860 - Sections 302/120B - Punishment for murder - Code of Criminal Procedure, 1973 - Sections 161 & 313 - Appeal against conviction - Life imprisonment - As per FIR, accused had illicit relationship with co-accused - Accused brother encourage him for such relationship and he along with co-accused poured kerosene oil on deceased and set her on fire - Charge-sheet submitted - Charges framed - Appellant no.1 St.d that on date of incident, he was not at home and when he returned on next day, he found that she has been burnt and his family members have taken her to hospital - No direct evidence connecting appellants with commissioning of crime, as testimony of star independent witness P.W.-3 can't be reliable as he was aged about 5 years - Held, trial court rightly recorded that deceased was burnt upto 70% and it was due to kerosene oil being poured on her and set her on fire - Accused brother got benefit of doubt - Police have recovered kerosene oil canister, matchbox, semi burnt clothes from the spot - No evidence available to suggest deceased committed suicide by herself - P.W.-1 and P.W.-2 were aware of relationship, and corroborated the same version as unfolded in FIR - P.W. -3 in his testimony has specifically implicated his father and supported by P.W.-1 and P.W.-2 - After incident P.W.-3 went to his maternal grandmother - Strong motive to kill the deceased. (Para 1, 4, 8, 11, 14, 17, 47, 49, 50, 52, 53, 62)

Criminal Appeal dismissed. (E-13)

List of Cases cited:

1. Mekala Sivaiah Vs St. of Andhara Pradesh reported in 2022 SCC Online SC 88, (Para 25 and 26)

2. Ram Kumar Madhusudan Pathak Vs St. of Guj. reported in 1998 0 Supreme (SC) 836

3. Arulvelu & anr. Vs St. Rep. By the Public Prosecutor & anr. reported in 2009 0 Supreme (SC) 1628

4. Ram Nath Nonia Vs St. of Bihar reported in 1999 0 Supreme (Pat) 778

5. P. Ramesh Vs St. Represented by Inspector of Police reported in (2019) 20 SCC 593, (Para 14 to 16)

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

1. Both the criminal appeals are directed against the impugned judgment

dated 20th August, 2013 passed by the Additional Sessions Judge, Court No.2, Ghaziabad in Sessions Trial No. 1476 of 2011 (State Vs.Jaikishan @ Bablu and 2 Others), arising out of Case Crime No. 112 of 2011, under Sections 302/120B I.P.C., Police Station-Bahadurgarh, District-Ghaziabad, whereby accused-appellants Jaikishan @ Bablu and Smt. Anita have been convicted for an offence Section 302 I.P.C. and have been sentenced to life imprisonment along with Rs.10,000/- fine for commissioning of offence under Section 302.; in default of payment of fine they have to further undergo one year additional imprisonment, whereas the other co-accused Kuberdutt has been acquitted for the offence under Sections 302/120B I.P.C.

2. Since the basic facts, issues and the judgment of the trial court are similar and common, both criminal appeals have been clubbed and heard together and the same are being decided by this common judgment.

3. Heard Sri Mohammad Arshad, learned counsel for the accused-appellants and learned counsel for the State. Sri Sunil Kumar Dubey, learned counsel for the informant was not present at the time of hearing of both the appeals.

4. The present case proceeds on a written report of the informant/P.W.-1 Niranjan Sharma (Exhibit-ka-1), which has been scribed by Tarun Sharma (P.W.-2) dated 20th July, 2011, wherein it has been stated that he solemnized the marriage of his daughter Rekha with Jai Kishan alias Bablu son of Radhe Shukla village Bhadsyana about 14 years ago. Some time ago, the accused-appellant Jai Kishan alias Bablu started establishing illicit relationship with accused-appellant Anita wife of Hari Prakash Sharma village Bhadsyana police station Bahadurgarh, who is a peon in Sarvitaishi Inter College Bhadsyana. Daughter of the informant Rekha used to repeatedly object her husband (accused-appellant Jaikishan) for having illicit relations with accused-appellant Anita. On that objection, her husband used to beat her time and again. It has further been stated that accused Kuber Dutt, Rekha's brother-in-law i.e. Jeth used to encourage his brother i.e. Jaikishan for such illicit relationship. On 19th July, 2011 at 11:00 p.m. (night), as per the conspiracy hatched by accused Kuber Dutt, the accused-appellants Jaikishan and Anita, they poured kerosene on Rekha and set her on fire, due to which Rekha died. Information about the death of the deceased Rekha was given to the informant on telephone by the Village Pradhan, Mr. Satish Fauji and he has informed him that in-laws of the deceased Rekha took her in burnt condition to the Hospital at Meerut. On receiving the said information, the informant reached the Meerut Medical College/Hospital where he was informed that the deceased was referred to the hospital at Delhi. When they were on the way to Delhi by Ambulance along with deceased Rekha for her treatment, she succumbed to death. Informant reached the Police Station for lodging the FIR along with Ambulance wherein the dead body of the deceased was kept.

5. Pursuant to the above written report dated 20th July, 2011, a FIR (Exhibit-ka/10) came to be registered as Case Crime No. 112 of 2011 under Sections 302, 120-B I.P.C. at Police Station-Bahadurgarh, District-Meerut. After lodging of the FIR, the first Investigating Officer Sub-Inspector Ram Prasad Sharma (P.W.-4) proceeded

and after perusing and making entry in the Case Diary about the written report and chik FIR, he reached the place where the Ambulance was standing. He got the inquest of the body of the deceased prepared (Exhibit-ka/2) in the presence of inquest witnesses, who have been appointed by him. After getting the dead body sealed and making all necessary formalities like preparing of documents, draft of seal, photo lash, police form-13, letters wrote to Chief Medical Officer and R.I. P.W.4 got the dead body sent to the Mortuary. After that P.W.-4 has recorded the statements of P.W.1 and P.W.-2 and went to the place of occurrence along with P.W.-1. P.W.-4 has prepared the site plan (Exhibit-ka/9), whereafter he has collected plastic jar (jerkin) containing kerosene oil, a matchbox, some matches, some pieces of clothes of deceased Rekha which she had worn at the time of incident from the place of occurrence and prepared recovery memo (Exhibit-ka/10) in the presence of witnesses Desh Deepak, Sushil Kumar, Dinesh Kumar. He has also recorded their statements. P.W.-4 has also arrested the accused-appellants Jaikishan and Anita and their statements were also recorded.

6. The autopsy of the body of the deceased Rekha was conducted on 20th July, 2011 at 05:00 p.m. by Autopsy Surgeon Dr. Jitendra Kumar Tyagi (P.W.-6) and in the autopsy report (Ex.Ka-7), P.W.-6 has found superficial to deep burn injuries about 70% on the body of the deceased. He has opined that the cause of death of the deceased is sock due to following ante mortem burn injuries:

"1. Singeing of hair present.

2. Line of redness present.

3. Superficial to deep burn present.

4. Areas spared-lower back, both foot, half of lower extremities,

5. About 70% to burn area is present.

6 Foley's catheter is present in place."

7. On 11th August, 2011, Sub-Inspector Sanjeev Kumar (P.W.-7) took over the further investigation after P.W.-4 and has recorded the statement of HCP Netrapal Singh. After conclusions of the statutory investigation under Chapter XII Cr.P.C.. P.W.-7 has submitted the charge-sheet (Exhibit-ka/14) against the accused-appellants.

8. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. On 16th March, 2012, the concerned Court framed charges under Sections 302/34 and 120-B I.P.C. against the accused-appellants Jaikishan and Anita and co-accused Kuberdutt. The charges were read out and explained to the accused-appellant, who denied the accusation and demanded trial.

9. The trial started and the prosecution has examined seven witnesses, who are as follows:-

1	Niranjan Sharma (informant/complainant)	PW1
2	Tarun Sharma (scriber of the written report)	PW2
3	Tanu	PW3
4	Sub-Inspector Ram Prasad Sharma (first Investigating Officer)	PW4

5	Head Constable-06 Ram Charan Singh	PW5
6	Dr. Jitendra Kumar Tyagi (Autopsy Surgeon)	PW6
7	Sub-Inspector Sanjeev Kumar (Investigating Officer, who submitted the charge-sheet)	PW7

10. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

1	Written report dated 20th July, 2011	Ex.Ka.-1
2	Inquest report dated 20th July, 2011	Ex.Ka.-2
3	FIR dated 20th July, 2011	Ex. Ka.-10
4	Recovery memo of plastic jar of kerosene oil, matchbox, matches, pieces of clothes of the deceased	Ex.Ka/10A
5	Post-mortem/autopsy report dated 20th July, 2011	Ex.Ka.-13
6	Documents relating to paper no.33, draft of seal, photo lash, police form 13, letters to CMO and RI	Ex. Ka.-3 to 8
7	Charge-sheet	Ex.Ka/14
8	Site plan with index	Exhibit-ka/9

11. After recording of the prosecution evidence, the incriminating evidence were put to the accused for recording his statement under section 313 Cr.PC. In their statements recorded U/s 313 Cr.P.C. the accused-appellants including co-accused Kuber Dutt denied his involvement in the crime. Accused appellants specifically stated before the trial court that they have been falsely implicated in this case. The accused-appellant Jaikishan @ Bablu has stated that on the date of incident, he was not at home and when he returned on the next day of the incident, he came to know that his wife has been burnt and his family members have taken her to the hospital. Two witnesses namely, Jeetpal as DW-1 and Viresh Kumar as DW-2 were examined by the defence.

12. On the basis of above evidence adduced during the course of trial, the court below after relying upon the documentary as well as oral evidence adduced by the prosecution and after recording categorical findings of facts has come to the conclusion while passing impugned judgment of conviction that the prosecution has been able to fully prove that the accused-appellants have committed the offence of murder of deceased Rekha. As such, the trial court has found the offence under Sections 302 I.P.C. to have been committed by both the accused-appellants and the trial court has not found the offence under Sections 302/120-B I.P.C. against the co-accused Kuber Dutt. The trial court has accordingly convicted the accused-appellants under Section 302 of the Indian Penal Code and sentenced him life imprisonment with fine of Rs. 10, 000/- for the offence under Sections 302 I.P.C.

13. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the accused-appellant has preferred the present jail appeal.

14. The submission of the learned counsel for the accused-appellants is that

there is no direct evidence connecting the accused-appellants with the commissioning of the crime as the testimony of star independent witness Tanu (P.W.-3) cannot be said to be reliable as at the time of incident he was aged about 5 years and was under the custody of his maternal grand-father; the motive is absolutely weak; the prosecution case rests on circumstantial evidence in which the accused-appellants have been implicated only on the basis of suspicion that there were illicit relationship between both the accused-appellants and no evidence exist to hold the accused-appellants guilty.

15. It is further submitted that the trial court has relied upon the statement of Tanu which was recorded by the Investigating Officer after four days of the incident in which there is no whisper of the version as unfolded in the FIR. It is further submitted that the accused-appellants have not committed the alleged offence, whereas the deceased has committed suicide by pouring kerosene oil on herself and set her on fire, as being a loose temper lady, she used to quarrel with the accused-appellant Jaikishan due to suspicion of his having illicit relationship with accused-appellant Anita. Qua the aggressive conduct of the deceased due to suspicion of accused-appellant having illicit relationship with accused-appellant Anita, he had made an application before the concerned Police Station. It is then submitted that since the marriage of the accused-appellant Jaikishan was solemnized with the deceased 14 years ago, there was no occasion for the accused-appellant to commit the murder of the deceased. It is also submitted that the conviction and sentence passed by the trial court against the accused-appellant is too severe and without considering the evidence available on record. It is next submitted that the accused-appellant has no criminal antecedents to his credit except the present and he was on bail during the course of trial.

16. On the cumulative strength of the aforesaid, learned counsel appearing for the appellants submits that in view of the inconsistency in the statements of the prosecution witnesses; the prosecution has failed to establish the guilt of accused-appellant beyond reasonable doubt based on circumstantial evidence. As such the sentence is excessive and ought not be sustained and the order of sentence must be modified taking lenient view in the matter.

17. Per contra, Mr. N.K. Sharma, learned A.G.A. for the State, supporting the judgment and order of conviction, submits that the first information report has been lodged promptly naming the accused person; there is clinching evidence to support the prosecution's case; the incident in which the deceased is alleged to have been murdered by the accused-appellants Jaikishan @ Bablu and Anita at about 11:00 p.m. which is alleged to have been witnessed by the son of accused-appellant Jaikishan and deceased Rekha (P.W.-3); P.W.-3 is star eye witness of the alleged incident; the place of occurrence has not been disputed by the defence; and the accused-appellants have strong motive or intention and the same has also been explained by the evidence of prosecution. Therefore, the prosecution has proved the charges levelled against the accused-appellants beyond reasonable doubt.

18. To bolster the aforesaid submissions, learned A.G.A. has invited the attention of the Court to the latest judgment of the Apex Court in the case of **Mekala Sivaiah vs. State of Andhara Pradesh**

reported in *2022 SCC Online SC 887*, whereby the Apex Court i*n paragraph nos.25 and 26* has held as follows:

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

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

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

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

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

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

(Emphasis added)

19. Mr. N.K. Sharma, learned A.G.A. for the State has also placed reliance upon the following judgments of the Apex Court and Patna High Court:

(a) Ram Kumar Madhusudan Pathak vs. State of Gujurat reported in 1998 0 Supreme (SC) 836;

(b) Arulvelu & Anr. Vs. State Rep. By the Public Prosecutor & Anr. Reported in 2009 0 Supreme (SC) 1628; and

(c) Ram Nath Nonia vs. State of Bihar reported in 1999 0 Supreme (Pat) 778.

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

20. We have examined the respective contentions urged by the learned counsels for the parties and have perused the records of the present appeal including the lower court records as also the impugned judgment of conviction.

21. The only question requires to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable in law and suffers from any infirmity and perversity.

22. Before entering into the merits of the case set up by the learned counsel for the accused-appellants and the learned A.G.A. qua impugned judgment and order of conviction passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses.

23. P.W.-1/informant/complainant, who happens to be the father of the deceased Rekha in his examination-in-chief has stated that deceased Rekha was his daughter. Her marriage was solemnized with accused Jaikishan @ Bablu before 14 years of incident. The character of the accused-appellant Jaikishan @ Bablu was very bad. He had illicit relations with accused-appellant Anita. She is wife of Hari Prakash, who is working as a peon at Sarva Hitaishi Inter College, Bhadsyana. Rekha and Jaikishan had relations earlier. Later when Jaikishan had an illicit relationship with Anita, Jaikishan used to beat Rekha after consuming alcohol. Rekha told Jaikishan not to go near Anita and this witness also told Jaikishan about the said matter, on which he had beaten Rekha in front of him. Accused Kuber Dutt supported Jaikishan in continuance of such illicit relationship. It was Kuber Dutt who got Rekha killed in collusion with. The accused Kuber Dutt was the Jeth (brother-in-law of the deceased), who used to encourage Jaikishan. He used to torture his daughter Rekha.

24. In the Court this witness has identified the accused persons, namely, Anita, Jaikishan alias Bablu, who conspired with Kuber Dutt and set Rekha on fire by pouring kerosene oil at around 11.00 pm on 19-7-11 in the night. Rekha was tied with a rope and was set on fire. The village head (Gram Pradhan) Satish Fauji informed the informant/P.W.-1 about Rekha's burning through telephone. The informant/P.W.-1 told Satish Pradhan how much Rekha was burnt on which Satish Pradhan made Rekha talk on the phone and in reply Rekha said that she had completely burnt.

25. This witness has further stated that Rekha was assaulted by the accused persons on 22-5-11 prior to the incident due to which she had come to him, then she went to Bahadurgarh Police Station on 23rd May, 2011 and gave a written report for lodging of the FIR against the accused persons for torturing and assaulting her on which the FIR was registered, the signatures appended thereon have been proved by the informant/P.W.-1 before the trial court. On 24-5-2011, the informant/P.W.-1 got Rekha medically examined at Medical Garh Hospital and the photo copy of the medical examination is on record. Then the deceased went to the house of informant/P.W.1 and after that a meeting was held between both the family members and the Police in which the accused Kuber Dutt took responsibility that accused Jaikishan alias Bablu would never go to accused Anita, resultantly a settlement has been arrived at bearing Faisalanama N.C.R. No. 41 of 2011, a photo copy of the same is on record as Paper No. 11A. When it was read out to the witness, the witness said that it was the same.

26. In the cross -examination, this witness has stated that in the Meerut Medical Hospital, he did not met with accused Kuber Dutt and the people of the village fled after seeing him. The informant/P.W.1 met his daughter Rekha, where she told that the accused Jaikishan, Anita and Kuber set her on fire. Rekha also told that first she was tied on the cot, then accused Anita poured kerosene oil on her

and accused Jai Kishan lit the fire. This was disclosed to him on 20-7-11 at 7.30 a.m. in the Medical Hospital, where Rekha was admitted. In the cross-examination, this witness has also stated that his statement was recorded by the Inspector on 20th July, 2011 at 12:00 noon.

27. P.W.-2 Tarun, who happens to be the real brother of the deceased and son of informant/P.W.1, in his examination-in-chief has stated that Rekha (deceased) was married 14 years before her murder. His sister Rekha was kept well after marriage for one or two years, after that a woman named Anita came in the village, whose husband's name is Hari Prakash, who is a peon in Sarva-Hitaishi Inter College. Rekha's husband, namely, Jai Kishan alias Bablu had illicit relations with accused Anita. His sister Rekha repeatedly told Jaikishan not to meet Anita on which her husband Jaikishan alias Bablu and brother-in-law Kuber Dutt used to beat his sister. Her brother-in-law Kuber also used to abuse her badly saying that Rekha should be killed and would keep Anita in the house in her place. On hearing the illicit relationship of Jai Kishan with Anita, this witness along with other family members including (informant/P.W.-1) tried to convince Jai Kishan not to meet Anita and they also complained to Kuber Dutt about the same.

28. This witness has further stated that before this incident, the accused persons Jaikishan, Kuberdutt and Anita had beaten his sister Rekha badly and thrown her out from their house in relation to which Rekha had informed the Police and Rekha's medical was also done. Rekha had given the written information on 23-5-11. This witness has also attested the signatures of Rekha appended on NCR.

29. This witness has further stated that after some days, on the advice of some respectable person and relatives, this witness's side and accused persons reached on an agreement, wherein the accused Kuberdutt assured that such thing would not happen in the future and it was his responsibility. This witness has also verified the photocopy of the compromise entered into between the parties arising out of the N.C.R. lodged by the deceased Rekha which is also on record.

30. This witness has further stated that they went to Meerut Medical Colelge from their home. His sister Rekha was found in the hospital in a serious burnt condition. She told that her husband Jaikishan alias Bablu and brother-in-law Kuber Dutt and Anita were set her on fire. This witness has identified the accused persons in the Court and has stated that they killed his sister Rekha after setting her on fire. This witness has further stated that the doctor told them that Rekha was seriously burnt due to which they refused to admit her and advised to take her to Delhi. But the deceased was admitted due to decent approach of Jai Kishan and Kuber Dutt in the hospital, after that Doctor told that the deceased has been referred to Delhi. After referring Delhi, they went to Delhi with Rekha but Rekha succumbed to severe burns on the way. He had written the report of the incident at the behest of his father Niranjan Sharma (informant/P.W.-1).

31. This witness has further stated that all the three accused had murdered his sister Rekha as Jaikishan alias Bablu had illicit relations with Anita and the refusal of Rekha to keep Anita in her house resulted in her murder.

32. P.W.-3 Tanu, who happens to be the son of the deceased Rekha and accused

Jaikishan @ Bablu, has stated in his examination-in-chief that he was staying with his maternal grand-father (Nana) at Nangla Karan. He had been living at the place of maternal grand-father and maternal uncle since his mother's death. His mother's name was Rekha. His mother died many days ago. His mother died in the fire. His father, his uncle and Anita aunty had set his mother on fire. This witness has identified the accused persons, Jaikishan alias Bablu, Tau Kuber and Anita in the Court.

33. This witness has stated that his father jumped into the house and opened the latch, then Anita Aunty and Tau Kuber entered, injected his mother in the arm and then all three together tied up her and poured kerosene oil on her, then his father took out a matchbox from his pocket and set her on fire. At that time he was there he asked them why were they burning his mother, then his father hit him in the house due to which he sustained injuries on his head that is why he cried and shouted, then the people of the neighborhood came, then his father took him in his lap to a Thakur's house. He did not know the name of that Thakur. He kept him locked up in the same Thakur's house. On the next day in the evening, sons of his uncle and neighbour came, they brought him out from that house and on the way his maternal uncle met him at Dehra Kuti and from there he went to maternal uncle's house with him. Since then he has been living with maternal uncle and maternal grandfather.

34. This witness has further stated that his father (accused Ramkishan @ Bablu) used to beat his mother (deceased Rekha). His mother used to tell his father not to go to Anita aunty's house, on this his father used to beat his mother. His father used to go to Anita aunty's house and stay there and his father did not live with his mother. His father used to come to their house in drunken condition and used to beat his mother. His maternal grand-father and uncle used to convince his father and accused Kuber Dutt, but such act of his father did not stop. He also asked his father to live at Hapur with Anita and leave his mother. This witness has also stated that he has disclosed all the facts to the Inspector, which he has stated in his testimony.

35. This witness has also stated that his father used to work as a driver of bus and truck. He, his mother and his sister lived at home. His father used to go out for work on a day and come home on the next day. When his mother was burnt by the accused-persons, his mother and he were in the house at that time. His mother cooked food on that day, he ate it but his mother (deceased) did not eat. His father had killed his mother in the evening. His mother cooked food at 9 o'clock after that his father came. This witness had finished eating when his father came. He could not tell as to when his father came. He has further stated that the door of the house was closed with latch. His father (accused-appellant Jaikishan @ Bablu) entered into the house by jumping across the wall of which no sound was raised. He could not point out the height of the wall from which his father jumped. At that time he was lying with his mother on the cot but he was not sleeping.

36. This witness has further stated that on the date of incident, his father was at the place of accused Anita, so they did not make any phone call to him on that day. Co-accused persons Anita and Kuber Dutt entered through the door when his father (accused-appellant Jaikishan) opened the door. On the date of incident the deceased

i.e. his mother had gone to Pradhan's place, when his father had beatten her. He was there in the house when his mother was burning. His mother was wearing salwar suit at that time. He did not know the colour of her mother's Salvar suit. There is a wall between the place where food was cooked and where they laid down. While his mother was cooking, at that time he was there with his mother.

37. In the cross-examination, this witness has stated that earlier he had given his statement to the Police at Dehrakuti, 4 to 5 days after his mother was burnt. The police station is at Dehra Kuti itself. His maternal uncle Satish had brought him for giving his statement,. He has disclosed the Police that his father had entered the house by jumping. He has also disclosed the Police that his uncle i.e. accused Kuber was present there. He has further stated that his father had assaulted his mother in the evening on the date of incident. Even before that they used to beat her. The deceased was also beaten an hour or two of the burning. Bricks were hit on the back. He has disclosed the Inspector about the beating in the evening. His mother had also disclosed to his maternal grand-father after she was beaten. When his father was beating his mother, the people of the locality had gathered there.

38. This witness has further stated that before the incident of burning, his father did not come to his house for two-three months. Before two to three days, his father had beaten his mother and after that on the date of incident in the evening. He did not know whether his mother and his father had any meeting in these 2 to 3 days or not. His father did not come to his house 2 to 3 days before the date on which his mother was burnt. His father came to uncle's house i.e. accused Kuber Dutt. Two to three days before when his father came to his uncle's house, he had beaten his mother and this fact has been disclosed by him to the Inspector.

This witness has denied that he stayed with his aunt Usha for several days after the incident. He has also denied that the police met him at his aunt Usha's place after the incident. He did not go with the police where his mother was burnt.

39. This witness has also stated that his mother fainted when his uncle (Tau i.e. accused Kuber Dutt) gave injection to her. The injection was given in front of him. His uncle Kuber Dutt kept the vial from which the injection was filled in his pocket. After getting the injection, his mother did not speak, these people had removed the clothes spread on the cot to which the mother was tied.

40. This witness has denied that he did not see the incident about which he has given the statement. He has also denied that his mother was alone at home at that time and burnt herself while cooking. This witness has also denied that his maternal grand-father had demanded Rs. Ten lacs and on refusal of the same, he has falsely implicated. He has also denied that because of staying with his maternal uncle, he was giving false testimony under their pressure.

41. P.W.-4 Sub-Inspector Ramprasad Sharma, who has been adduced by the prosecution, has investigated the case. This witness has stated in his cross examination that the deceased used to live with her family. The house of accused Kuber Dutt was different. The witness Tanu did not disclose him that his father jumped into the house and opened the latch, then accused

Anita and his uncle Kuber entered, his uncle Kuber injected his mother, then all three together tied his mother and pured kerosene on her, then father took out a matchstick and struck on matchbox, set her on fire. P.W.-3 Tanu did not disclose him that at the time of setting her on fire, his father had hit him on ground and he did not disclose him whether he sustained any head injury or a lump had come out on his head. This witness has also not disclosed that when he cried and shouted, the people of the neighborhood came and his father picked him up and took him to Thakur's house. P.W.-3 has also not disclosed him that he was locked up in a Thakur's house. P.W.-4 has denied that his maternal uncle brought him for giving his statement. This witness has stated that P.W.-3 has not disclosed him about the presence of accused Kuber Dutt at the time of the incident. P.W.-3 has not disclosed him about accused Kuber setting the deceased on fire and his father hitting the deceased with bricks a couple of hours before the incident. Head Constable-06 Ram Charan Singh has been adduced as P.W.-5. This witness has prepared the chik FIR and proved the same in the Court.

42. Autopsy Surgeon Dr. Jitendra Kumar Tyagi who has conducted the autopsy of the deceased Rekha has been adduced as P.W.-6. In his examination-in-chief he has stated that the age of the deceased was about 35 years. During the external examination of the body of the deceased Rekha, P.W.-6 has found that the deceased was of normal structure and stiffness after death was present all over the body; her eyes were congested, the skins of nose, ears and mouth of the deceased were burnt; the burn existed superficial to deep; there was no fracture; the hair of the head of the deceased was the distressed; line of redness was present; some part was superficial burn and some was deep burn; total about 70 percent of the body was burnt; the parts that were not burnt were the lower part of the waist and the anus, both the feet and the lower half of both the legs. A urine pipe was present in the dead body.

43. P.W.-6 on internal examination of the body of the deceased has found that the scalp and membranes were congested; the brain and its membranes were also congested; the walls were congested; both the lungs and their pleura were congested; larynx and trachea were also congested and shoot particles were present in it; the bone cord congested; the heart membrane was congested and the heart was full of blood. On the basis of aforesaid examination, P.W.-6 has opined that the cause of death of the deceased was shock due to ante-mortem burn injuries. In the cross-examination, this witness has stated that there was no mark of tying of any rope on the body of the deceased and there was no mark of any assault on her body.

44. Sub-Inspector Sanjeev Kumar has been adduced as P.W.-7, who has also investigated the case after P.W. 5. In his examination-in-chief this witness has stated that on 12th August, 2011, before her death, the deceased lodged an N.C.R. No. 41 of 2011 under Sections 323, 504 and 506 I.P.C. and on that N.C.R. settlement agreement (Faisalanama) was submitted. In the cross-examination, this witness has stated that in the N.C.R. lodged by the deceased, the investigation was conducted by an earlier incumbent. He has stated that it is true that on 22nd May, 2011, an application about the aforesaid incident mentioned in N.C.R. was given by the deceased wherein she claimed that in the presence of respectable persons of the

village, whatever the differences and suspicion, there might be in between the deceased and her husband, came to an end and therefore, she did not want any action against her husband. This witness has submitted the charge-sheet.

45. From the side of defence, Viresh Kumar has been adduced as D.W.-1. In his examination-in-chief this witness has stated that the accused Jaikishan and Kuber Dutt were his neighbours. He was sleeping on his terrace when the deceased died. He had come to the spot after hearing the noise. The time was around 11 to 11.30 in the night, he saw that the deceased was lying burnt. He did not see when she was burning. P.W.-3 Tanu son of accused Jaikishan and deceased disclosed him that his mother got burnt after pouring kerosene and at that time, his father was not at home, as he was on duty. He was a private bus driver. He saw that he goes to drive the bus in the morning and after staying for a night comes the next day in the morning. Accused Kuber Dutt and his wife had gone to get the deceased admitted to the Medical College in Meerut. The next day a panchayat was held in which the family members of the deceased demanded money.

46. Jeet Pal Singh has been adduced as D.W.-2. In his examination-in-chief, this witness has stated that at the time of occurrence he had reached the spot after hearing the noise. He heard that the deceased had set herself on fire. The accused Kuber Dutt and his wife took the deceased to the hospital. In the cross-examination, this witness has stated that he asked P.W.-3 as to how his mother was burnt, in reply he disclosed him that his mother got burnt after pouring kerosene oil on herself.

47. According to the story of the prosecution, in the night of 19th July, 2011, the informant/P.W.-1 was informed on the phone by Satish Fauji, Pradhan of village Bhadsyana that his daughter Smt. Rekha had been burnt by her in-laws at 11:00 p.m. (in the night) and she was taken to Meerut Medical Hospital in burnt condition. On this information, the informant/P.W.-1 went to the hospital to see his daughter where he saw his daughter in a burnt condition and his daughter was burnt up to 70%. Seeing the serious condition, daughter of the informant/P.W.1 was referred from Meerut Hospital to Safdarjung Hospital, Delhi, but she died on the way. On 20th July, 2011 at 11.00 a.m. a written report was lodged at the Police Station against husband of the deceased, namely, Jaikishan @ Bablu, lover of her husband, namely, Anita and her brother-in-law Kuber Dutt. After investigation, the Police has submitted the charge-sheet.

48. On the deeper scrutiny of the oral as well as documentary evidence led during the course of trial as also the judgment of the trial court, we are in full agreement with the categorical findings recorded by the trial court while passing the impugned judgment. The trial court has rightly recorded that according to P.W.-6 Dr. Jitendra Kumar Autopsy Surgeon, the deceased was burnt upto 70%. The deceased was burnt due to kerosene oil being poured on her and being set her on fire. The Police have recovered kerosene oil canister, matchbox, some matches and some semi-burnt clothes from the spot. On the basis of aforesaid facts and circumstances the trial court has opined that the untimely death of deceased Rekha was due to setting her on fire at her in-laws' house by pouring kerosene oil on her. As such the argument of the defence that the

deceased has committed suicide herself by pouring kerosene oil on her and setting her on fire in the night of the incident has no force. There is no such reliable evidence or proof available on record to suggest that the deceased committed suicide by pouring kerosene oil on her and setting herself on fire. The accused Jaikishan i.e. the husband of the deceased was having an illicit relationship with accused-appellant Anita, wife of Hari Prakash, resident of the same village and the knowledge of that illicit relationship was with the deceased due to which quarrel took place between the deceased Rekha and her husband Jaikishan @ Bablu. The deceased Rekha used to object the illicit relationship of her husband with accused Anita due to which he used to beat and torture her. Because of the aforesaid illicit relationship in the night of the incident, the deceased Mrs. Rekha was burnt by pouring kerosene on the night of the incident. At that time P.W.-3 Tanu, son of the deceased, whose age was 5 to 6, was inside the house. Tanu's elder sister had gone to her maternal grand-father's house 15 to 20 days before the incident because there was an incident of fighting and discordant atmosphere in the house, the main reason behind which was the illicit physical relationship between accused Jaikishan and accused Anita. Informant/P.W.-1, Niranjan Sharma and P.W.-2 Tarun Sharma were at their house at the time of occurrence, meaning thereby that these two prosecution witnesses were not present at the place of incident, but after the incident, when they were informed by the Village Pradhan Satish Fauji, through the phone, then they came to the hospital to see the deceased Rekha. The deceased Rekha Sharma was married to accused Jaikishan 14 years ago. From then, accused Jaikishan did not had illicit relationship with Anita and the atmosphere of the family was fine but after having illicit relationship with Anita, there was estrangement and discord between accused Jaikishan and his wife Rekha. P.W.-1 and P.W.-2 were also aware of illicit physical relations of accused Jaikishan alias Bablu and Anita. Even two months before the incident, the deceased Rekha was beaten up by the accused Jaikishan, for which the deceased Rekha had complained to her mother and father, as a result of which she went to her maternal home. She had also given a written report to the concerned Police Station against the accused Jaikishan and Anita. She had also got her medical examination done, later, after Panchayat, the deceased came back to live with her in-laws and forgave her husband Jaikishan alias Bablu on the assurance that he would not have any illicit relationship with Anita from that date and would improve his conduct but nothing like that happened because of which discordant atmosphere started again between Rekha and accused Jaikishan regarding his illicit relationship with accused Anita. The informant/P.W.-1 Nirjan Sharma had written a report, which has been scribed his son P.W.-2 Tarun in which the allegation of killing the deceased by pouring kerosene oil on her and setting her on fire has been made against the accused Jaikishan and accused Anita, whereas the allegation of conspirator for committing such offence has been made against the accused Kuberdutt.

49. The trial court has also rightly recorded that both the prosecution witnesses i.e. P.W.-1 and P.W.-2, who are hear say witnesses, have corroborated the same version as unfolded in the FIR. The trial court has also recorded that both the prosecution witnesses i.e. P.W.-1 and P.W.2, however, have not clarified in their testimony as to why accused Kuber Dutt

conspired to get the deceased Rekha burnt to death. Accused Kuber Dutt lives separately from the deceased Rekha and accused Jaikishan. The accused Kuber Dutt is elder brother of accused Jaikishan, who are total five brother and all of them are living separately in their different houses. The house of accused Kuber Dutt is also different from that of accused Jaikishan. Accused Kuber Dutt also has his own family. Accused Jaikishan had illicit physical relationship with accused Anita but the prosecution has failed to explain the vested interest of accused Kuber Dutt in such illicit relationship between the two, meaning thereby the interest behind the involvement of accused Kuber Dutt in this crime is unclear. Behind any crime, the criminal's maliciousness is hidden. There is always some connection or reason between the crime and criminal. In the present case, accused Kuber had no illicit relationship with accused Anita. If accused Anita had illicit relationship with accused Kuber, then it could be said that because of accused Anita, he supported accused Jaikishan in getting Rekha killed but only on the basis that the accused Jaikishan is real brother of accused Kuber Dutt, he played the role of conspirator in this incident, does not seem expedient as there is no reliable evidence.

50. P.W. -3 Tanu, son of deceased Rekha and accused Jaikishan in his testimony has specifically implicated his father i.e. Jaikishan and accused Anita for killing his mother by pouring kerosene oil on her and setting her on fire. Four days after the incident i.e. on 24th July, 2023 statement of this witness was recorded by P.W.-4 under Section 161 Cr.P.C. in which he has named his father Jaikishan @ Bablu and his girlfriend i.e. accused Anita for murdering his mother by setting her on fire. According to P.W.-3 Tanu, in the night of incident at 11:00 pm his father Jaikishan and Anita tied his mother Rekha Sharma with a rope and then poured kerosene on her and set her on fire.

51. For examining the correctness or other wise of the testimony of P.W.-3, who is the star prosecution witness and an eye witness, his statement recorded under Section 161 Cr.P.C. is extracted herein-under:

"मुकदमा उपरोक्त में विवेचना की कार्यवाही का पर्चा III दि० 22/7/11 को किता कर वास्ते अवलोकन सादर सेवा में प्रेषित किया जा चुका है। आज मैं SO थाना हाजा से रवाना होकर विवेचना में मामूर होकर ग्राम भदस्याना में मृतका के मकान पर आया तो देखा कि घर के मेन दरवाजे पर कुण्डी लगी। जानकारी करने पर पता चला कि मृतका का बेटा तनू अपने ताऊ राजेश्वर दत्त के पास रह रहा है अतः चलकर श्री राजेश्वर दत्त के घर पर आया। घर पर मृतका का बेटा तनू मौजूद मिला तथा ताऊ राजेश्वर व ताई श्रीमति उषा मौजूद मिले। अतः बच्चे को प्यार से बिना किसी पूछताछ कर कथन अंकित किये जाते हैं।

बयान गवाह – बदरीयाफत मिस्टर तनू पुत्र जयकिशन @ बब्लू निवासी भदस्याना थाना बहादुरगढ ***उम्र करीब 5-6 वर्ष ने पूछने पर रोते हुए बताया कि मेरी मम्मी बहुत अच्छी थी। मेरे पापा गन्दे हैं। पापा अनिता आन्टी के पास जाते थे। मम्मी मना करती थी। तब पापा मम्मी को पीटते थे। ताऊजी कुबेर मम्मी को ही डाटते थे। पापा को कुछ नही कहते थे। तीन दिन पहले शाम को पापा ने मम्मी की पिटाई की थी। फिर पापा को कई लोगों ने डाटा था। रात में मम्मी रो रही थी। मम्मी जल रही थी। मैन देखा मेरी मम्मी को पापा व अनिता आन्टी ने तेल डालकर आग लगायी। फिर पापा मुझे बाहर छोड़कर अनिता आन्टी के साथ चले गये। फिर मम्मी को डाक्टर के यहाँ ले गये।"***

52. The said statement of P.W.-3 has also been supported by P.W.-1 and P.W.-2 in their testimony. It was only after the incident that P.W.-3 Tanu went to his maternal grandmother. At the time of occurrence P.W.-3 Tanu was 5 to 6 years old and a child studying in class-I. Two years after the incident, he has come to the court to give his statement as P.W.-3. In

such a situation, how much does a 5 to 6 years old child remember about the incident that happened two years back is doubtful in itself.

53. On the basis of such finding the trial court has opined that the child is undeveloped, probably that is why he has come to the court and gave a very different statement from what he had given to the Police under Section 161 Cr.P.C. immediately after four days of the incident. According to P.W.-3 Tanu, accused Kuberdutt rendered her mother unconscious by giving her injection. His father Jaikishan entered into the house by scaling the wall and opened the main door. The latch was opened after which accused Anita and accused Kuber came inside the house, accused Anita and accused Jaikishan tied her mother with ropes with the cot, then his father Jaikishan burnt her mother with fire by pouring kerosene oil on her. If the incident took place in such a manner, as P.W.-3 Tanu has given in the trial court, then he could have said these things when P.W.-4 questioned him after 4 days of the incident while recording his statement under Section 161 Cr.P.C, why he did not disclosed the above facts, no satisfactory answer has been given by the prosecution. Soon after the incident P.W.-3 Tanu had gone to his maternal grand-father and maternal uncle's place. If the incident had happened in the same way as he has given in his statement in the trial court, then in such a situation he must have disclosed same to his maternal grandparents also about how the incident happened. The informant/P.W.1 and P.W.2 should have also given the statements in the same manner as given by P.W.-3 Tanu. After the incident P.W.-1 Niranjan Sharma had written a report to the Police Station. In the FIR same version should have been written as has been given by PW-3 Tanu in his statement. The statement of PW-3 Tanu is not supported by any other evidence available on record.

54. The trial court has further recorded that the accused Kuber Dutt, being the brother of accused Jaikishan alias Bablu, had some sympathy with accused Jaikishan, but because of this sympathy, accused Kuber Dutt conspired to get the deceased Rekha killed, does not seem to be appropriate. What was the intention of the accused Kuber behind getting the deceased Rekha killed and what was being done for his benefit, the prosecution has not succeeded to prove the same. In the FIR and in the statements of P.W.-1 and P.W.-2, accused Kuber Dutt has been described as a conspirator but no clear evidence has been given regarding his participation in the alleged offence. P.W.-3 Tanu has clearly given his statement regarding the involvement of accused Kuber Dutt but the statement of P.W.-3 Tanu cannot be given much importance as P.W.-3 Tanu was a child of 5 to 6 years of age at the time of incident and he was 8 to 9 years old at the time of giving his statement before the trial court. The statement of P.W.-3 Tanu under Section 161 Cr.P.C. and the statement given in the trial court have been presented with a fanciful story. In such a situation, a natural question arises as to why P.W.-3 Tanu did not disclose such facts when his statement has been recorded by P.W.-4 under Section 161 Cr.P.C. which he disclosed in the trial court. In his testimony, P.W.-3 Tanu has stated that after the incident, his father Jaikishan alias Bablu had beaten him and taken him to another house and locked him there. After remaining closed for a day, Kuber Dutt's son took him out. All these things do not match with any other evidence available on record. In such a

situation statement of P.W.-3 Tanu in the opinion of the trial Court is of a less relevancy as he was taught by a truthful person, and has fabricated story on his own free will. However, the trial court has opined that if the entire statement of P.W.-3 Tanu given in the trial court as well as before P.W.4 under Section 161 Cr.P.C. is seen together, then it definitely establishes that her mother was burnt to death by pouring kerosene oil on her in the night of the incident, behind which his father Jaikishan @ Bablu and accused Anita was involved. Since they had an illicit relationship and both had killed the deceased Rekha after pouring kerosene oil on her and setting her on fire.

55. The trial court has further recorded that learned counsel for the accused Kuber Dutt argued that according to P.W.-1, when the information of incident was given to him by Pradhan Satish Fauji, he had also talked to his daughter Rekha and asked about the incident, on the basis of which, as well as on the basis of the information given by the villagers, he had written a report at the police station. Learned counsel for accused Kuber further argued that there were various discussions in the village regarding the relationship between accused Anita and accused Jaikishan, due to which the family environment of accused Jaikishan and deceased Rekha had become discordant. There used to be fights between them. The parents of the deceased had held a panchayat twice. Even before the incident, accused Jaikishan threw Rekha out of the house after beating and at the same time accused Kuber Dutt, being elder brother, convinced the accused Jaikishan and the parents of deceased Rekha. Due to the efforts of accused Kuber Dutt, the parents of the deceased Rekha agreed to send her again with accused Jaikishan. The trial court on the basis of such argument has formed an opinion that after the incident of fight that took place two months before the incident, the accused Kuber had a great involvement in bringing about a settlement between the husband and wife. On the assurance of Kuber Dutt, the deceased Rekha had come to live with her in-laws when the accused Jaikishan's habits did not improve and he again maintained illicit relations with accused Anita, which ultimately resulted in the murder of the deceased Rekha, that is why Rekha's parents including his father and brother i.e. P.W.-1 and P.W.-2 became angry with the accused Jaikishan, Anita and also Kuber Dutt, as if they had not believed to the assurance of the accused Kuber Dutt and would have not sent Rekha with accused Jaikishan, his daughter Rekha would have been alive today. Neither Rekha would have gone to live with her in-laws nor she would have been burnt to death by Jaikishan along with his girlfriend Anita. P.W.-7 is also an Investigating Officer who has proved the police papers. P.W. -5 is a policeman who proved the chik FIR.

56. The trial court has further recorded that the statements of defence witnesses i.e. D.W.-1 Jeetpal Singh and D.W.-2 Viresh also do not seem to help the accused-appellants as the incident took place at 11.00 p.m. (night). DW-1 and DW-2 were informed about the same. It was not known when the accused Jaikishan goes to his job and when he comes. If the said defence witnesses were aware that the deceased Rekha was murdered and accused Jaikishan and Anita did not burn her, then in such a situation they should have written a request to the police and administrative officials during the investigation. It should have been that Mrs. Rekha was not burnt but she herself committed suicide. In this regard,

they should have also given affidavits in the court before the magistrate, which would have clarified what is the truth behind the incident. Two years after the incident, now all of a sudden coming to the court, without any basis, the statements given by the said defence witnesses is definitely a statement made away from truth with the intention of saving the accused.

57. The trial court has further recorded that as far as the involvement of accused Jaikishan alias Bablu and accused Anita in the incident is concerned, in the light of the above analysis, the involvement of two accused is completely proved. This incident has happened only because of illicit relationship between accused Jaikishan and accused Anita due to which they murdered the deceased by pouring kerosene oil on her and setting her on fire in the night of the incident. As far as the question of accused Kuber Dutt is concerned, the trial court has opined that the presence of accused Kuber Dutt is doubtful in the light of evidence available on record. There is no evidence available as to participation of accused Kuber Dutt in the incident. If the entire statements of the fact witnesses i.e. P.W.-1, P.W.-2 and P.W.-3 are seen together in the light of the version as unfolded in the FIR, then in such a situation, the prosecution story against the accused Kuber could not be proved beyond reasonable doubt, because the accused Kuber Dutt would have got the benefit of the doubt.

58. On deeper scrutiny and evaluation of the evidence led during the course of trial, we are of the in full agreement with the findings recorded by the trial court in holding the accused appellants Jaikishan @ Bablu and Anita guilty for the offence under Section 302 I.P.C. We also agree with the findings recorded by the trial court that since the prosecution has failed to prove the guilt of the accused Kuber Dutt under Section 120-B I.P.C. beyond reasonable doubt, he should be given benefit of doubt.

59. Apart from the above, so far as the conviction of the accused-appellants under Section 302 I.P.C. is concerned, it is worth noticing that no doubt there is some improvement in the statements of the star prosecution witness/solitary eye witness of the incident i.e. P.W.-3, but when both the statements are read together carefully, it will be definitely cropped up that the accused-appellants, namely, Jaikishan @ Bablu and Anita used to have illicit relations, which the deceased used to object and due to which the accused-appellant Jaikishan used to beat and torture her and ultimately, in the night of the incident, both the accused-appellants killed her by pouring kerosene oil on her and setting her on fire.

60. Mere on the basis of some improvement in the testimony of P.W.-3, the entire evidence of this witness cannot be ruled out as he was 5 to 6 years old at the time of recording his statement under Section 161 Cr.P.C. and 8 to 9 years old at the time of recording his statement before the trial court and he was under pressure of his maternal grand-father and maternal uncle. On this point, we do not agree with the findings recorded by the trial court while taking into consideration the oral evidence of P.W.-3 in respect of accused-appellants, namely, Ramkishan @ Bablu and Anita. No child in this country, who loves his mother and father most, will be ready to make allegations against his mother or father at the behest of his maternal grandfather or maternal uncle, until he feels that wrong is done by his

father with his mother or by his mother with his father.

61. The Apex Court in the case of **P. Ramesh Vs. State Represented by Inspector of Police** reported in *(2019) 20 SCC 593* has in paragraph 14 to 16 has observed as under:

"14. A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in Wheeler v United States, wherein it was held thus:

"5.... While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which- will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous..."

(emphasis supplied)

15. In Ratansinh Dalsukhbhai Nayak v State of Gujarat, this Court held thus:

"7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

(emphasis supplied)

16. In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to

understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."

62. This version of P.W.-3 that the accused-appellants, namely, Jaikishan @ Bablu and Anita used to have illicit relations, which the deceased used to object and due to which the accused-appellant Jaikishan used to beat and torture the deceased and ultimately, in the night of the incident, both the accused-appellants killed her by pouring kerosene oil on her and setting her on fire, has been fully supported by the testimony of P.W.1 and P.W.-2 and the version as unfolded in the FIR, even though the P.W.-1 and P.W.-2 are hear say witnesses but they are consistent from the very beginning and till the recording of their statements before the trial court. The prosecution version that due to illicit relations of accused-appellant Jaikishan @ Bablu with accused-appellant Anita, he used to beat and torture the deceased and before two months of the incident, accused-appellant had beaten the deceased as she objected his illicit relations with accused Anita and thrown out the deceased from his house after which she went to her parent's place and disclosed the same to her parents and after that she lodged an NCR being NCR No. 41 of 2011 under Sections 323, 504, 506 I.P.C. against the accused-appellants and she also got herself medically examined and after settlement agreement (faisalanama), she went to her in-laws place, has also been proved by the P.W.-7 (second Investigating Officer). From the such facts it is also clear that the accused-appellants had strong motive to kill the deceased. The autopsy report of the body of the deceased as well as statements of the Autopsy Surgeon P.W.6 Dr. Jitendra Kumar Tyagi support the prosecution version.

63. In view of the above discussions and deliberations, we find that the finding of the Court below with regard to accused-appellants Jaikishan @ Bablu and Anita is correct and the guilt of both the accused-appellants have been proved beyond reasonable doubt by the prosecution, which is sustainable in the eyes of law. Such accused-appellants, who committed heinous crime in murdering the deceased Rekha by pouring kerosene oil on her and setting her on fire only because she was strong protester of their illicit relationship, are not entitled to any leniency from us. Such persons, who are black spot in the society, cannot be set at liberty.

64. Consequently, both the appeals filed by the accused-appellants are devoid of merit and are accordingly dismissed. .

65. Let a copy of this judgment be sent to the Chief Judicial Magistrate, concerned henceforth, who shall transmit the same to the Jail Superintendent concerned in terms of this judgment.

(2023) 6 ILRA 140
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 5502 of 2017

Ramchandra Kushwaha ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Suresh Chandra Kushwaha, Sri Ramesh Kumar Singh, Sri Surendra Mohan Mishra

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 - Section 302 - Punishment for murder - Code of Criminal Procedure, 1973 - Sections 161 & 313 - Indian Evidence Act, 1872 - Section 106 - Appeal against conviction - Life imprisonment - Direct Evidence - According to prosecution dispute arose between accused and deceased and when accused started beating deceased, their daughter intervened, accused also assaulted his daughter, died during treatment - Held, motive has not been affirmed and proved by informant or other witnesses - On the fateful day, all witnesses deposed that deceased were alone in house with her daughter - Accused had gone to buy goods - On returned back, he found that his wife has been killed and his daughter was badly injured by miscreants - Reached police station, detained and arrested and fawda was planted as weapon used in commission of crime and forged recovery was shown - No evidence regarding scuffle between accused and deceased - Lack of last seen evidence - Fawda was not recovered on pointing out of accused, not established that it contained blood group of deceased - All the witnesses were out of house and busy in their work - Impugned order set aside. (Para 15, 16, 19, 21, 22)

Criminal Appeal allowed. (E-13)

List of Cases cited:

1. Jayamma & anr : Lachma s/o Chandyanaika & Anr Vs St. of Karn., 2021 LawSuit (SC) 312

2. Mahavir Singh Vs St. of M. P., 2016 Law Suit (SC) 1071

3. Machindra Vs Sajjan Gaplha Rankhamb & ors, 2017 LawSuit (SC) 422

4. St. of Har. Vs Bhagirath, 1999 LawSuit (SC) 617

5. Ramesh Bhai & ors. Vs St. of Raj. 2009 (Supplementary) ACC 860 (SC)

6. Shivaji Chintappa Patil Vs St. of Mah., 2021 0 Supreme (SC) 121

7. Bhaskar Rao & ors. Vs St. of Mah., (2018) 6 SCC 591

8. Ujjagar Singh Vs St. of Pun., (2007) 13 SCC 90

9. Nagraj Vs St., (2015) 4 SCC 739

10. Wakkar Vs St. of U.P., 2011 (2) ALJ 452 SC

11. Nathuni Yadav Vs St. of Bihar, (1998) 9 SCC 238

12. Kulwinder Singh Vs St. of Pun., AIR 2007 SC 2868

13. Ganpat Singh Vs St. of M.P., (2018) 2 SCC (Cri) 159

14. St. of Karn. Vs M.V. Mahesh, (2003) 3 SCC 353

15. G.L.Mangraju @ Ramesh Vs St. of A.P., AIR 2001 SC 2677

16. Raju Vs St., AIR 2009 SC 2171

17. Vithal E Adlinge Vs St. of Mah., AIR 2009 SC 2067

18. Krishna Ghose Vs St. of W.B., AIR 2009 SC 2279

19. Dev Kanya Tiwari Vs St. of U.P., (2018) 5 SCC 734

20. Rajesh Praksh Bhatnagar Vs St. (Delhi) (1985) 28 Del Lt 357

21. Prabhakar Vs St. of Mah. AIR 1982 SC 1217

22. St. of J&K Vs Vijay Kumar & ors., AIR 2017 Supreme Court 1507

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Umesh Chandra Sharma, J.)

1. Heard Sri Ramesh Kumar Singh, learned counsel for the appellant, Sri N.K. Srivastava, learned A.G.A. for the State and perused the record.

2. The present appeal has been preferred by the appellant against the judgment and order dated 07.09.2017 by which the learned Additional Sessions Judge, Kushi Nagar, has convicted and sentenced the accused-appellant for commission of an offence under Section 302 I.P.C. awarding life imprisonment and has imposed fine of Rs. 20,000/- and in default to undergo simple imprisonment for two years.

3. The investigation started after the information was received and F.I.R. was lodged at Case Crime No. 689 of 2014 in Police Station Ahirauli Bazaar, District Kushi Nagar. The police officer started the investigation and after recording the statements of the witnesses filed the charge-sheet.

4. The case was committed to the Court of Sessions and the accused pleaded not guilty.

5. So as to bring home the charge, the prosecution has examined 15 witnesses who are as under :

1	Kamlesh, informant &son of the accused and the deceased	P.W.1
2	Rajesh Kushwaha, son of the accused and the deceased	P.W.2
3	Basant @ Chirkut, father of the accused	P.W.3
4	Pramod Kushwaha, villager	P.W.4
5	Santosh Maurya, brother of the deceased Asha Devi	P.W.5
6	Rajawati, mother-in-law of the deceased	P.W.6
7	Miklesh Kushwaha, son of the accused and the deceased	P.W.7
8	Ramanand, witness of inquest of the dead body of Ku. Pooja	P.W.8
9	Umesh, witness of inquest of the dead body of Kr. Pooja	P.W.9
10	Pramod Kumar Rai, S.I. &I.O. of the case	P.W.10
11	Ram Gopal Yadav, constable moharrir/writer	P.W.11
12	Dr. Vijendra Prasad, who did autopsy of the dead body of Smt. Asha Devi	P.W.12
13	Vinay Kumar Pathak, S.H.O. &subsequent I.O.	P.W.13

14	Dr. S.N. Tiwari, who did autopsy of the dead body of Km. Pooja	P.W.14
15	Constable Ramtahal, who deposed secondary evidence for S.I. Ram Briksha Ram who did inquest of the dead body of Km. Pooja	P.W.15

6. So as to give credence to these oral testimonies following documents were also filed by the prosecution:

1	Written Report	Ex.Ka.1
2	Site Plan	Ex.Ka.2
3	Recovery memo Fawda	Ex. Ka. 3
4	Inquest of deceased Asha Devi	Ex. Ka. 4
5	Police Form 13	Ex. Ka. 5
6	Photonash, deceased Asha Devi	Ex. Ka. 6
7	Corbon copy G.D.	Ex. Ka.7
8	Chik F.I.R.	Ex. Ka. 8
9	Corbon copy G.D.	Ex. Ka.9
10	Postmortem Report of dead body of Smt. Asha Devi	Ex. Ka.10
11	Charge-sheet	Ex. Ka.11
12	Postmortem Report of deceased, Km. Pooja	Ex. Ka. 12
13	Inquest of deceased Km. Pooja	Ex. Ka. 13
14	Police Form 33	Ex. Ka. 14
15	Police Paper	Ex. Ka. 15
16	Photonash Km. Pooja	Ex. Ka. 16

F.S.L. Report paper no. 45/Ka-1 has not been exhibited by the trial Court under Section 293 Cr.P.C.

7. Learned counsel for the appellant has heavily relied on the following judgments of the Apex Court:

(a) Jayamma & Anr : Lachma s/o Chandyanaika & Anr Vs. State of Karnataka, 2021 LawSuit (SC) 312.

(b) Mahavir Singh Vs. State of Madhya Pradesh, 2016 Law Suit (SC) 1071.

(c) Machindra Vs. Sajjan Gaplha Rankhamb & Ors, 2017 LawSuit (SC) 422.

(d) State of Haryana Vs. Bhagirath, 1999 LawSuit (SC) 617.

8. So as to contend that the accused has been wrongly convicted, all the witnesses of fact have not supported the prosecution case. The evidence of Suresh has also not been recorded. Only on the basis of the evidence of the doctor which is not even corroborated, the accused has been punished invoking Section 106 of The Evidence Act.

9. It is further contended that there were miscreants who had attacked the house and this defence of the accused under Section 313 Cr.P.C. has not been considered.

10. It is submitted by learned counsel for the appellant that the alleged incident

took place on 25.4.2014 where accused-appellant has killed his wife and daughter with Fawda, however, the accused was challaned on 26.4.2014 and before being challaned he was medically examined wherein five injuries were found which make the story of the prosecution doubtful.

11. It is further submitted that the prosecution story does not support the evidence on record as on the point of time all the witnesses have turned hostile except the formal witnesses. In the present case there were 9 public witnesses and all of them have falsified the prosecution story but relying on statements recorded under Section 161 Cr.P.C., the accused-appellant has wrongly been convicted.

12. It is further submitted that the injuries do not match that of weapon recovered. The signatures of the informant was procured by the police is also not proved by the prosecution. It is submitted that the accused has been wrongly convicted by the learned Judge and the accused-appellant is entitled for being acquitted.

13. Before dealing with the evidences, let us consider the deposition of the prosecution witnesses:

(a) P.W.-1, Kamlesh, son of the accused and the deceased, has deposed that at the time of alleged incident, he had gone to Sukrauli Bazar for purchasing medicines and fertilizer. His father (accused) repairs cycle in Ahirauli Bazar. He had signed Ex. Ka-1 and several other plain papers on being told by the S.I. and the Inspector scared him for signing the same. He also threatened that if he did not sign, he will put his father in jail for years. After getting the signatures the inspector sent him home and told him that his father will go home later. Next day he came to know that his sister Pooja had died in Medical College Gorakhpur. This witness also recognized the signature at the recovery memo of fawda. He further deposed that when they were not present at home, some miscreants had beaten and killed his mother and sister but his statement was not recorded by the police when he went to the police station next day, he was not inquired about the place of incident.

This witness was declared hostile. In cross-examination by the prosecution, this witness denied recovery of blood stained fawda before him on 25.4.2014 and also preparation of recovery memo thereof and deposed that when he had signed, it was a blank paper. His signature was taken on the pretext of government help. He refused moving the application to S.P. He further deposed that he had signed this paper on the request of the villagers. This witness also denied the statement recorded by the I.O. He denied his presence at the place and time of the occurrence.

In cross-examination by defence, this witness denied prosecution story and deposed that from the villagers, he came to know that three miscreants came to his house, molested his sister and killed his mother. On the scream of his mother and sister, when villagers reached, the miscreants had fled away. When his father was coming to home from Ahrauli Bazar at about 4:30 P.M. after getting down from the Bus at Ahrauli, police took him alongwith him to the police station. As per the dictation of the police he wrote the tehrir, on refusal threatened to implicate him in

the case of murder. His father was neither arrested from the house nor any murder took place before them. This witness denied any fight between her father, mother and sister. This witness has not supported the prosecution story.

(b) P.W.-2, Rajesh Kushwaha, brother of P.W.1 and son of the accused and deceased, has deposed that at the time of alleged occurrence, he was in fields with his grand father and brother Mithilesh. His father had gone to Pipraich to buy goods for his shop. Brother Kamlesh had gone to Sukrauli. His sister and mother were alone at the home. On the information that his mother and sister were killed by the miscreants, they went towards house where they found mother Asha Devi in a pool of blood and sister Pooja was taken by the villagers for treatment. After sometime his father, Ramachandra, returned from Pipraich. Police men alonwith the Inspector came to home. For initiation of legal recourse, police took signatures of his brother and father on some plain papers. In the evening, he came to know that his sister has also died during treatment in the medical college. Police took his elder brother and father to the police station but only his brother returned, his father was stopped there, he was expected to come in the morning. This witness denied the recovery of fawda before him and deposed that when he had signed the recovery memo, it was a plain paper.

This witness was also declared hostile and was cross-examined by the prosecution wherein he did not support the prosecution version. In cross-examination by defence, the witness deposed the similar story as P.W.-1.

(c) P.W.-3, Basant @ Chirkut, father of the accused-appellant has deposed that when all the persons except deceased Asha Devi and Pooja were out of home, some miscreants entered the house, killed Asha Devi and also injured Pooja who died in medical college due to injuries inflicted by the miscreants. He reached home from the field and found many people and policemen on the spot. Policemen got his signature on some plain papers. This witness denied the statement recorded by the I.O. under Section 161 Cr.P.C.

This witness was declared hostile and was cross-examined by prosecution in which he also did not support the prosecution version.

In cross-examination by defence, the witness has given the similar statement as P.Ws.1 & 2.

(d) P.W.-4, Pramod Kushwaha, has deposed that on the date of occurrence, he was coming home from Ludhiyana, there was a crowd near the school. He came to know that some miscreants have killed Asha Devi and have injured her daughter Pooja. The inspector called him and got his and other persons' signature on plain papers. This witness has proved his signature on inquest but denied that he was interrogated by the I.O. This witness was also declared hostile and was cross-examined by prosecution but he did not support the prosecution. In cross-examination by defence, the witness has reiterated the deposition of the examination-in-chief.

(e) P.W.-5, Santosh Maurya, brother of the deceased Asha Devi and maternal uncle of Pooja, has deposed that some miscreants entered the house and killed his sister and badly beaten his niece due to which she died during treatment. The police instead of arresting the real miscreants had arrested his brother-in-law Ramchandra (accused-appellant). The

police neither enquired nor recorded his statement. The witness recognized his signature on affidavit. This witness was also declared hostile and was cross-examined by prosecution but in vain. In cross-examination by defence, the witness has reiterated the deposition of the examination-in-chief.

(f) P.W.-6, Rajawati, wife of Basantlal, has deposed that on the date of alleged occurrence some miscreants entered the house of his neighbour Ramchandra and killed his wife and injured his daughter Pooja who died in the medical college. When she came to village she was told that at the time of incident Ramchandra was at his shop and sons were also not present at home meanwhile the miscreants barged into and killed Asha Devi and thrashed Pooja. The witness refused that any statement was recorded by the I.O. This witness was also declared hostile and was cross-examined by prosecution but she did not support the prosecution. In cross-examination by defence, the witness has reiterated the deposition of the examination-in-chief.

(g) P.W.7, Miklesh Kushwaha, a minor witness was firstly declared to be competent witness and, thereafter, he was examined. This witness also deposed in the same manner that at about 4:00 p.m. he came to know about the incident when he was in the field with his brothers Rajesh, Kamlesh and grandfather Basant @ Chirkut. When he reached home he came to know that the sister has been taken to Gorakhpur for treatment and dead body was taken to police station. The inspector made his brother Kamlesh sit at the police station and locked his father in the lock up. They cried a lot but the police did not release his father. When they came to house, he came to know that Pooja had died during the treatment due to the injuries inflicted by the miscreants. The witness denied that he was interrogated by the police/inspector.

This witness was also declared hostile and was cross-examined by prosecution but he did not support the prosecution. In cross-examination by defence, the witness has reiterated the deposition of the examination-in-chief.

(h) P.W.-8, Ramanand, a witness of inquest of deceased Pooja, has deposed that no panchayatnama of the dead body was conducted before him. This witness was also declared hostile and was cross-examined by prosecution but he did not support the prosecution.

(i) P.W.-9, Umesh, a witness of the inquest of deceased Pooja has recognized his signature on the inquest but deposed that no such panchayatnama was conducted before him and the I.O. had not recorded his statement. This witness was also declared hostile and was cross-examined by prosecution but he did not support the prosecution.

(j) P.W.10, S.I. Pramod Kumar, I.O. of the case, has deposed that the investigation was entrusted to him. After lodging the F.I.R., he copied the written complaint, chik F.I.R. and recorded statement of the informant Kamlesh Kushwaha and prepared site plan on his pointing, recorded the statements of eyewitness Rajesh Kushwaha and accused Ramchandar. This witness has proved the spot map (Ex. Ka-2) and recovery memo (Ex. Ka-3) alongwith other papers annexed (Ex. Ka-5 to Ex. Ka-7) with the inquest of deceased Asha Devi (Ex. Ka-4). This witness has also proved the fawda as M. Ex.-1, cloths of the deceased Asha Devi as M. Exs. 2 to 4 and blood stained and simple

soil as M. Exs.- 5 to 6. This witness has deposed that the accused was arrested after the inquest. Later on he deposed that the family members and neighbors had caught the deceased when he was trying to run away after jumping from the roof.

This witness has further deposed that the fawda used in commission of crime was recovered on the pointing out of the accused but no witness of recovery has been averred in case-diary. There is no signature of the accused on it. It is signed merely by the witness and by him. No finger print were taken from the fawda of the accused. This witness did not care as to whether there were blood spot on the wearing apparels of the accused or not. He could not say on which matter, dispute arose between the accused, his wife and their daughter. The accused had not stated that he had killed the deceased from the recovered fawda but had stated that he had killed the deceased from fawda. This witness denied that when the accused had gone to police station to inform about the killing of his wife and daughter, he was arrested by the police. He has further denied that at the time of inquest and when the dead body was sent for post-mortem, the F.I.R. was not registered. This witness accepted that he had not sent the fawda and clothes etc. of the deceased to F.S.L. but it was sent by H.C. Shyama Yadav. He admitted that there was no mention of blood on the clothes of the deceased in the panchayatnama.

(k) P.W.-11, Ram Gopal Yadav, constable muharrir at police station Ahirauli, has proved preparation of chik F.I.R. (Ex. Ka-8) and proved carbon copy G.D. (Ex. Ka-9)

(l) P.W.-12, Dr. Vijendra Prasad, had conducted the post-mortem of the dead body of deceased Asha Devi at 2:45 P.M. on 26.4.2014. This witness found following injuries on dead body of the deceased Asha Devi:

i. Contusion with swelling 10.00 x 8.00 cm over right side face including right orbit.

ii. Contusion with swelling 6.00 x 5.00 cm over right side forehead just above right eyebrow.

iii. Lacerated wound 6.00x1.5.00 cm x bone deep over right side back of neck.

iv. Incised wound 3.00 x 1.00 cm x bone deep over left infra clavicular region.

v. Lacerated wound 5.00 x 1.00 cm x cavity deep over left side of neck at level of hyoid bone.

vi. Abrasion with contusion with swelling 7.00 x 6.00 cm over left side neck.

vii. Contusion with swelling 5.00 x 4.00 cm over post aspect of the right forearm underline fracture of the right radio ulna at the lower end.

In the *Internal Examination* this witness found fracture of the frontal bone at the right side, cut blood vessels and hyoid bone. In the opinion of this witness the cause of death was hemorrhage and shock as a result of antimortem injury. The witness opined that injuries might have been caused by hard object and sharp weapon. The injuries had been occurred by sharp edged *fawda and blunt object.*

(m) P.W. -13, Vinay Kumar Pathak, Station Officer, was the subsequent I.O. of the case, he has also recorded the statement of witness Chirkut, Rajwati. He had also copied inquest report and post-mortem report of the deceased Pooja. He recorded the statements of Chandrabhan

Yadav, Ram Narain Singh, Anil Sharma, Awdhesh Yadav and Manoj Gupta. This witness has submitted charge-sheet Ex. Ka-11.

(n) P.W.-14, Dr. S.N.Tiwari, District Hospital, Gorakhpur, who had conducted autopsy of deceased Km. Pooja daughter of the accused on 26.4.2014 at 4:10 P.M. and found following injuries;

(i) multiple horizontal linear abrasion in an area of 14.00 x 4.00 cm contused swelling over the past part of chest.

(ii) Contusion swelling present on chest on cutting skin underneath haematoma with ribs fracture underneath heart and lung rapture apart one litre blood present in thoracic cavity.

(iii) Stitched wound (1) over chin on udnerlying haematoma present in size of 7.00 x 1.00 cm.

In the opinion of this witness the deceased had died due to shock and as a result of antimortem injury.

(o) P.W.15, Constable Ramtahal, has deposed that in his presence, the then S.I. Ramvriksha Raj, had conducted the panchayatnama (Ex. Ka-13) of the dead body of the deceased Pooja. The dead body was sealed and given in his custody along with homeguard Ram Pratap. This witness has produced secondary evidence regarding paper no. 13 Ka and paper no. 33, photonash and challan nash. The papers annexed with the inquest report have been proved by this witness as Ex. Ka-13 to Ka-16.

14. After closure of the prosecution evidence, the statement of accused was recorded under Section 313 Cr.P.C. in which he denied the allegations of the prosecution and has stated that formal witnesses have given false statement. In addition to that he has stated that at the time of occurrence he was not at home, he had gone to his shop in the morning at 8:00 A.M. wherefrom he had gone to Pipraich to buy the goods. When he returned to Ahirauli, he was illegally arrested and beaten by the police.

15. From the above evidence it is very much clear that all the witnesses of fact have turned hostile and have not supported the prosecution version. According to prosecution some dispute arose between the accused and deceased Asha Devi and when the accused started beating Asha Devi, their daughter Pooja intervened and tried to save her mother, the accused in a fit of anger also assaulted Pooja by which she died during the course of treatment in medical college, Gorakhpur.

16. Further from the perusal of the impugned judgment, it transpires that the Sessions Judge has simply based his judgment of conviction and sentencing upon Section 106 of the Indian Evidence Act. Relying on the judgment of ***'Ramesh Bhai and Others Vs. State of Rajsthan 2009 (Supplementary) ACC 860 (SC)***, the trial Court has concluded that it is a case of circumstantial evidence (in absence of any intact direct evidence). The trial Court has firstly dealt with the motive. The motive alleged in the F.I.R. has not been affirmed and proved by the informant or other witnesses. It is nowhere established that at the time of the incident, the accused was at home. All the witnesses alongwith accused have deposed and stated that the accused had a cycle shop in Ahirauli Bazar and on

the fateful day he left the house at 8:00 A.M. and went to buy good in Pipraich Bazar wherefrom when he returned to Ahirauli Bazar at about 4:30 P.M., he came to know that his wife has been killed and his daughter was badly injured by some miscreants and when he reached the police station, he was detained and next day he was arrested and a fawda was planted as weapon used in commission of crime and a forged recovery was shown. There is no evidence that whether there was any scuffle between the accused and the deceased. According to prosecution version except deceased Asha Devi and Pooja none else was present at home. Rest of the family members were somewhere else. So far as the writing of the F.I.R. and recovery memo are concerned, the prosecution witnesses have deposed that on several plain papers their signatures were obtained by the police and police was in haste to open and conclude the case finally that is why they did not try to search and know the real miscreants.

17. Since the witnesses have turned hostile and there is no iota of evidence to take in support of the prosecution version, hence, it remains a case based on circumstantial evidence for which generally motive, last-seen, extra-judicial confession and recovery are considered and if the occurrence had taken place inside the house, in appropriate cases Section 106 of the Evidence Act can be invoked.

In para 11 of ***Shivaji Chintappa Patil Vs. State of Maharashtra, 2021 0 Supreme (SC) 121***, principles have been laid down regarding the cases based on circumstantial evidence;

"11. The law with regard to conviction on the basis of circumstantial evidence has been very well crystalised in the 5 (2010) 9 SCC 189 6 (2019) 19 SCC 447 7 (2006) 12 SCC 254 judgment of this Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra8 :-

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793 where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047] "19. .....Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions." (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of

the accused and must show that in all human probability the act must have been done by the accused. "

18. **Motive:** In this case so far as the motive is concerned, it is not established that there was any motive to the accused to cause death of the deceased and to injure his daughter. It could not be known that there was any motive. The wife and husband were passing their matrimonial life peacefully and out of their wedlock three siblings were born out and all were living happily in the joint family. There is no evidence that any altercation had taken place prior to this incident between the husband and the wife.

In ***Bhaskar Rao and Others Vs. State of Maharashtra, (2018) 6 SCC 591, Ujjagar Singh Vs. State of Punjab, (2007) 13 SCC 90***, it has been held that the motive has significance in cases based on circumstantial evidence.

In ***Shivaji Chintappa Patil Vs. State of Maharashtra, 2021 0 Supreme (SC) 121***, it has been held that in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances. If motive could not be proved the chain of circumstances would not be said to be completed.

In cases based on direct evidence motive does not have much significance, but in the cases based on circumstantial evidence motive becomes significant and of much consequence. The legal propositions were stated in ***Nagraj vs. State, (2015) 4 SCC 739, Wakkar Vs. State of U.P., 2011 (2) ALJ 452 SC and Nathuni Yadav Vs. State of Bihar, (1998) 9 SCC 238.***

Thus, on the basis of above discussion this Court is of the view that the prosecution has failed in establishing and proving the motive against the appellant.

19. **Last-seen:** So far as the last seen is concerned, none of the witnesses have deposed that at the time of occurrence, the deceased was accompanied by the accused. Certainly in the F.I.R., it has been averred that during the course of heated argument with the deceased, the accused started assaulting her by fawda and when daughter Km. Pooja tried to save the life of her mother, she was also assaulted but this fact has not been proved by either of the witness. Kamlesh, informant, P.W.-1, has deposed that he had signed Ex. Ka-1 and several other papers on being pressurized by the S.I. and the Inspector scared him to sign the same.

The dying declaration of Km. Pooja could not be recorded and she died during course of treatment at medical college, Gorakhpur. All the witnesses of fact have deposed that on the fateful day in the morning at about 8:00 A.M., the accused had left the house and had gone to Pipraich to buy goods for his shop at Ahirauli and when he returned there at about 4:00 P.M., he learnt about the incident occurred at his home and when he approached police, he was detained and next day he was booked as an accused. In absence of any reliable and cogent evidence that at the time of commission of crime the accused was at his home and during his stay at home, the deceased Asha Devi was killed and Km. Pooja was badly injured, it can not be concluded that there is any last-seen evidence against the accused-appellant. It is noteworthy that even P.W.5, Santosh Maurya, brother of the deceased Asha Devi, has not supported the

prosecution version and has deposed that some miscreants entered the house and killed his sister and injured his niece badly. The police instead of arresting the real miscreants arrested his brother-in-law.

In ***Kulwinder Singh Vs. State of Punjab, AIR 2007 SC 2868***, it has been held that there must be proximity of time and place. In this case it is lacking.

In ***Ganpat Singh Vs. State of M.P., (2018) 2 SCC (Cri) 159***, it has been observed, it would be difficult in some cases to positively establish that the deceased was lastly seen with the accused when there is a long gap and possibility of other persons coming in between exists. In absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in such cases.

In ***State of Karnataka Vs. M.V. Mahesh, (2003) 3 SCC 353***, it has been held that merely being last seen together is not enough to establish and indicate that the deceased had been done to death.

20. **Extra-judicial confession:** In this case there is no such extra-judicial confession and confession before police is barred by Section 25 of the Evidence Act.

21. **Recovery**: According to prosecution on the pointing of the accused fawda had been recovered which was used by the accused in commission of the alleged crime. It is noteworthy that except injury no. 4 rest of the injuries had been caused by blunt object and had not been occurred from fawda, if it is used in its normal course. Certainly if the back part of the fawda is used, the above injury may occur which is not the case of the prosecution that fawda was used from the back side as blunt object. As per the F.S.L. report there was human blood on saree and fawda but blood group could not be established. As per Ex. Ka-3, the plain fawda was recovered from the room at the roof but it was not recovered on the pointing of the accused. The witnesses Vinod Kumar and Kamlesh have denied that such fawda was recovered before them. They have deposed that their signature had been obtained on plain paper which might have been used in favor of the prosecution later on as recovery memo of fawda.

In ***G.L.Mangraju @ Ramesh Vs. State of A.P., AIR 2001 SC 2677***, it has been held that in a case based on circumstantial evidence one circumstance by itself may not unerringly point to the guilt of the accused. It is the cumulative result of all circumstances, which could matter. Hence, it is not proper for the Court to cull out one circumstance from the rest for the purpose of giving a different meaning to it.

When the alleged fawda was not recovered on the pointing out of the accused and when blood group could not be established that the sharp edged part of the weapon was containing the blood group of the deceased, it can not be concluded that the alleged fawda was used in commission of crime by the accused-appellant.

22. **About Section 106 of the Evidence Act;**

Learned trial Court has solely based his judgment upon Section 106 of the Evidence Act, hence, it would be

appropriate to quote the same which is as under;

"106. Burden of proving fact especially within knowledge.*—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

The evidence of the witnesses has been discussed. All the witnesses have deposed that at the time of alleged incident, accused-appellant had gone to Pipraich Bazar for purchasing goods, the deceased were alone in the house with her daughter Km. Pooja. There was separate house of the accused and the deceased persons. All the witnesses were out of the house and were busy in their work. Even P.W.5, Santosh Maurya, brother of the deceased Asha Devi who was also maternal uncle of Km. Pooja has admitted the same story that some miscreants entered the house, killed his sister and injured his niece badly due to which she also died during the treatment. He is also of the firm view that his brother-in-law accused-appellant Ramchandra had not committed the alleged offence. None of the prosecution witness has supported the prosecution story. Thus it is proved that the trial Judge has wrongly concluded that at the time of incident the deceased was in the company of the accused at the house and in the presence of the accused the deceased had been killed. According to this Court there is no such evidence that the accused was not having a cycle shop in Ahirauli Bazar and in the day hours he used to live in the house leaving his shop and soon before the killing or at or after the incident, the accused was there.

In ***Raju Vs. State, AIR 2009 SC 2171***, it has been held that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompitable with the innocence of the accused or the guilt of any other person.

In ***Vithal E Adlinge Vs. State of Maharshtra, AIR 2009 SC 2067***, it has been held that onus is on the prosecution to prove that the chain is complete and false defence or plea can not cure the infirmity or lacuna in the prosecution case. If the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted.

In ***Krishna Ghose Vs. State of W.B., AIR 2009 SC 2279***, it has been held that the circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

In ***Dev Kanya Tiwari Vs. State of U.P., (2018) 5 SCC 734***, it has been held that when there is no eye witness to the incident and the case is entirely based upon circumstantial evidence, then court is expected to be more careful while analyzing the evidence and convicting the

accused. In other words, in all probabilities chain of circumstances should lead to irresistible conclusion that accused participated in commission of crime and committed the offence.

The learned trial Judge has relied on the following citations:

(a) ***Rajesh Praksh Bhatnagar Vs. State (Delhi) (1985) 28 Del Lt 357***; in this case the occurrence had taken place in the night when the deceased wife, husband and two little children were inside the room and there was no chance of intervention by third party. The spouses were last seen together; in the morning dead body found on the road in such circumstances it was held that guilt of the accused was held.

In this case the occurrence took place in day light and none of the witnesses has deposed that at the time of the alleged occurrence, accused was at home. All the witnesses of fact have deposed that the accused had gone to Pipraich Bazar for buying goods for his cycle shop at Ahirauli Bazar. Hence, there being difference in facts of both the cases, the cited case can not be applied to this case.

(b) ***Prabhakar Vs. State of Maharashtra AIR 1982 SC 1217;*** in this the victim had died by asphyxia at the time of death only the accused was present with the victim. Victim tried to commit suicide by poisoning and it was held that the circumstantial evidence were enough to sustain conviction.

In this case it has not been established that at the time of commission of crime, the accused was in the company of the deceased, hence, the principles laid down in the cited case can not be applied in the present case.

(c) ***State of J&K Vs. Vijay Kumar and Others, AIR, 2017, Supreme Court 1507***; in this case there was allegation that accused-husband had committed murder of his wife. The dead body recovered from nallah near house of the accused. Torture marks including burns marks were found on the dead body. Medical evidence established homicidal death. It was also established from the evidence that soon before the death, the deceased was living with husband, therefore, Apex Court concluded that in such circumstances burden lies on husband under Section 106 of the Evidence Act to explain the circumstances in which the deceased had died and her dead body was found near nallah. Since the involvement of the accused husband was proved in commission of crime, hence, accused was convicted under Section 302 I.P.C. and sentenced to life imprisonment.

In the present case it has not been established that soon before the death of the victim and the daughter, the accused was present in the house. All the witnesses have deposed that the accused had left his house at 8:00 A.M. as he had gone to his shop at Ahirauli Bazar and Pipraich for buying goods. In absence of reliable and cogent evidence that at the time of occurrence, the accused was at his home with the deceased and Pooja, no burden under Section 106 of the Evidence Act would lie upon the accused-appellant.

23. **Fault of the trial Judge, Sri Vinay Kumar (presently posted as District and Sessions Judge, Etawah).**

It is very much clear from para 21 of the judgment that the trial Judge has

merely transcribed the head notes of the rulings, without going through it, he has copied the head notes of the rulings only. Citing the judgments in such a manner is showing casual approach of the trial Judge. Even he did not care to correct the spellings as ‘Burder’ in place of ‘Burden’ and ‘onh’ in place of ‘on’ have been transcribed. In para 22 of the judgment 'पोस्टमार्टम' has been written as 'पोस्मार्टम'. About injuries 'just' has been written as 'rust', 'bone deep' as ‘bonedip’, ‘back’ as ‘beack’, ‘infra clavicular' as 'intra cla’, ‘region' as 'rigion', 'lacerated' as 'lacrtad', 'level' as 'loved', 'hyoid' as 'hiyod', 'abrasion' as 'abrrassion', 'swelling’ as 'swiling', 'neck' as 'neack', 'aspect' as 'aspeed', 'forearm' as 'fore srm', 'underline’ as 'induring' , 'ulna' as 'albon' and ‘end’ has not been written, 'fracture' as 'facture', 'frontal bone' as 'frontbone', 'lungs' as 'lunges', 'congested' as 'congusted', 'faecal matters' as 'fecal mater', 'gases' as 'gase', 'haemorrhage' as 'hamingri', 'antimortem injury' as 'antimortam injuri'. At page 4 of the judgment 'उसने दरख्वास्त लिखा' has been written as 'उसे दरखास्त लिख' . 'दस्तखत' has been written as 'दस्ताखत'. In para 24 & 25 of the judgment several writing mistakes have been committed such as 'thoracic cavity' has been written as 'korecil cabity', on three other places 'पोस्टमार्टम' has been written as 'पोस्टामर्टम', 'उपनिरीक्षक' as 'उपनिरीखक', ' पंचायतनामा as 'पंचायतामा नकी', on two places 'हस्तलेख' has been written as ' हस्तलखे'. In para 28 'दरख्वास्त' has been written as 'दरखास्ते’. Similar writing mistakes have been committed in para 33 & 34 of the judgment. So many other clerical mistakes have been committed by the trial Judge which shows that either he does not know to write the basic Hindi, English and judicial precedents or he has very casual approach regarding the judicial work.

Hence an instruction has to be sent to the trial Judges to remain cautious in future while writing the judgment and referring the citations.

24. The trial Court has also discussed the plea of alibi that mere assertion of plea of alibi, it can not be said to be proved. However, as per this Court when from the evidence on record it would be established beyond reasonable doubt that the accused has committed the crime and he was present on the spot at the alleged time of commission of crime only then an explanation can be sought from the accused-appellant regarding his liability. When none of the witnesses deposed that accused-appellant was present on the place of occurrence as alleged by the prosecution, why the burden of proving the alibi would be upon the accused. When from the evidence of all the eyewitnesses of fact, it has been established that the appellant had left his house as usual at 8:00 A.M. Mere disproved assertion in the F.I.R. is not enough to conclude that the version of the prosecution is true, correct and final. The F.I.R. is merely an instrument to accelerate the police machinery, it is not substantive piece of evidence which can be used only to contradict the author under Section 145 of the Indian Evidence Act. There is also allegation by the informant and other witnesses that their signatures were obtained on the plain papers which were later on used by the I.O. as per the convenience.

25. On the basis of above discussion, this Court is of the view that if it is accepted that is a case of direct evidence, since the witnesses have not supported the prosecution version and there is cross-

version from the side of accused-appellant that some miscreants had committed the crime in absence of the family members, it can not be concluded that the prosecution has been successful in proving the case beyond reasonable doubt. If after ousting the oral testimonies which are not in support of the prosecution, it is concluded that it was a case of circumstantial evidence, in that case the mandatory elements such as motive, last-seen, extra-judicial confession and recovery have not been proved beyond reasonable doubt against the accused-appellant. Since there is no iota of evidence that at the time of alleged occurrence, the accused was at home, hence, no burden under Section 106 of the Evidence Act, would be upon the accused-appellant.

26. Thus, from all the four corners, this Court is of the view that the prosecution has failed miserably in proving the guilt beyond reasonable doubt against the accused-appellant. The trial Court has also failed in appreciating the evidence and law and has wrongly applied the law and has come up to the wrong conclusion and has convicted and sentenced the accused-appellant without any basis.

27. Accordingly, this appeal succeeds and the impugned judgment and order of conviction and sentencing dated 7.9.2017 is liable to be set aside.

Order

28. The appeal is allowed and the order and judgment of conviction and sentencing dated 7.9.2017 is hereby set aside. The accused-appellant, Ramchandra, is acquitted of the charge under Section 302 I.P.C. levelled against him. The appellant be set free forthwith if not warranted in any other offence.

29. We request Registrar General of this Court to place this judgment before Hon'ble The Chief Justice to circulate our concern in para 23 to concerned Judge and to trial Judges to be more careful in future while referring to medical reports and authoritative pronouncements.

30. Records of the case along with copy of this judgment be sent back to the Trial Court forthwith for consignment.

(2023) 6 ILRA 155
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.03.2023 & 01.05.2023

BEFORE

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

First Appeal From Order No. 279 of 1996

Radhey Shyam Gupta & Ors. ...Appellants
Versus
Qamar Uddin & Anr. ...Respondents

Counsel for the Appellants:
Sri Madhav Jain

Counsel for the Respondents:

A. Civil Law - Motor Vehicles Act, 1988-Section 173-quantum of compensation-deceased falls within the category of self employed and his age is within the age bracket of 21-25 years at the time of accident-income of the deceased is

considered to be Rs. 1000/- 40% of income added towards future loss of income-Hence, total compensation granted Rs.2,56,800/- @ 6% from Rs. 66000/- (Para 1 to 16)

B. As per ratio laid down in Hansaguri Ladhani case, the 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 fo this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income-Tax Authority. (Para 14)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. NICL Vs Pranay Sethi (2014) 4 TAC 637 SC

2. Sarla Verma & ors. Vs DTC (2009) 2 TAC 667(SC)]

3. Kurvan Ansari @ Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr. (2021) 4 TAC SC

4. A.V. Padma Vs Venugopal (2012) 1 GLH SC 442

5. Smt Hansaguri P. Ladhani Vs The Oriental Ins. Co. Ltd 2007(2) GLH 291

6. Bajaj Allianz Gen. Ins. Co. Pvt. Ltd Vs U.O.I. & ors.

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

1. By way of this appeal, the appellant has challenged the judgment and order dated 30.11.1995 passed by Motor Accident Claims Tribunal / 1st Additional District Judge, Firozabad (hereinafter referred to as "Tribunal') in M.A.C.P. No. 38 of 1992 (Radhey Shyam and others Vs. Qamar Uddin and others) awarding a sum of Rs.4,34,000/- as compensation to the claimants/appellants with interest at the rate of 12% per annum from the date of filing the claim petition.

2. Heard Mr. Madhav Jain, learned counsel for the appellant. This appeal is of the year 1994, the National Insurance Co. Ltd./respondent has chosen not to appear in this case. This Court has no other option but to conduct the matter ex parte.

3. The brief facts of the case are that claimants-appellants filed a Motor Accident Claim Petition before the Tribunal for claiming the compensation under Motor Vehicles Act, 1988 for the death of Rakesh Gupta in a road accident with the averments that on 13.9.1991, Rakesh Gupta-deceased was going towards railway station by his scooter, at that time bus bearing no. 81/1027 was coming from opposite side, which was being driven very rashly and negligently by its driver. The aforesaid bus being driven in such a manner dashed deceased's scooter. In this accident, deceased sustained very serious injuries and died during the treatment in the S.N. Hospital, Firozabad.

4. Aggrieved mainly with the compensation awarded, the appellants have preferred this appeal.

5. The accident is not in dispute. The issue of negligence has attained finality as neither the Insurance Company nor the owner of the vehicle has disputed the same even in oral submissions. The driver of the

said vehicle was having valid and effective driving licence on the date of accident is also a decided fact. The vehicle being insured and there being no breach of policy condition is a finding, which has attained finality. The only issue to be decided is the quantum of compensation awarded by the Tribunal.

6. Learned counsel for the appellants-claimants has submitted that the learned Tribunal has not added any amount towards future loss of income, which is bad on facts and has not granted any amount under the head of non pecuniary damages.

7. The income of the deceased can be considered to be Rs.1,000/- per month as considered by learned Tribunal. The income of Rs.1,000/- cannot be found fault with in the year of accident i.e. 1991 of a person, who was a bachelor doing business in a small village, therefore, submission that the income should be considered at Rs.4,000/- cannot be accepted. The deceased will fall within the category of self employed and his age was in the age bracket of 21-25 years at the time of accident, hence, 40% of income shall be added towards future loss of income and 1/2 shall be deducted for personal expenses as held by Hon'ble Apex Court in ***National Insurance Company vs. Pranay Sethi [2014 (4) TAC 637 (SC)].*** Keeping in view the age of the deceased, multiplier of 18 will be admissible in the light of the judgment of Hon'ble Apex Court in the case of ***Smt.Sarla Verma vs. Delhi Transport Corporation [2009 (2) TAC 677 (SC)].***

8. As far as non-pecuniary damages are concerned, the Tribunal has not awarded any sum towards non pecuniary damages. In the light of Judgment in the case of ***Pranay Sethi (supra)***, parents/claimants shall be entitled to get Rs.30,000/- for loss of consortium in the light of the judgment of Hon'ble Apex Court in the case of ***Kurvan Ansari alias Kurvan Ali and another vs. Shyam Kishore Murmu and another [2021 (4) TAC (SC)].***

9. Hence, the total amount of compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

(i) Annual Income : Rs.12,000/- Per annum (Rs.1,000 X 12)

(ii) Percentage towards future prospects 40% : Rs. 4,800/-

(iii) Total income : Rs. 12,000/- + Rs.4,800/- = Rs. 16,800/-

(iv) Income after deduction 1/2 : Rs.16,800/- - Rs.8,400/- = Rs.8,400/-

(v) Multiplier applicable : 18

(vi) Loss of Dependency : Rs. 8,400/- X 18 = Rs.1,51,200/-

(vii) Amount under non pecuniary head : Rs. 30,000/-

(viii) Total compensation : Rs.1,51,200/- + Rs.30,000/- = Rs.1,81,200/-

10. As far as issue of rate of interest is concerned, the interest of 12% is maintained. However, from the date of filing of claim petition, on the enhanced amount interest would be 9% from the date of filing of the claim petition till award and 6% thereafter till deposit of amount.

11. 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. The

amount already deposited be deducted from the amount to be deposited.

12. Record and proceedings be sent back to the Tribunal forthwith. The amount be paid to the claimants and no amount be kept in fixed deposit.

13. 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.

14. 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. The said decision has also been reiterated by High Court Gujarat in R/Special Civil Application No.4800 of 2021 (The Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS) decided on 5.4.2022.

15. 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.

16. 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.

Further Order:-

Officers of Insurance Company are present in other matters for conciliation. After pronouncement of judgment, the amount is accepted but the rate of interest would be flat 6 % per annum, which is agreed by the parties.

1. Heard learned counsel for the appellants.

2. The reliefs as prayed for are granted as the parties have already decided to bury their dispute after the judgment was passed ex parte.

3. In the light of the submission made by the counsel for the appellants-applicants, the following correction is being made in the order dated 1.3.2023:-

4. "In the sixth line of first paragraph of the order, in place of Rs.4,34,000/- it shall be read as Rs.66,000/-.

5. The income of the deceased can be considered to be Rs.1500/- per month i.e. Rs.18,000/- per annum, 40% will have to be added towards future loss of income, deducted 1/2 towards personal expenses of the deceased, granted multiplier of 18 and granted Rs.30,000/- towards non pecuniary damages. Hence the total amount of compensation in view of above discussion is being recalculated herein below:-

(i) Annual Income : Rs.18,000/- Per annum (Rs.1,500 X 12)

(ii) Percentage towards future prospects 40% : Rs. 7,200/-

(iii) Total income : Rs. 18,000/- + Rs.7,200/- = Rs. 25,200/-

(iv) Income after deduction 1/2 : Rs.25,200/- ? Rs12,600/- = Rs.12,600/-

(v) Multiplier applicable : 18

(vi) Loss of Dependency : Rs. 12,600/- X 18 = Rs.2,26,800/-

(vii) Amount under non pecuniary head : Rs. 30,000/-

(viii) Total compensation : Rs.2,26,800/- + Rs.30,000/- = Rs.2,56,800/-

6. In view of above, the correction application is allowed.

(2023) 6 ILRA 159
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.06.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 67 of 2023

Mirah Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Manushresth Misra, Sushil Kumar Singh

Counsel for the Respondents:
G.A., Manoj Kumar Misra

The Constitution of India, 1950-Article-226- Habeas Corpus- While deciding the matter of custody of children, primary and paramount consideration is welfare of the children so demands then technical objections cannot come in the way. However, while deciding the welfare of the children it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the children. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at way with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents- In the interest of Justice as the welfare love affection company protection is in the custody of the father-Visitation rights granted to mother- Petitioner is at liberty to approach the appropriate forum for claiming the custody of the children under the Hindu Minority and Guards Act 1956 or under the Guardians and Wards Act, 1890.(Para 19, 27 & 28) (E-15)

List of Cases cited:

1. Nithya Anand Raghvan v St. (NCT of Delhi) & anr.2017 8 SCC 454

2. Dhanwanti Joshi Vs Madhav Unde (1998) 1 SCC 112

3. Shradha Kannaujia (Minor) & anr.,Vs St. of U.P. & ors. in Habeas Corpus No. 716 of 2020

4. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors. Criminal Appeal No. 838 of 2019 order dated 06.05.2019

5. Master Manan @ Arush Vs St. of U.P & ors., decided on 18.02.2021

6. Vahin Saxena (Minor Corpus) & anr. Vs St. of U.P. & ors. decided on 27-08-2021

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

1. Heard Sri Shubham Aggarwal along with Ms. Suksham Aggarwal and Sushil Kumar Singh, the learned counsel for the petitioner-Smt Ira Sharma as well as Smt. Kiran Singh and Prem Prakash, the learned Additional Government Advocate-I for the State-respondent Nos. 1 to 3 and Sri Manoj Kumar Misra, learned counsel for the respondent No.4 and pleadings between the parties have already been exchanged.

2. The petitioner-Ira Sharma has filed this Habeas Corpus petition with the following reliefs:

"i) to issue a writ, order or direction in the nature of Habeas Corpus commanding the respondents to produce the corpus of detenues, namely Rayan Pandey and Mirah Pandey at the earliest before this Hon'ble Court and to handover the custody of the said minor children to petitioner being their mother.

ii) to issue directions to the respondent no.4 through respondent No.1 and 2 for making necessary provisions for interaction and conversations between the petitioner/mother and the minor children immediately and during pendency of the present writ petition by mode of voice and video calls.

iii) to issue any other order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case in favour of the petitioner in the interest of justice.

iv) Allow the writ petition with costs."

3. This Court on 20.04.2023 had passed the following order:

"Sri Manoj Kumar Misra, Advocate has filed his Vakalatnama today in Court on behalf of opposite party No.4. The same is taken on record.

In compliance of order dated 02.03.2023 opposite party No.4-Dhreerendra Pandey @ Dheerendra Vikram Pandey along with detenues, namely, Mirah Pandey-daughter and Rayan Pandey-son is present before this Court in person accompanied by Sub Inspector Sri Rajneesh Dwivedi and lady constable Ms. Archana Yadav, Police Station Kotwali Nagar, District Gonda.

Smt Ira Sharma, petitioner is also present before this Court in person. She has been identified by her counsel Mr. Shubham Aggarwal.

Heard Shri Shubham Aggarwal alongwith Ms. Suksham Aggarwal, the learned counsel for the petitioner-Smt Ira Sharma as well as Sri Manoj Singh and Prem Prakash, the learned A.G.A.-I for the State and Sri Manoj Kumar Misra, learned counsel for the opposite party No.4.

Learned counsel for the opposite party No.4 has filed counter affidavit today in Court after serving the copy of the same to learned counsel for the petitioner. The same is taken on record.

Learned counsel for the petitioner prays for and is allowed four days time to file rejoinder affidavit.

Smt Ira Sharma, petitioner submits that she is staying in India till 2nd may, 2023. She further prays that she may be given at least one hour time in the evening between 6.00 p.m. to 7.00 p.m. to meet her children, during her stay in India and she wants to talk to her children on mobile and on video call.

Mr. Dhreerendra Pandey @ Dheerendra Vikram Pandey-opposite party No.4 has no objection to the request made by the petitioner-Smt Ira Sharma.

As prayed, Smt Ira Sharma, petitioner is permitted to meet her children in the evening between 6.00 p.m. to 7.00 p.m.during her stay in India up to 02.05.2023 at the current residence of opposite party No.4 i.e. Omax R-2, Building 15, Flat 1104, Lucknow and she is also permitted to talk to her children for ten minutes in the evening on mobile and on video call, but not after 9.00 p.m.

It is made clear that during visit of Smt Ira Sharma at the residence of opposite party No.4 and during mobile call, Mr. Dhreerendra Pandey @ Dheerendra Vikram Pandey-opposite party No.4 will not create any hindrance.

Put up this case on 27.04.2023 for further hearing before this Court.

On the next date fixed, Mr. Dhreerendra Pandey @ Dheerendra Vikram Pandey,opposite party No.4 and Smt. Ira Sharma, petitioner shall again appear in person before this Court but detenues, namely, Mirah Pandey-daughter and Rayan Pandey-son need not to appear unless called for and their custody during that period shall remain with their father Mr. Dhreerendra Pandey @ Dheerendra Vikram Pandey-opposite party No.4."

4. On 27.04.2023 this Court had passed the following order:

"In compliance of order dated 20.04.2023 opposite party No.4-Dhreerendra Pandey @ Dheerendra Vikram Pandey and petitioner-Smt Ira Sharma are present before this Court in person and they have been identified by their respective counsels.

Pleadings between the parties have been exchanged. The case is being heard finally today.

Heard Sri Shubham Aggarwal along with Ms. Suksham Aggarwal and Sushil Kumar Singh, the learned counsel for the petitioner-Smt Ira Sharma as well as Smt. Kiran Singh and Prem Prakash, the learned Additional Government Advocate-I for opposite party Nos. 1 to 3 and Sri Manoj Kumar Misra, learned counsel for the opposite party No.4-Dhreerendra Pandey @ Dheerendra Vikram Pandey.

Judgment reserved.

Till the pronouncement of the judgment, interim arrangement made by this Court vide order dated 20.04.2023 shall continue. It is further provided that petitioner-Ira Shama, if she is in abroad, she is allowed to have conversation with her children Mirah Pandey-daughter and Rayan Pandey-son by mobile phone, whats app call or video call during 8.00 p.m to 8.30 p.m. as per Indian Standard Time."

5. Learned counsel for the petitioner submits that the petitioner-Ira Sharma got married to respondent No.4-Dheerendra Pandey @ Dheerendra Vikram Pandey at Dharamshala, Himanchal Pradesh on 15.02.2008 as per Hindu Rites and Ceremonies. Thereafter, the couple relocated to U.S.A. for their bright future. After shifting to U.S.A., due to their wedlock two children, one male child namely Master Rayan Pandey born on 02.10.2013 and one female child namely Mirah Pandey born on 03.04.2018 and

were having American Passport and it was further submitted that after the second child was born the relationship between the husband and wife started to turn more absurd and regular dispute arose.

Thereafter, the petitioner and respondent No.4 entered into an amicable settlement through a document titled as "Matrimonial Settlement Agreement" (hereinafter referred to as "M.S.A.") on 02.06.2022. After entering into a settlement, the petitioner and respondent No.4 approached family court and got divorce by mutual consent by the court of competent jurisdiction at U.S.A. i.e. Superior Court of New Jersey Chancery Division: Family Part Somerset Country vide Docket No. FM-18-267-22. True copy of the Matrimonial Settlement Agreement and Decree of Divorce as granted by the Courts of the USA have been filed as Annexure Nos. 3 and 4 to this habeas corpus petition.

6. Learned counsel for the petitioner further submits that the respondent No.4 is running an IT Company in U.S.A. with his brother and is earning in millions of U.S. Dollars per annum but the petitioner did not take a single penny as Alimony or any amount of maintenance from the respondent No4 at the time of divorce.

7. Learned counsel for the petitioner has drawn attention of this Court towards Article III of the M.S.A. and submits that the days were fixed for the physical custody of the children but the respondent No.4 kept the petitioner in dark and on certain pretext took the children from U.S.A. to India at his native place, without obtaining consent of petitioner for permanent relocation of children while the children, being born and settled in USA and having being attached to their mother and they never wanted to come to India with the respondent No.4. He further submits that initially, respondent No.4 used to make the children speak to the petitioner and allowed petitioner to interact with her children, but, later on he did not allow the children to talk to petitioner over video call or even on phone voice call for several weeks.

8. Learned counsel for the petitioner further submits that after some time the behavior of respondent No.4 turned very abnormal and the petitioner came under suspicion and started to feel very unsafe regarding children.

9. Learned counsel for the petitioner further submits that the son and daughter of petitioner, namely Rayan Pandey and Mirah Pandey, who are aged about 9 and 4 years respectively at present are in illegal detention of the respondent No.4-father against the judgment of the Court of U.S.A. for which he is not legally entitled as he is flouting the orders of the Hon'ble Court of USA.

10. Learned counsel for the petitioner further submits that the petitioner approached Station House Office, Civil Lines, Gonda and Superintendent of Police, Gonda, U.P. and brought into their notice about the entire incident, but they did not conduct the investigation to locate the whereabouts of the children of petitioner. Learned counsel for the petitioner further submits that the respondent No.4 has no love and affection towards the children and the petitioner being mother is legally entitled to get the custody of her children being natural guardian and she is earning handsome figure and can take care.

11. Learned counsel for the petitioner further prays for handing over the custody of said minor children to petitioner who is

biological mother of minor children, so that the children can be taken to United States of America where they were born and the present habeas corpus petition may be allowed by this Hon'ble Court.

12. Per Contra, Sri Manoj Kumar Misra, learned counsel for the respondent No.4 filed counter affidavit, which is on record and submits that the petitioner-Ira Shama is a most irresponsible lady who does not have any respect or love and care for any relation nor for her husband and for minor children. She has been sent to jail for committing cruelty against the respondent No.4. She is an alcoholic lady with very short temperament. She used to even beat her children. Even she is so self-centered that she had left her son alone in America when he was only five years old child and came to India just for her career. Even she left her very young daughter at Dharamshala, Himachal Pradesh to live with her maternal grandmother and she herself went to Bangalore in the name of her work. However, from May, 2020 till July, 2020 Ira Sharma-the petitioner stayed at Dharamshala due to the Nationwide lockdown and once again in August, 2020 she went to Banglore leaving her two years old daughter at Dharamshala. He further submits that when the children were infected with Covid, her focus was on finding a new job instead of the well-being of the children. On top of that, even though she was not working at that time, but she started keeping Rayan Pandey-son in day-care (creche) for the entire day even tough Covid was still at peak in the U.S. resulting Rayan Pandey-son got sick several times and once had to be hospitalized too. She did not show any love and affection towards the children. He further submits that while signing the MSA, petitioner-Ira Sharma deliberately, willfully and knowingly insisted to add a condition which allows her to leave her children in custody of respondent No.4 so that she will be at liberty to move to any country in the name of her profession. This fact, itself shows that petitioner-Ira Sharma does not have any love and affection towards her children.

13. Sri Manoj Kumar Misra, learned counsel for the respondent No.4 has placed reliance on the Clause 10.1 of the Article X of MSA to show the conduct of the wife and the reason for divorce and the mental cruelty cause to the husband, which is being reproduced herein-below:

"10.1 Husband filed his complaint for divorce under the causes of action of extreme cruelty, adultery, and irreconcilable differences. Upon final dissolution, Husband agrees to withdraw his count of extreme cruelty and proceed solely under the counts of adultery and irreconcilable differences. Wife filed her counterclaim for divorce under the causes of action of irreconcilable differences and extreme cruelty. Upon final dissolution, Wife agrees to withdraw her count of extreme cruelty and proceed under the cause of action of irreconcilable differences."

14. Learned counsel for the respondent No.4 has also placed reliance on the decree of divorce and submitted that in the decree of divorce a finding has been recorded that respondent No.4 has been able to prove the charges of adultery against petitioner-Ira Shama. The relevant extract of the decree of divorce is being reproduced herein-below:

"This MATTER having come before the Court for an uncontested

hearing, and the plaintiff, Dheerendra Pandey, having been represented by IIham S. Rose, Esq, of Offit Kurman, P.A. and the defendant, Ira Sharma, having been represented by Taryn R. Zimmerman, Esq. Of the De Tommaso Law Group, LLC, and the parties having entered into a Marital Settlement Agreement dated June 2, 2022, and it appearing the plaintiff and defendant were joined in the bond of matrimony of February 15,2008, and each having proven a cause of action of irreconcilable differences, and no reasonable prospect of reconciliation exists between them; along with plaintiff proving a cause of action of adultery and successfully serving the co-respondent; and

IT FURTHER APPEARING that at the time the within causes of action arose, the plaintiff was a bona fide resident of this State and has ever since and for more than one year next preceding the commencement of this action, continued to be scuh a bona fide resident, and

IT FURTHER APPEARING that jurisdiction herein has been acquired pursuant to the Rules of Court; and

IT FURTHER APPEARING that a certain Marital Settlement Agreement dated June 2, 2022 was entered into between the plaintiff and the defendant, was submitted to this Court by counsel for the parties and is annexed hereto, with no testimony having been taken by the Court as to the terms of said Agreement;

IT IS thereupon, on this 7th day of June, 2022 by the Superior Court, Chancery Division, of the State of New Jersey;

ORDERED AND ADJUDGED by virtue of the power and authority of this Court and of the acts of the Legislature in such cases made and provided, that the plaintiff, Dheerendra Pandey, and the defendant, Ira Sharma, are hereby divorced from the bonds of matrimony from each other, for the causes aforesaid, and the said parties and each of them be and same are hereby freed and discharged from the obligations thereof and the marriage between the parties be and the same hereby is dissolved; and

IT IS FURTHER ORDERED AND ADJUDGED that the Marital Settlement Agreement between the parties hereto, a copy of which is attached hereto but not merged herewith be and hereby is permitted by this Court to be made a part of and is incorporated in this Judgment with the understanding that the Court took no testimony upon and did not pass upon the merits of said Agreement, except that the Court has determined that both parties have voluntarily executed the Agreement and that each has accepted the terms thereof as fair and equitable; and

IT IS FURTHER ORDERED AND ADJUDGED that the parties have adequately addressed the issue of the standard of living and the likelihood of maintaining a reasonably comparable standard of living as required by Crews v. Crews, 164 N.J. 11 (2000).

IT IS FURTHER ORDERED AND ADJUDGED that the parties are directed to comply with each and every obligation to which they have subscribed in the aforementioned written Marital Settlement Agreement; and

IT IS FURTHER ORDERED AND ADJUDGED that the attorneys for plaintiff and the attorneys for defendant be and hereby are discharged as the attorney of record after 45 days from the date of this judgment; and

IT IS FURTHER ORDERED AND ADJUDGED that all issues pleaded and not resolved in the judgment are deemed abandoned."

15. Sri Manoj Kumar Misra, learned counsel for the respondent No.4 further submits that petitioner-Ira Shama herself consented to get both the children admitted to some reputed school in India by e-mail and she will keep on visiting India and whenever she will be in India she will visit her children at Lucknow, the place of stay of respondent No.4 and it was under these circumstances that respondent No.4 had got both the children admitted in G.D. Goenka Public School, Sector B Sushant Golf City, Shaheed Path, Lucknow affiliated to CBSE Board, New Delhi, where they are studying in Class IV and I. The e-mail sent by petitioner-Ira Sharma to respondent No.4-Dheerendra Pandey is quoted herein-below:

"I will check with them again. They have asked me to call tomorrow morning.

Also, find attached my passport copy and aadhar card. I am only providing you for using it in school admission for kids.

Best Regards,
Ira Sharma
Cell 201-560-7693"

Copy of the e-mails in which petitioner-Ira Sharma herself had consented for admission of the children in India and the Admission Record of the children and e-mails are annexed as Annexure No.CA-2 to the counter affidavit.

16. Learned counsel for the respondent No.4 further submits that the respondent No.4 does not have any objection if the petitioner-Ira Sharma wishes to visit the children in Lucknow during her stay in India, provided the same does not hamper their studies. He further submits that the admission of both the children were done at the aforesaid school with the consent of mother-Ira Sharma. She has given copy of her Aadhar Card and Passport by e-mail on 22.08.2022. Thus, it is not a case of any illegal detention but the children are living and studying with their father with the consent of her mother.

17. Learned counsel for the respondent No.4 further submits that in case of any dispute as per Matrimonial Settlement Agreement there is a Provision in Clause 3.11 of the agreement for Return to Mediation, which is being reproduced herein-below, thus this habeas corpus petition is not maintainable.

"3.11 Return to Mediation: The parties agree that if any differences arise from this agreement, they will first attempt to resolve these concerns amicably between themselves. If the parties reach an impasse, they agree that they will attempt to resolve these issues through mediation and understand that they may contact the Somerset Country Family Mediation program before filing a motion for Court intervention. The parties agree that either of them may initiate this process by contacting the mediator and scheduling a session. Both parties agree to participate in future mediation sessions with a good faith effort at resolution."

18. Smt Kiran Singh and Sri Prem Prakash, learned A.G.A-I have also supported the argument advanced by learned counsel for the respondent No.4.

19. After considering the arguments as advanced by learned counsel for the parties this Court finds that minor child should not be deprived of the love and affection of both the parents as deprivation results in a grave phycological impact upon the impressionable and innocent disposition of a child in his formative years and in this

case the minor children are being deprived of the love an affection of their parents and the parents are not able to interact with their children meaningfully. Whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child. The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. Further the question of custody cannot be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. It is further held that the welfare of the child must be decided on a consideration including the general psychological, spiritual and emotional welfare of the child. While resolving the disputes between the rival claimants for the custody of a child, the aim of the Court must be to choose the course which will best provide for the healthy growth, development and education of the child so that he or she will be equipped to face the problems of life as a mature adult.

20. In the present case it is not in dispute that the petitioner-Ira Sharma got married to respondent No.4-Dheerendra Pandey @ Dheerendra Vikram Pandey at Dharamshala, Himanchal Pradesh. Thereafter, the couple relocated to U.S.A. for their bright future. After shifting to U.S.A., due to their wedlock two children, one male child namely Master Rayan Pandey born on 02.10.2013 and one female child namely Mirah Pandey born on 03.04.2018 and were having American Passport. After some time the relationship between the husband and wife started to turn absurd and regular dispute arose. Thereafter, the petitioner and respondent No.4 entered into an amicable settlement through a document titled as Matrimonial Settlement Agreement on 02.06.2022. After entering into a settlement, the petitioner and respondent No.4 approached family court and got divorce by mutual consent by the court of competent jurisdiction at U.S.A. i.e. Superior Court of New Jersey Chancery Division: Family Part Somerset Country vide Docket No. FM-18-267-22. and from perusal of the decree of divorce, finding has been recorded that respondent No.4 has been able to prove the charges of adultery and irreconcilably differences against the wife Ira Shama, thus this type of situation gives a negative impact on the psychological behavior of the minor children and is also not in the welfare of the children.

21. In the case of **Nithya Anand Raghvan v State (NCT of Delhi) and another 2017 8 SCC 454,** it was held by Hon'ble Apex Court that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. The relevant observations made in para 44 to 47 in the judgement are being reproduced herein below:

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in **Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674**, has held that habeas corpus was

essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in **Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247,** has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In **Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42**, it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be

taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

Similarly, in the case of **Dhanwanti Joshi Vs Madhav Unde (1998) 1 SCC 112**, the Hon'ble Apex Court was pleased to observe in para 27, 29, 30 of the judgment as under:

"27…..…However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to the United States of America on the ground that its removal from USA in 1984 was contrary to the orders of US courts. It was also held that whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest of the minor." (emphasis supplied) Again in paragraphs 29 and 30, the three-judge bench observed thus:-

"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full Nithya Anand Raghavan vs State Of Nct Of Delhi on 3 July, 2017 development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in Mckee v. McKee that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in L (Minors), In re and the said view has been approved by this Court in Dhanwanti Joshi. Similar view taken by the Court of Appeal in H. (Infants), in re has been approved by this Court in Elizabeth Dinshaw."

Similarly, in the case of **Shradha Kannaujia (Minor) and Another ,Vs State of U.P. and 5 others** in Habeas Corpus No. 716 of 2020 a co-ordinate

Bench of this Hon'ble court was pleased to observe as under:

"It is well settled that writ of habeas corpus is a prerogative writ and an extraordinary remedy. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration and it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed."

22. In the present case petitioner-Ira Sharma herself consented to get both the children be admitted to some reputed school in India by e-mail and she will keep on visiting India and whenever she will be in India she will visit her children at Lucknow, the place of stay of respondent No.4 and it was under these circumstances that respondent No.4 had got both the children be admitted in G.D. Goenka Public School, Sector B Sushant Golf City, Shaheed Path, Lucknow affiliated to CBSE Board, New Delhi, where they are studying in Class IV and I. It is not in dispute that the admission of both the children was done at the aforesaid school with the consent of the mother Ira Sharma for this reason she herself has provided her Aadhar Card and Passport copy as per e-mail dated 22.08.2022 sent to the respondent No.4, thus the case set up by the petitioner Ira Sharma that the minor children are under illegal detention of respondent No.4 have no force and there appears force in the argument of learned counsel for the respondent No.4 that the present habeas corpus writ petition is not maintainable as the children are not under illegal custody of the father and are studying in India with the consent of the mother Ira Sharma and for custody she may approach the correct forum in accordance with law.

23. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined by Hon'ble Apex Court in the case of **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others Criminal Appeal No. 838 of 2019 order dated 06.05.2019** and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective.

The observations made in the judgment in this regard are as follows:-

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

x x x

19. Habeas corpus proceedings is not to justify or examine the legality of the

custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

24. A co-ordinate Bench of this in **Master Manan @ Arush Vs State of U.P & 8 others, decided on 18.02.2021** was pleased to observe in para 16 and 17 as under :

"16. In the present case, it is undisputed that the child is with his father since 22.8.2019 under his care and custody. It is not the case of either party that the child was forcibly taken away by the father from the custody of the mother. The pleadings and the material on record indicates the existence of a dispute with regard to the handing over the custody of the child to the mother, pursuant to some agreement between the parties, the terms of which, are now being disputed.

17. It has been pointed out that the date of birth of the child is 09.08.2013, and accordingly, the child being more than 5 years of age, the custody of the child with the father, in view of the provisions under Section 6 (a) of The Hindu Minority and Guardian ship Act, 1956, cannot be said to be prima facie illegal."

25. A co-ordinate Bench of this Court in Habeas Corpus Writ Petiton No. 467 of 2021 **Vahin Saxena (Minor Corpus) ans Another Vs State of U.P. and three others** decided on 27-08-2021 was pleased to observe in para 22 as under:

"22. In a child custody matter, a writ of habeas corpus would be entertainable where it is established that the detention of the minor child by the parent or others is illegal and without authority of law. In a writ court, where rights are determined on the basis of affidavits, in a case where the court is of a

view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate forum. The remedy ordinarily in such matters would lie under the Hindu Minority and Guardianship Act, 195613 or the Guardians and Wards Act, 189014, as the case may be."

26. It is, therefore, seen that in an application seeking a writ of habeas corpus for custody of minor children, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the children can be said to be unlawful and illegal and whether the welfare of the children requires that the present custody should be changed and the children should be handed over in the care and custody of somebody else other than in whose custody the children presently are.

27. It is well settled law by a catena of judgments that while deciding the matter of custody of children, primary and paramount consideration is welfare of the children so demands then technical objections cannot come in the way. However, while deciding the welfare of the children it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the children. A child, especially a child of tender years requires the love,affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at way with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents.

Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody.

28. This Court is not going into various allegations and counter allegations made by both the spouses. I am clearly of the view that it is in the best interest of the children to have parental care of both the parents, if not joint then at least separate. I have no doubt that the children needs both parents and the children would be equally happy, if not happier, in the company of the mother as well, the children would perhaps be happier if they could have both their parents. Unfortunately, the parents are unable to resolve their differences and stay together. Be that as it may, the children have a right to access both parents, and get the love and affection of both parents. Whatever the differences arose between the spouses, the children cannot be denied company of both.

From perusal of the e-mail dated 22-08-2022 in which petitioner-Ira Sharma herself had consented for admission of the children in India, it is clear that the mother was well aware of the custody of detenue/children, who are with their father in India, as such it cannot be said that it was an illegal custody / detention.

It is also noteworthy that on the previous date of argument on 20.04.2023 when the Court had asked the detenue-Master Rayan Pandey (son) in open court, whether he wants to go with her mother, he refused to go with her mother and submits that he want to live with his father and submits that he is studying in class IV in G.D. Goenka Public School, Lucknow other detenue, Mirah Pandey is minor girl and she is aged about four and half years and she is also studying in Class Ist in G.D. Goenka Public School, Lucknow and as there was an allegation against the mother Ira Sharma of committing adultery and that was the one of the ground for divorce between Ira Shama and Dheerendra Pandey @ Dheerendra Vikram Pandey, thus this Court is of the view that the girl child Mirah Pandey shall remain in custody with her father in the interest of Justice as the welfare love affection company protection is in the custody of the father/ respondent no. 4.

Master Rayan Pandey and Mirah Pandey are studying in G.D. Goenka Public School, Sector-B, Sushant Golf City, Shaheed Path, Lucknow and are residing with their father in Lucknow and their studies cannot be disturbed for the present academic session, therefore, in view of the discussion and observation made above, this court issues following directions :

(i) The custody of both the children; Master Rayan Pandey(son) and Mirah Pandey (daughter) shall remain with father respondent No.4-Dhreerendra Pandey @ Dheerendra Vikram Pandey.

(ii) Since the mother-Ira Sharma lives in U.S.A., she is permitted to meet the children during her stay in India in the evening between 6:00 PM to 8:00 PM at the current residence of respondent no. 4 i.e Omax R – 2 Building 15, Flat 1104 Lucknow with the condition of giving one week prior information to the respondent No.4- Dhreerendra Pandey @ Dheerendra Vikram Pandey (father) regarding her arrival at Lucknow. It is further provided that if she is in abroad, she allowed to have conversation with her children Mirah Pandey-daughter and Rayan Pandey-son by mobile phone, whats app call or video call during 8.00 p.m to 8.30 p.m. as per Indian Standard Time.

(iii) If the mother of children wants to give any gifts on account of love and affection or do anything for well being of children then father/ respondent no. 4 or any of his family members will not make any objection. However, mother shall keep in mind that such thing will be given, which are for use and safe for the children health.

(iv) The petitioner Ira Sharma is at liberty to approach the appropriate forum for claiming the custody of the children under the Hindu Minority and Guards Act 1956 or under the Guardians and Wards Act, 1890 as the case may be in accordance with law.

29. With the above observations/directions, this habeas corpus petition is finally **disposed of.**

(2023) 6 ILRA 172
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.05.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 148 of 2023

Aarfa Bano ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sikandar Zulqarnain Khan

Counsel for the Respondents:
G.A.

Civil Law - Constitution of India, 1950 – Article 226 - Writ of Habeas Corpus – Married daughter staying with her parents – father-in-law prayed for custody of detenue – detenue is petitioner's daughter-in-law who is living with her parents - Maintainability - Locus standi of father-in-law - court finds that, Marriage is a Contract as per the Muslim Law and husband is bound to give protection, shelter and fulfil all the desires and day to day requirement of his wife – After marriage husband of detenue is living and earning in Kuwait and detenue is living with her parents – therefore it cannot be said that she is in illegal detention – held, husband has remedy to approach before appropriate forum, but not the father-in-law, as he has no locus at all – accordingly, present habeas corpus is disposed of. (Para - 5)

Writ Petition Disposed of. (E-11)

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

1. Heard Shri Sikandar Zulqarnain Khan, the learned counsel for the petitioner, Shri Sushil Kumar Mishra, the learned A.G.A.-I for the State-respondent Nos. 1 and 2 and perused the record.

2. The present habeas corpus petition has been filed with the following prayer:

"(i) issue a writ, order or direction in the nature of habeas corpus directing the opposite parties to produce the detenue before this Hon'ble Court who is illegally detained by the opposite party No. 3 and 4 without any reason since 2021 and free to her from illegal custody.

(ii) issue any other writ order or direction which this Hon'ble court may just and proper also kindly be passed in favour of the detenue.

(iii) allow writ petition in favour of the detenue with costs."

3. This petition has been filed by the father-in-law of the detenue, with the prayer that his daughter-in-law, who is married with the son of petitioner, is in illegal custody of her parents, thus, custody of detenue be given to her father-in-law as her parents are not allowing her to go to her matrimonial house. It has further been stated in the petition that husband of detenue, who is son of petitioner is living in Kuwait for earning his livelihood.

4. Shri Sushil Kumar Mishra, the learned A.G.A.-I has raised a preliminary objection by submitting that the present petition has not been filed by the husband of the detenue and it has been filed by the father-in-law of the detenue, thus, it is not maintainable.

5. Marriage is a contract as per the Muslim Law and husband is bound to give protection, shelter and fulfill all the desires and day to day requirements of his wife. After marriage the husband of the detenue is living and earning in Kuwait and detenue is living with her parents, thus, it cannot be said that she is in illegal detention. It may be possible that detenue herself does not want to go to her matrimonial house when her husband is not living there. Even if there is any grievance, the husband has remedy to approach before appropriate forum, but not the father-in-law, as he has no locus at all.

6. With the above observations, the present habeas corpus is finally **disposed of.**

(2023) 6 ILRA 174
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Civil Misc. Review Application No. 121 of 2022
Along with
Civil Misc. Review Application No. 307 of 2022
Civil Misc. Review Application No. 117 of 2022
Civil Misc. Review Application No. 84 of 2023

Board of Revenue & Ors. ...Applicants
Versus
Ram Ji Shukla ...Opposite Party

Counsel for the Applicants:
C.S.C.

Counsel for the Opposite Party:
Devi Prasad Maurya

A. Civil Law - U. P. Qualifying Service for Pension and Validation Act, 2021-Sections 2 & 3-Retiral benefits-Reckoning of past service-Rules of 1974 do not contain any provision for making appointment to a post of Collection Amin on a seasonal basis and, therefore, any service rendered by an employee prior to his appointment under the Rules of 1974, would not be in furtherance of an appointment made in accordance with service rules and it will not be reckoned as " qualifying service" under Section 2 of Act 1 of 2021. (Para 31 to 53)

The review petition is allowed. (E-6)

List of Cases cited:

1. Ghanshyam Mishra Vs St. of U.P. & ors. (2013) SCC Online All 3809

2. S.K. Naushad Rahman Vs U.O.I. & ors. (2022) AIR SC 1494

3. G.J. Farnandes Vs St. of Maysoor (1967) AIR SC 1753

4. Vijay Narayan Thatte Vs St. of Mah. (2009) 9 SCC 92

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

6. St. of U.P. & ors. Vs Mahendra Singh, SPLD No. 1003 of 2020

7. Bhavnagar Univ. Vs Palitana Sugar Mill (P) Ltd. (2003) 2 SCC 111

8. BSNL Vs Mishri Lal (2011) 14 SCC 739

9. Chandra Singh Vs St. of U.P. & ors. (2022) 3 ALJ 781

10. Board of Revenue Vs Prasidh Narain Upadhyay (2006) 2 All LJ 66

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

1. Heard Dr. L. P. Mishra, Sri S. S. Rajawat, Sri Yogendra Kumar Mishra, Sri Dileep Gautam, Sri Devi Prasad Maurya, Sri Kuldeep Pati Tripathi, learned Additional Advocate General assisted by Sri Rohit Nandan Shukla, learned Standing Counsel, Sri Shailendra Kumar Singh, learned Chief Standing Counsel assisted by Sri Vivek Shukla, the learned Additional Chief Standing Counsel and Sri. Amitabh Rai, the learned Additional Chief Standing Counsel for the respective parties.

2. Review Application No. 121 of 2022 has been filed for review of the judgment and order dated 21.06.2021 passed by a coordinate Bench of this Court whereby the Special Appeal Defective No. 259 of 2020 filed by the appellant against the judgment and order dated 26.02.2019 passed by the learned Single Judge allowing Writ Petition No. 8737 (S/S) of 2011 filed by the opposite party-petitioner and holding that the opposite party-

petitioner is entitled for retiral benefits, including pension, taking into account his services rendered as a Seasonal Collection Amin on temporary basis, has been set aside.

3. The opposite party-petitioner in Writ Petition No. 8737 (S/S) of 2011 was initially appointed as Seasonal Collection Peon on 01.08.1979 and thereafter he was appointed as regular Collection Peon under the quota meant for direct recruitment from amongst Seasonal Collection Peon under the provisions of the relevant Service Rules. The case set up by the opposite party-petitioner is that his appointment as Seasonal Collection Peon was a temporary appointment and, as such, in terms of the provisions contained in U. P. Retirement Benefit Rules, 1961, the services rendered by him as a Seasonal Collection Peon are to be counted for the purposes of reckoning the "qualifying service" for payment of pension.

4. Review Application No. 117 of 2022 has been filed for review of the judgment and order dated 22.04.2022 passed by this Bench whereby the special appeal filed by the appellant against the judgment and order dated 17.09.2021 dismissing Writ Petition No. 20874 (S/S) of 2021, was dismissed and the order passed by the Hon'ble Single Judge holding that services rendered by the petitioner as a Seasonal Collection Amin cannot be taken into consideration as qualifying service for the purpose of payment of pension, has been affirmed.

5. The case set up by the opposite party-petitioner in Writ Petition No. 20874 (S/S) of 2021 was that his appointmanent as Seasonal Collection Peon was a temporary appointment and, as such, in terms of the provisions contained in U.P. Retirement Benefit Rules, 1961, the services rendered by him as Seasonal Collection Peon are to be counted for the purposes of reckoning the "qualifying service".

6. Special Appeal Defective No. 84 of 2023 has been filed by the State against the judgment and order dated 13.09.2022 passed by an Hon'ble Single Judge allowing Writ A No. 4305 of 2021 and directing the respondents to compute pensionary benefits payable to the petitioner after taking into account the service rendered by the petitioner as a Seasonal Collection Amin.

7. The Special Appeal Defective No. 307 of 2022 has been filed by the State against the judgment and order dated 23.09.2022, passed by Hon'ble Single Judge, whereby the petition was allowed in terms of the aforesaid order dated 13.09.2022, passed in Writ-A No.4305 of 2021.

8. As to whether the services rendered as a Seasonal Collection Peon are to be taken into account for the purposes of reckoning the qualifying service for pension or not, is the issue involved in all these connected matters.

9. Presently, the service conditions of the Collection Amins are regulated by The Uttar Pradesh Collection Amins' Rules, 1974 (which will hereinafter be referred to as 'the Rules of 1974), which came into being with effect from 24.08.1974.

10. On 24.05.2022, this Court had passed an order directing the State to furnish information on the following points: -

(i) As to whether there are any service rules/ executive instructions/ Government Order for appointment of seasonal employees such as Seasonal Collection Amins and Seasonal Collection Peons.

(ii) as to whether the post of seasonal employees i.e. Seasonal Collection Peons and Seasonal Collection Amins were ever created or they were engaged without availability of any substantive posts.

(iii) once seasonal employees were engaged by the revenue authorities in the tehsils/sub divisions, from they were / are paid their salary/emolument. The learned State Counsel shall produce all relevant documents which may throw some light as to the nature of engagement of Seasonal Employees such as, Seasonal Collection Amins and Seasonal Collection Peons.

11. In response to first query, the learned State counsel has submitted that Seasonal Collection Amins are appointed under Para 19 of the U. P. Collection Manual.

12. Para-19 of the U. P. Collection Manual provides that the Sub-Divisional Magistrate shall keep a close watch on the need for appointment of seasonal Amins for assistance of the appointed Amins, on annual basis. It further provides that the Sub-Divisional Magistrate will submit a report to the Collector for sanction of additional seasonal employees by showing cause therefor and presenting region -wise data of the demands to be recovered under various categories, for making a request to the Divisional Commissioner.

13. In response to the second query, the State has informed that various Government Orders and orders passed by the Board of Revenue deal with appointment of Seasonal Collection Amin / peon, but no statutory service Rule has been framed in this regard. A Government Order dated 13.09.1999 specifically declares that the seasonal employees working under Consolidated Collection Scheme are not full time government employees and on 15.07.2000, the Board of Revenue had issued a Circular to all the Collectors in the State, reiterating the recitals made in the aforesaid Government Order dated 13.09.1999.

14. In response to the third query, the State has informed that Seasonal Collection Amins / Peons are paid salary from the same head, from which the salary of the regular Collection Amins / regular Peons is paid.

15. It has been submitted on behalf of the State that the seasonal employees are not appointed in accordance with any statutory service Rules framed by the Government and their service conditions are not governed by any such Rules.

16. In **Ghanshyam Mishra versus State of U. P. and others,** 2013 SCC OnLine All 3809, the issue involved was as to whether the service rendered by the petitioner in the capacity of Seasonal Collection Amin on temporary basis can be taken into consideration for the purposes of computing qualifying service. A Single Judge Bench of this Court held that: -

"On the dictum of Apex Court, the ad-hoc service rendered cannot be kept at par with regular service and benefit of the same cannot be extended for computing ten years regular service. On the same analogy once term ***"temporary employee"***

is of general category wherein incumbents engaged as per exigencies of service are of various sub-categories such as seasonal, causal, daily rated, ad-hoc services then the same cannot be kept at par with regular service, *and once petitioner's services had never been made regular then certainly in such a situation and in this background as petitioner continued to be seasonal temporary employee and continued on the strength of interim order as such no relief or reprieve could be given to him as he has not to his credit "10 years of regular service", which is per-requisite term and condition for grant of pension to a temporary employee also.*

17. Subsequently, on 21.10.2020 the State Legislature promulgated The Uttar Pradesh Qualifying Service for Pension and Validation Ordinance, 2020 (U. P. Ordinance No. 19 of 2020), which was replaced by The Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021", (U. P. Act No.1 of 2021) with effect from 04.03.2021, which was enacted *to provide for qualifying service for pension and to validate certain actions taken in this behalf and for matters connected therewith or incidental thereto.*

18. The Statement of Object and Reasons of the aforesaid Act states that *"Pension and gratuity admissible to a retired Government servant are determined in relation to the length of qualifying service of the Government servant. Although the term "Qualifying Service" is described in the Uttar Pradesh Civil Service Regulation and the Uttar Pradesh Retirement Benefit Rules, 1961, however the definition of the said term is open to subjective interpretation which leads to administrative difficulties. It has, therefore, been decided to make a law defining the term "Qualifying Service" and to validate such definition with effect from April 1, 1961 which is the date of commencement of the Uttar Pradesh Retirement Benefit Rules, 1961."*

19. Sections 2 and 3 of U. P. Act No. 1 of 2021 are being quoted herein below: -

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

3. Notwithstanding any judgment, decree or order of any Court, anything done or purporting to have been done and any action taken or purporting to have been taken under or in relation to sub-rule (8) of rule 3 of the Uttar Pradesh Retirement Benefit Rules, 1961 before the commencement of this Act, shall be deemed to be and always to have been done or taken under the provisions of this Act and to be and always to have been valid as if the provisions of this Act were in force at all material time with effect from April 1, 1961.

20. Sri Kuldeep Pati Tripathi, the learned Additional Advocate General, Sri. Amitabh Rai, the learned Additional Chief Standing Counsel and Sri. Rohit Nandan Shukla, the learned Standing Counsel, have submitted that the Rules of 1974 do not contain any provision for making appointment to a post of Collection Amin on a seasonal basis and, therefore, any service rendered by an employee prior to his appointment under the Rules of 1974,

would not be in furtherance of an appointment made in accordance with the service rules and it will not be reckoned as "qualifying service" under Section 2 of the Act 1 of 2021.

21. The learned State Counsel have also submitted that where there is a conflict between the provisions contained in any Act, Rules and executive instructions, the Act will prevail over the Rules and the executive instructions. In support of the above submissions, learned Standing Counsel relied upon a decision of Hon'ble Supreme Court in the case of **S. K. Naushad Rahman Versus Union of India and others,**AIR 2022 SC 1494 and thus have argued that U. P. Act No. 1 of 2021 will prevail in case there is any inconsistency between the provision of the Act and those of any rules or any executive instructions.

22. Relying upon a decision of Hon'ble Supreme Court in the case of G. **J. Farnandes Versus State of Maysoor,** AIR 1967 SC 1753, the learned State Counsel have also submitted that executive instructions do not have any statutory force and no writ petition can lie for enforcement of any right based on the executive instructions.

23. Per contra, Dr. Lalta Prasad Mishra, the learned counsel appearing on behalf of the petitioner-respondents in Review Petition No. 121 of 2022 has submitted that Rule 3 (i) of the Rules of 1974 defines 'Seasonal Amins' and therefore the aforesaid post is contemplated in the Rules of 1974.

24. Clauses (h), (i) and (j) of Rule 3 of U. P. Collection Amins' Service Rules, 1974 (hereinafter referred to as 'the Rules of 1974') defines the terms 'members of service', 'seasonal amins' and 'service' as follows: -

"(h) "Member of the service" means a person substantively appointed under these rules or the rules or orders in force prior to the commencement of these rules ***to a post in the cadre of the service.***

(i) "Seasonal Amin" means an Amin appointed for Rabi or Kharif or for both the reasons;

(j) "Service" means the Uttar Pradesh Collection Amins' Service."

25. Rule 4 of the aforesaid Rules defines the term 'strength of service' as follows: -

"4. Strength of Service. -

(1) ***the strength of service shall be such as may be determined by the Governor from time to time.***

(2) The permanent strength of the service shall, until orders by reading the same have been passed under subrule one, be as given below:

collection Amin is (ordinary grade) 5341

collection Ameens (selection grade) 593;

Provided that –

(a) the Collector may leave and failed or the Governor may hold in appearance anywhere can't post without thereby entitling any person to compensation; and

(b) the Governor may create such additional permanent or temporary posts as may be considered necessary."

26. Rule 5 of the aforesaid Rules contains the following provision for the source of recruitment

"5. Source of recruitment. -

(1) Recruitment to posts in the ordinary grade of the service shall be made on the result of a competitive examination as provided in part V of these Rules:

Provided that subject to availability of suitable candidates, up to fifteen per cent of the vacancies shall be filled by promotion from amongst such substantively appointed Collection Peons –

(a) who have passed at least High School Examination of the board of High School and Intermediate Education, Uttar Pradesh, or an Examination recognised by the government as equivalent thereto; and

(b) who have worked in the Collection Organization of the Revenue Department for a period of at least six fasls:

Provided that…"

27. It is relevant to note that the Rules of 1974 contain no provision for making appointment on seasonal basis. Although a certain percentage of posts of ordinary cadre of the service are reserved for being filled in by Seasonal Collection Amins, the Seasonal Collection Amins themselves are not included amongst the strength of service as defined in Rule 4 of the Rules of 1974. Therefore, a mere mention of Seasonal Amins in the Rules, without any provisions for appointment of the Seasonal Amins, will not make the appointment of Seasonal Collection Amins as per Rules of 1974.

28. Two things are significant to note regarding appointment of seasonal collection Amins. First is that the provision for their appointment is contained in the U. P. Collection Manual, which is merely a collection of Executive Instructions which is neither a Statute nor Rules framed under any Statute. Second, the seasonal posts are sanctioned by the Divisional Commissioner on the request made by the Collector in furtherance of a report submitted by the Sub-Divisional Magistrate, whereas the strength of service of collection Amins under the U. P. Collection Amins' Service Rules, 1974, is determined by the Governor, as provided in Rule 4 of the Rules of 1974.

29. Dr. Mishra has next submitted that the Circular dated 22.02.1991 issued by the Board of Revenue provides that the appointment of Seasonal Collection Amin and Seasonal Collection Peon will be made on pay-scales sanctioned for the post, which indicates that the post was sanctioned. This submission is also not acceptable for the reason that Rule 4 (1) of the Rules of 1974 specifically provides that the strength of service shall be such as may be determined by the Governor from time to time, which clearly indicates the authority to sanction the posts of Amins under the Rules of 1974 vests in the Governor only, whereas as per Para 19 of the U. P. Collection Manual, the seasonal posts of Collection Amins are sanctioned by the Divisional Commissioner. Therefore, a mere direction regarding fixation of pay scales of Seasonable Collection Amins will not make their posts sanctioned under the Rules.

30. Dr. Mishra has further submitted that the pension is not a bounty, it is a succor and that pension is a property protected by Article 300-A of the Constitution of India and it cannot be taken away except in accordance with the law and the law 'does not include the government order'. He has submitted that the provisions of law relating to grant of pension to the employees have to be construed liberally.

31. **We may observe in this regard that there can be no dispute against the proposition that pension cannot be taken away except in accordance with the law, but at the same time, the pension cannot be ordered to be paid except in accordance with the law, and in any case, it cannot be ordered to be paid in violation of the specific provisions of law, which in the present case is the U. P. Act No. 1 of 2021.**

(Emphasis supplied by the Court)

32. It is true that the provisions of law regarding payment of pension to retired employees are to be interpreted liberally, but the question of liberal interpretation would arise only when there is any ambiguity in the provision of law relating to grant of pension, in which case, the provision would be interpreted liberally. However, here the provision contained in Section 2 of the U. P. Act No.1 of 2021 are not ambiguous and, therefore, question of liberal interpretation of its provisions does not arise at all in this case. In **Vijay Narayan Thatte v. State of Maharashtra,** (2009) 9 SCC 92, the Hon'ble Supreme Court reiterated this well established principle of interpretation of statutes in the following words: -

"22. In our opinion, ***when the language of the statute is plain and clear then the literal rule of interpretation has to be applied and there is ordinarily no scope for consideration of equity, public interest or seeking the intention of the legislature.*** *It is only when the language of the statute is not clear or ambiguous or there is some conflict, etc. or the plain language leads to some absurdity that one can depart from the literal rule of interpretation. A perusal of the proviso to Section 6 shows that the language of the proviso is clear. Hence the literal rule of interpretation must be applied to it.* ***When there is a conflict between the law and equity it is the law which must prevail.*** *As stated in the Latin maxim dura lex sed lex which means "****the law is hard but it is the law".****"*

(Emphasis supplied)

33. Dr. Mishra has next submitted that the Seasonal Collection Amins are appointed against temporary or permanent posts and when there are no Rules governing the appointments, the appointments have to be made as per Government Orders. We find ourselves unable to accept this submission also as the Seasonal Collection Amins are engaged on seasonal basis as per exigencies of work after sanction made by the Divisional Commissioner, on a request made by the Collector in furtherance of a report to be submitted by the Sub-Divisional Magistrate and they are not appointed against any temporary or permanent posts created by the Government. It is not that there are no Rules governing the appointments of Collection Amins, but those Rules provide that the posts of Collection Amins shall be sanctioned by the Governor and the said Rules do not contain any provision for appointment of Seasonal Collection Amins and, therefore, the appointment of Seasonal Collection Amins made under executive instructions on posts sanctioned by the Divisional Commissioner for a particular season only cannot be treated as an appointment made in accordance with the Rules.

34. The learned counsel for the respondents next submitted that the mere factum of appointment gives rise to a presumption that the appointment was

made against a sanctioned post, otherwise payment cannot be drawn from the consolidated fund. In this regard we are of the considered opinion that when there are specific provisions of law authorizing the Governor to sanction the posts of Collection Amins, any appointment made on posts not sanctioned by the Governor can, by no stretch of imagination, be presumed to have been made on a sanctioned post and, therefore, we are unable to accept this submission also.

35. Dr. Mishra has relied upon the judgments in the cases of **Prem Singh versus State of U. P.,** (2019) 10 SCC 516, wherein the Hon'ble Supreme Court read down Rule 3 (8) of the U. P. Retirement Benefits Rules, 1961 and held that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid Rule for grant of pension.

36. In **Prem Singh** (Supra) the employee concerned was appointed as a welder in the year 1965 in a work-charged establishment. He was transferred from one place to another and thereafter ultimately the Selection Committee recommended for regularization of his services. His services were regularized on 13-03-2002 and he was posted as a pump operator in the regular establishment. He superannuated on 31-01-2007. Then he filed a writ petition in the High Court on 31-07-2008 with the prayer to count the period spent in the work-charged establishment as qualifying service under the Rules of 1965. In the present case, the Appellant was being engaged as seasonal collection Amin, on a seasonal basis and not on regular basis. The U. P. Act No. 1 of 2021 had not been enacted till decision of **Prem Singh**'s case and, therefore, **Prem Singh** is not an authority for interpreting the provisions of the aforesaid Act No.1 of 2021. Therefore, the law laid down in **Prem Singh** has no application in this case.

37. Sri. Y. K. Mishra appearing for the petitioner-respondent in Review Petition No. 117 of 2022 has submitted that **State of Uttar Pradesh and others vs. Mahendra Singh,** Special Appeal (Defective) No. 1003 of 2020 was decided on 04.02.2021, after promulgation of the Ordinance 19 of 2020 and in that case, a co-ordinate Bench of this Court had held that: -

"It is clear from perusal of Section 2 of the Ordinance that it would have effect notwithstanding anything contained in U.P. Retirement Benefit Rules, 1961 or Regulation 361 and 370 of the Civil Service Regulation. Though it has been informed at the bar that in certain writ petitions, validity of the aforesaid U.P. Ordinance has been challenged, however, even if for purpose of adjudicating the present appeal the Ordinance is accepted as it is, section 2 thereof would inure to the benefit to the opposite party-petitioner and not to the benefit of appellants. The word "Qualifying Service" has been defined in Section 2 of the aforesaid U.P. Ordinance to mean the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post.

As discussed aforesaid, the appellants have admitted the appointment of the opposite party-petitioner on temporary post of Godown Chaukidar from 04.09.1981 till the date of his appointment on a regular post in 1997. Therefore, under this very U.P. Ordinance, the petitioner is entitled to his claim for counting the period of his service from the date of his appointment on 04.09.1981 on a temporary

post till his regularization on the permanent post in the year 1997."

38. The Division Bench while deciding **Mahendra Singh** (Supra) has though noticed Section 2 of the Ordinance, which is in pari materia with Section 2 of the U. P. Act No. 1 of 2021, however, there is no discussion or mention or finding as to whether the employee was appointed "in accordance with the provisions of the service rules". In the aforesaid view of the matter, the judgment in **Mahendra Singh** (Supra) is not a binding precedent regarding the impact of U. P. Act No. 1 of 2021 (before that, the Ordinance) in matters where the initial appointment of an employee was made on ad-hoc basis / as daily wager / work charge employee / seasonal employee or any other non regular category of employment. Our view finds support by the judgment of the Hon'ble Supreme Court in the case of **Bhavnagar University v. Palitana Sugar Mill (P) Ltd.**, (2003) 2 SCC 111, wherein it was reiterated that *"A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom."*

39. Sri. Y. K. Mishra next submitted that numerous Writ Petitions have been allowed by counting the service rendered by the employee as Seasonal Collection Amin while computing the qualifying service for payment of pension and, therefore, this Court should take the same view on the ground of parity as also to balance the equities.

40. The aforesaid submission of Sri. Y. K. Mishra does not appeal to us for numerous reasons. First, the submission is vague, as he has not placed before this Court any of the so called numerous decisions referred by him. Secondly, the mere fact of numerous Writ Petitions having been allowed would not affect the provisions of law, unless the law has been interpreted and settled by any judgment which has a binding precedential value. Thirdly, equity can only supplement the law and it cannot supplant the law. In any case, the equity cannot override the express provisions of law.

41. In **BSNL v. Mishri Lal,** (2011) 14 SCC 739, the writ petition was filed praying for quashing of the Recruitment Rules, 2005 as well as the letters by which the writ petitioners were told to appear in the limited internal competitive examination for promotion. The writ petition was allowed and the order was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court allowed the Appeal and held that the decision to fill up the posts in question by limited internal competitive examination was a policy decision and the High Court could not have found fault with it. It is well settled that the Court cannot ordinarily interfere with policy decisions. The Hon'ble Supreme Court further held that *"There is no question of equity in this case because it is well settled that law prevails over equity if there is a conflict. Equity can only supplement the law and not supplant it. As the Latin maxim states "dura lex sed lex" which means "the law is hard, but it is the law".*

42. Other learned Counsel appearing in the case have also advanced their submissions, but the same are overlapping the submissions recorded and dealt with in the earlier part of this judgment and, therefore, the same are not being repeated.

43. In terms of the provisions contained in Section 2 of U. P. Act No.1 of 2021 qualifying service requires- (i) the employee concerned should have been

appointed either on a temporary or permanent post and, (ii) his appointment should have been made in terms of the provisions contained in Service Rules.

44. The Seasonal Collection Amins are engaged as per exigencies of work and they are not appointed against any temporary or permanent post. Further, they are not appointed in terms of the provisions contained in any service Rules. At the cost of repetition it may be observed that para 19 of the U. P. Collection Manual provides that the Sub Divisional Magistrate shall minutely supervise the requirements of the appointments of Seasonal Collection Amin on annual basis for assisting the Amins and will submit a report to the Collector, who will made a request to the Divisional Commissioner for sanctioning the appointment of Additional Seasonal Employees. However, the U. P. Collection Manual is a merely a collection of administrative instructions and it is not a statute or statutory rules.

45. In **Chandra Singh vs. State of U.P. and Ors.** 2022 (3) ALJ 781, this Court held that: -

"13. A Seasonal Collection Amin is appointed for a limited time only for a specified duty, on the completion of which he is discharged. Duty performed as a Seasonal Collection Amin intermittently, will not fall within the category "continuous temporary or officiating service under the Government of Uttar Pradesh" within the purview of Rule 352 (a) of the Civil Service Regulations reproduced above. It will also not fall within the purview of "services rendered by an officer appointed on a temporary or permanent post" occurring in Section 2 of the U.P. Act No. 1 of 2021. Therefore, the service rendered by petitioner as seasonal collection Amin cannot be added while computing qualifying service as defined under Article 361 of Civil Service Regulation or Section 2 of The Uttar Pradesh Qualifying Service of Pension and Validation Act, 2021."

46. The Hon'ble Single Judge had dismissed the Writ Petition holding that the post of Collection Amin is a seasonal post and it is not a regular post and therefore the competent authority had rightly not counted the services rendered by the petitioner to be his regular service. While dismissing the Special Appeal filed against the aforesaid order passed by Hon'ble Single Judge, the Division Bench has taken into consideration the provisions of U. P. Act No.1 of 2021 and has held that the services rendered on seasonal basis as Collection Amin will not fall within the purview of 'service rendered by an officer appointed on temporary or permanent basis' and as has been discussed above, such appointment is not in accordance with any service rules.

47. Review Petition No. 117 of 2022 has been filed for review of the aforesaid judgment and in view of the foregoing discussion, we do not find any error in the aforesaid judgment, much less an error apparent on the face of the record, warranting review of the aforesaid judgment. Therefore, we are of the considered opinion that the judgment dated 22.04.2022, passed in Special Appeal No.398 of 2021 does not suffer from any error, much less an error which is apparent on the face of record. The Review Petition No.117 of 2022 lacks merit and it is liable to be dismissed.

48. Now we come to Review Petition No. 121 of 2022, which seeks review of the

judgment dated 21.06.2021 passed in Special Appeal Defective No. 259 of 2020. The aforesaid Special Appeal was dismissed on the ground that: -

"The Government Order dated 1.7.1989 provides that temporary Government Servants who have completed minimum 10 years of service would be entitled for pension, gratuity and family pension on the same rate as are payable to the permanent employee under the relevant Rules. However, while rejecting the representation of the respondent-petitioner, the competent authority has considered only the period of service rendered by the respondent-petitioner after becoming permanent i.e., 7 years 6 months 2 days and since he had not completed 10 years of service after becoming permanent, therefore, the pension has been denied.

It is not in dispute that the Government Order dated 1.7.1989 is in force."

49. The Division Bench decided the Special Appeal after following the judgment in the case of **Board of Revenue v. Prasidh Narain Upadhyay,** (2006) 2 All LJ 66, which was also a case decided prior to enactment of U. P. Act No. 1 of 2021 which had followed the Ordinance containing similar provisions. In that case, the respondent had worked as a Collection Peon since 10.02.1962 till he retired on attaining the age of superannuation on 31.07.1999 after working for more than 37 years. The Hon'ble Single Judge found that in the Service Book, his employment was mentioned as Collection Peon (Temporary) but subsequently it was mentioned in the service book that he was working as Seasonal Collection Peon. The notice of retirement dated 05.05.1999 mentioned the designation of the petitioner as Collection Peon and not a Seasonal Collection Peon. In the year 1996 the appellants had made a recommendation to the Board of Revenue for regularization of the petitioner's service but no order could be issued and in the meantime he retired on 31.07.1999. The Division Bench decided the Appeal after taking note of the fact that the pensionary benefit was denied for the only reason that a formal order of confirmation or regularization had not been issued by the appellants. In this background, the Division Bench held that: -

"12. The term "qualifying service" is defined in section 1 Chapter 16 of Article 361 of the Civil Service Regulations, which provides that the service of an officer does not qualify for pension unless it conforms to the following three conditions:—

(A) The service must be under Government.

(B) The employment must be substantive and permanent.

(C) The service must be paid by Government.

13.In the present case, so far as the condition Nos. A and C are concerned, they are satisfied and the dispute is only with respect to condition No. B, i.e., lack of permanent character of service. However, in our view, the aforesaid provisions stand obliterated after the amendment of Fundamental Rule 56 by U. P. Act No. 24 of 1975 which allows retirement of a temporary employees also and provides in clause (e) that a retiring pension is payable and other retiral benefits, if any, shall be available to every Government servant who retires or is required or allowed to retire under this rule. Since the aforesaid Amendment Rule 56 was made by an Act of Legislature, the provisions contained otherwise under Civil Service Regulations,

which are pre-constitutional, would have to give way to the provisions of Fundamental Rule 56. In other words, the provisions of Fundamental Rule 56 shall prevail over the Civil Service Regulations, if they are inconsistent. Conditions (supra) of Article 361 of Civil Service Regulations are clearly inconsistent with Fundamental Rule 56 and thus is inoperative."

14.A similar controversy came up for consideration earlier before this Court in the case ofDr. Hari Shankar Ashopav.State of U.P. 1989 (59) FLR 110. After referring to the Fundamental Rule 56 and various provisions contained in Civil Service Regulations, this Court observed as under:—

"Clause (e) of Rule 56 unequivocally recognizes, declares and guarantees retiring pension to every Government servant who retires on attaining the age of superannuation, or who is prematurely retired or who retires voluntarily. To be precise, every Government servant (whether permanent or temporary) who retires under clause (a) or clause (b), or who is required to retire, or who is allowed to retire under clause (c) of Rule 56, becomes entitled for a retiring pension, of course, the first and third conditions stipulated in article 361 of the Regulations are satisfied."

15.In this view of the matter, the contention of the appellants that since the petitioner-respondent was not a permanent confirmed employee and hence not entitled for pension, is clearly misconceived and is rejected."

50. Although U. P. Act No. 1 of 2021 had come into force with effect from 04.03.2021, it escaped attention of the Division Bench while it was deciding the Special Appeal Defective No. 259 of 2020 on 21.06.2021. Therefore, we are of the considered view that there is an apparent error in the judgment dated 21.06.2021 passed by the Division Bench dismissing the Special Appeal Defective No. 259 of 2020 without taking into consideration the provision of U. P. Act No. 1 of 2021. Accordingly Review Petition No.121 of 2022 deserves to be allowed.

51. Special Appeal Defective No. 84 of 2023 has been filed by the State against the judgment and order dated 13.09.2022 passed by Hon'ble Single Judge allowing Writ A No. 4305 of 2021 and directing the respondents to compute pensionary benefits payable to the petitioner after taking into account the service rendered by the petitioner as a Seasonal Collection Amin. In view of the foregoing discussion, this Special Appeal deserves to be allowed and the order passed by the Hon'ble Single Judge is liable to be set aside.

52. The Special Appeal Defective No. 307 of 2022 has been filed by the State against the judgment and order dated 23.09.2022, passed by Hon'ble Single Judge, whereby the petition was allowed in terms of the aforesaid order dated 13.09.2022, passed in Writ-A No.4305 of 2021 and, therefore, this Special Appeal also deserves to be allowed and the order passed by the Hon'ble Single Judge is liable to be set aside.

ORDER

53. **Review Petition No.121 of 2022 is allowed**. The judgment and order dated 21.06.2021 dismissing Special Appeal Defective No. 259 of 2020 is hereby set aside. Consequently, the Special Appeal is allowed and the judgment and order dated 26.02.2019 passed in Writ Petition No. 8737 (S/S) of 2011 is also set aside and the

aforesaid Writ Petition is dismissed for the reason that the service rendered by the petitioner as seasonal collection was not on any temporary or permanent post, in furtherance of an appointment made in accordance with any Rules framed by the Government.

54. **The Special Appeal (D) No. 307 of 2022 is allowed** and the judgment and order dated 23.09.2022 passed in Writ A No. 6005 of 2022 is also set aside and the aforesaid Writ Petition is dismissed.

55. **Review Petition No. 117 of 2022 is dismissed.**

56. **The Special Appeal (D) No. 84 of 2023 is hereby allowed** and the judgment and order dated 13.09.2022 passed in Writ A No. 4305 of 2021 is also set aside and the aforesaid Writ Petition is dismissed.

57. There will be no order as to costs.

(2023) 6 ILRA 186
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.06.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matters Under Article 227 No. 3243 of 2023

Municipal Corporation Moradabad ...Petitioner

Versus

M/S A 2 Z Waste Management (Moradabad) Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Santosh Srivastava

Counsel for the Respondents:
Suyash Gupta, Indu Prakash Singh

(A) Constitution of India - Article 227 - The Code of Civil Procedure, 1908 - Rule 27 of Order XLI - Production of additional evidence in Appellate Court , The Arbitration and Conciliation Act 1996 - Section 16 - Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes , Section 19 - Determination of rules of procedure, Section 34 - Application for setting aside arbitral awards, Section 37 - Appealable orders, Section 45 - Power of judicial authority to refer parties to arbitration - conditions contained in an Arbitration Agreement are not binding on a person who is not a party to the Agreement.(Para -17)

Application by petitioner-applicant before commercial court - for impleading Hydroair Pvt. Ltd. as a respondent - Arbitration Case - not a party to arbitration agreement - rejected by Commercial court - validity of an order under challenge - Commercial Court rejected application for additional evidence - citing Section 34 of the Arbitration and Conciliation Act - an Arbitration Award can only be set aside if the applicant proves the Arbitral Tribunal's record - that Award is liable to be set aside - on ground mentioned in Section 34. **(Para - 2,11)**

HELD:-Rightly rejected application for impleadment by Commercial Court, Accord Hydroair Pvt. Ltd., not party to Arbitration Agreement, indicating no illegality. Order passed by Commercial Court in Arbitration Case so far as it rejects the prayer made by the petitioner for adducing additional evidence in the form of copies of Arbitration Awards, quashed**.** Application for submission of additional evidence in the form of the five arbitration awards, which have already been filed by the petitioner, allowed. Commercial Court to expeditiously decide Section 34 arbitration application, considering additional evidence and allowing respondents to rebutte it . **(Para -18,28)**

Petition Partly allowed. (E-7)

List of Cases cited:

1. Chloro Controls (I) P. Ltd. Vs Severn Trent Water Purification Inc. & ors. , AIR 2012 SC (Supp.) 1017

2. Panipat-Jalandhar NH-1 Tollway Pvt. Ltd. Vs N.H.A.I., Arbitration Petition No. 820 of 2021

3. A.P. Transco Vs Sai Renewable Power Pvt. Ltd., (2011) 11 SCC 34

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

1. The petitioner has filed a supplementary affidavit, which is taken on record.

2. Heard Sri Pankaj Srivastava and Sri Santosh Srivastava, Advocates for the petitioner, Sri Suyash Gupta and Sri Arun Gaur, Advocates for the respondent no. 1 and Sri Indu Prakash Singh, learned counsel for the respondent no. 2, and perused the records.

3. By means of the instant petition filed under Article 227 of the Constitution of India the petitioner has challenged the validity of the order dated 23.05.2023 passed by the Commercial Court No. 2, Lucknow, in Arbitration Case No. 923 of 2019, whereby an application for impleadment of M/s Accord Hydroair Pvt. Ltd. as a respondent to the case, filed by the petitioner-applicant before the Commercial Court, has been rejected.

4. Briefly stated, facts of the case are that the petitioner had entered into a Tripartite-Agreement dated 28.04.2010 with the respondent no. 1 and respondent no. 2 to ensure scientific disposal of solid waste for a period of 30 years. It was a specific condition in the Agreement that the concessionaire shall not assign in favour of any person the Agreement or rights, benefits and obligations thereunder, save and except with prior consent of U.L.B. (Urban Local Body), i.e. Municipal Corporation, Moradabad. However, the concessionaire entered into a memorandum of understanding dated 02.07.2013 with M/s Accord Hydroair Pvt. Ltd. and in violation of the conditions of the Tripartite Agreement dated 28.04.2010, it assigned its obligations under the Agreement dated 28.04.2010 to M/s Accord Hydroair Pvt. Ltd. The memorandum of understanding dated 02.07.2013 entered into between the respondent no. 1 and M/s Accord Hydroair Pvt. Ltd. makes a reference to the Tripartite Agreement dated 28.04.2010 executed between the parties to the present case and the scope of work makes a reference to the Concession Agreement in question.

5. It appears that the Memorandum of Understanding dated 02.07.2013 has been issued in execution of works, which were to be performed under the Tripartite Agreement dated 28.04.2010. It is one of the conditions of the Agreement dated 02.07.2013 that M/s Accord Hydroair Pvt. Ltd. shall be entitled to receive payments from the respondent no. 2 against the works done by respondent no. 1 under the Tripartite Agreement dated 28.04.2010.

6. Certain disputes occurred between M/s Accord Hydroair Pvt. Ltd. and the respondent no. 1, regarding which Arbitration proceedings were initiated. The respondent no. 2 was also made a party in the Arbitration proceedings. The respondent no. 2 challenged it's impleadment by filing an application under Section 37, which was rejected by the Arbitral Tribunal. The respondent no. 2 challenged the order of rejection by filing Appeal No. 674 of 2014 under Section 37 of the Arbitration Act before the Commercial Court at Lucknow.

7. Certain disputes arose between the parties in execution of the Agreement dated 28.04.2010 also, regarding which separate Arbitration proceedings were initiated by the respondent no. 1, which culminated into an award dated 03.09.2019 by the Arbitrator. The petitioner has challenged the Arbitration award dated 03.09.2019 by filing an application under Section 34 of the Arbitration and Conciliation Act 1996, which has been registered as Arbitration Case No. 923 of 2019 and is pending before the Commercial Court No. 2, Lucknow.

8. The petitioner filed an application for consolidation of the proceedings of the application under Section 34 filed by it with the appeal under Section 37, which was filed against the order of rejection of the application of respondent no. 2 for being deleted from the array of parties in the Arbitration proceedings between the respondent no. 1 and M/s Accord Hydroair Pvt. Ltd. The application was rejected by means of an order dated 20.03.2023. The petitioner had challenged the order before this Court by filing petition under Article 227 of the Constitution of India bearing No. 1551 of 2023, which was dismissed by means of an order dated 29.03.2023.

9. After dismissal of the earlier petition under Article 227 of the Constitution of India by this Court by means of order dated 29.03.2023, the petitioner filed an application for impleadment of M/s Accord Hydroair Pvt. Ltd. before the Commercial Court. During pendency of the application, the petitioner challenged the order dated 29.03.2023 before the Supreme Court by filing S.L.P.(Civil) No. 7327 of 2023. The petitioner filed an application for impleadment of M/s Accord Hydroair Pvt. Ltd. in S.L.P. also, i.e., I.A. No. 72892 of 2023. In the aforesaid application, the petitioner filed an application for impleadment of M/s Accord Hydroair Pvt. Ltd. as a respondent. The application has been rejected by means of an order dated 23.05.2023 holding that ***"from the Agreement dated 28.04.2010 it is clear that it was executed between Moradabad Municipal Corporation (the petitioner), Construction and Design Services (the respondent no., 2) and M/s A 2 Z Waste Management Moradabad Pvt. Ltd. (the respondent no. 1). M/s Accord Hydroair Pvt. Ltd. is not a party to this Agreement, so M/s Accord Hydroair Pvt. Ltd. cannot be impleaded in the present petition under Section 34 of the Arbitration and Conciliation Act 1996 for setting aside the award dated 03.09.2019 passed by the learned Arbitrator."***

10. The aforesaid S.L.P. was dismissed by means of an order dated 25.04.2023 passed by the Hon'ble Supreme Court and while dismissing the S.L.P., the pending applications also stood disposed of. Thus, the application for impleadment of M/s Accord Hydroair Pvt. Ltd. filed in the S.L.P. was not allowed by the Hon'ble Supreme Court.

11. The Commercial Court has rejected the application for filing additional evidence for the mere reason that Section 34 of the Arbitration and Conciliation Act provides that an Arbitration Award may be set aside by the Court only if the party making the application establishes on the basis of the record of Arbitral Tribunal that the Award is liable to be set aside on the ground mentioned in Section 34.

12. Sri Pankaj Srivastava, the learned Counsel for the petitioner, has relied on a

judgment of the Hon'ble Supreme Court in the case of ***Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and others, AIR 2012 SC (Supp.) 1017***. This was a case arising out of International Commercial Arbitrations, for which the statutory provisions are contained in Part-2 of the Arbitration and Conciliation Act, 1996, whereas the arbitration in question falls within the purview of Part-1 of the Arbitration and Conciliation Act, 1996, which contains provisions for arbitrations, other than those dealt with by the provisions contained in Part-2 of the Act. In Chloro Control (supra), while dealing with the provisions contained in Section 45 falling within Part-2 of the Act, the Hon'ble Supreme Court dealt with the following questions:

1.1What is the ambit and scope of Section 45 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act")?

1.2 Whether the principles enunciated in the case of Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya [(2003) 5 SCC 531 : (AIR 2003 SC 2252 : 2003 AIR SCW 2209)] is the correct exposition of law?

1.3 Whether in a case where multiple agreements are signed between different parties and whether some contain an arbitration clause and others don't and further the parties are not identically common in proceedings before the Court (in a suit) and the arbitration agreement, a reference of disputes as a whale or in part can be made to the arbitral tribunal, more particularly, where the parties to an action are claiming under or through a party to the arbitration agreement?

1.4 Whether bifurcation or splitting of parties of causes of action would be permissible, in absence of any specific provision for the same, in the 1996 Act?"

13. The aforesaid questions were answered by the Hon'ble Supreme Court in the following manner: -

"167. Section 45 is a provision falling under Chapter I of Part II of the 1996 act, which Code is a self-contained Code. The expression 'person claiming through or under' would mean and take within its ambit multiple and multi-party agreements, though in exceptional case. Even non-signatory parties to some of the agreements can pray and be referred to arbitration provided they satisfy the pre-requisites under Sections 44 and 45 read with Schedule I. Reference of non-signatory parties is neither unknown to arbitration jurisprudence nor it is impermissible.

168. In the facts of a given case, the Court is always vested with the power to delete th name of the parties who are neither necessary nor proper to the proceedings before the Court. In the cases of group companies or where various agreements constitute a composite transaction like mother agreement and all other agreements being ancillary to and for effective and complete implementation of the Mother Agreement, the court may have to make reference to arbitration even of the disputes existing between signatory or even non-signatory parties. However, the discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously."

14. It is not the case of the parties that M/s A 2 Z Waste Management Moradabad and M/s Accord Hydroair Pvt. Ltd. constitute a group of companies and it is not that the Agreement dated 26.04.2010 was executed as the Mother Agreement.

15. Even in matters governed by Section 45 of the Arbitration Act the Hon'ble Supreme Court did not lay down any principle for impleadment of parties, who are not parties to the Arbitration Agreement. Therefore, I am of the considered view that the judgment in the case of Chloro Controls (I) Pvt. Ltd. (supra) does not help the petitioner in any manner.

16. The next judgment placed by the learned counsel for the petitioner has been rendered by the Delhi Court in the case of ***Panipat-Jalandhar NH-1 Tollway Pvt. Ltd. v. National Highways Authority of India, Arbitration Petition No. 820 of 2021, decided on 17.01.2022***. This was a petition under Section 11(6) of the Arbitration and Conciliation Act 1996 and the issue of impleadment of a party, who is not a party to the Arbitration Agreement, was neither involved nor decided in the aforesaid case and, therefore, this judgment also does not help the petitioner.

17. In ***A.P. Transco v. Sai Renewable Power Pvt. Ltd., (2011) 11 SCC 34***, the Hon'ble Supreme Court held that the conditions contained in an Arbitration Agreement are not binding on a person who is not a party to the Agreement.

18. As M/s Accord Hydroair Pvt. Ltd. is not a party to the Arbitration Agreement, the Commercial Court has rightly rejected the application for impleadment of M/s Accord Hydroair Pvt. Ltd. and I find no illegality in the order dated 23.05.2023, which may warrant interference of this Court.

19. Another prayer made by the petitioner in the same application was for taking on record some documents as additional evidence. The documents sought to be placed in additional evidence are copies of Arbitration Awards in five Arbitration cases between the respondent no. 1 and respondent no. 2, both of whom are already parties to the proceedings. Since the petitioner was not a party to those Arbitration proceedings, it claims that the Awards were not in its knowledge.

20. Rule 27 of Order XLI of the Code of Civil Procedure, as it applies to the State of Uttar Pradesh, provides as follows: -

"27. Production of additional evidence in Appellate Court.—*(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—*

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the evidence sought to be adduced by a party to the appeal is evidence, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree under appeal was passed or made, or; and

(c) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

21. Although the application under Section 34 of Arbitration and Conciliation Act, 1996 is not an "Appeal" in the strict sense of the term, in effect the proceedings under the aforesaid provision are in the nature of and are akin to an Appeal.

22. The provisions of the Code of Civil Procedure are applicable to the proceedings before the Commercial Courts and come of the provisions of the Code applicable to the Commercial Courts have been amended for their application to the Commercial Courts Act only. The relevant provision in this regard is contained in Section 16 of the Commercial Courts Act, 2015, which provides that: -

"16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes.—

(1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.

(2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a specified value.

(3) Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908 (5 of 1908), by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail."

23. An appendix appended to the Commercial Courts Act contains the amended provisions of the Code of Civil Procedures which will be applicable to Commercial Courts, but it does not contain any amendments made in Order XLI Rule 27 of the Civil Procedure Code, 1908. Therefore, Order XLI Rule 27 of the Code applies to the proceedings before the Commercial Courts without any restriction.

24. Although Section 19 of the Arbitration and Conciliation Act provides that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, but it does not prohibit applicability of the principles of the Civil Procedure on the Commercial Courts.

25. The petitioner is seeking to file copies of the arbitration awards passed in Arbitration proceedings between the respondent no. 1 and the respondent no. 2. The petitioner was not a party to the arbitration proceedings or the aforesaid awards passed therein and the petitioner claims that the awards were not within its knowledge and, therefore, the same could not be produced by it before the Arbitrator.

26. The peculiar facts of the present case appear to be covered by the provision contained in Sub-Rule (aa) of Rule 1 of Order XLI of the Code of Civil Procedure in which the petitioner should be granted to submit additional evidence.

27. In view of the aforesaid submission, I am of the view that the order dated 23.05.2023 passed by the

Commercial Court No. 2, so far as it rejects the prayer made by the petitioner for adducing additional evidence in the form of copies of Arbitration Awards, is not sustainable in law and it is liable to be quashed.

28. In view of the aforesaid discussion, the petition is **partly allowed**. The order dated 23.05.2023 passed by the Commercial Court No. 2, Lucknow in Arbitration Case No. 923 of 2019 so far as it rejects the prayer made by the petitioner for adducing additional evidence in the form of copies of Arbitration Awards, is quashed and the application for submission of the additional evidence in the form of the five arbitration awards, which have already been filed by the petitioner, is allowed. The Commercial Court shall proceed to decide the application under Section 34 of the arbitration and Conciliation Act expeditiously, in accordance with the law, after taking into consideration the aforesaid additional evidence and after giving an opportunity to the respondents to adduce evidence in rebuttal of the additional evidence.

(2023) 6 ILRA 192
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.05.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 4403 of 2023

Siddarth Wardhan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Ashish Kumar Singh, Anuj Pandey

Counsel for the Opposite Parties:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections – 125 & 482 – Domestic Violence Act, 2005 - Section - 12: - Application U/s 482 – challenging the order of Family Court, allowing the application of his wife moved u/section 125 of Cr.P.C. to pay Rs. 18,000/- per month as maintenance – on the ground that fixation of such high amount is causing great hardship to the applicant-husband - Quantum of maintenance – court finds that, relation of applicant and his wife became strange and he was not interested to keep her wife and he wants to marry with another woman – moreover, wife filed a case u/section 12 of Domestic Violence Act, wherein Trial court passed an order granting maintenance of Rs. 42,000/- per month, but said amount is not paid by the applicant which shows his malafide intention – Held, the provisions of section 125 Cr.P.C. are beneficial provisions which are enacted to stop the vagrancy of a destitute wife and to provide some succour to them, who are entitled to get the maintenance which has been wrongly denied – Applicant is serving in a multinational company and earning Rs. 88 lakh rupees per annum as salary, thus, the amount fixed by trial court as maintenance cannot be said to be excessive or disproportionate – hence, impugned order does not require any interference – application is liable to be dismissed.(Para – 6, 7)

Application u/s 482 Dismissed. (E-11)

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

1. Heard learned counsel for the applicant and Shri Diwakar Singh, the learned A.G.A. for the State.

2. The present application under Section 482 Cr.P.C. has been filed by the applicant for quashing of the order dated 12.04.2023 passed by the court of learned Additional Principal Judge, Family Court No. 1, Lucknow in Criminal Case No. 1961 of 2022, Smt. Shaleeni Singh Vs. Siddarth

Wardhan, under Section 125 Cr.P.C. by means of which the learned court while allowing partly the said application under Section 125 Cr.P.C., has directed the applicant to pay Rs. 18,000/- per month to his wife-opposite party No. 2 from the date of filing of application under Section 125 Cr.P.C. as maintenance.

3. Submission of learned counsel for the applicant is that Rs. 18,000/- per month to the wife from the date of application has been fixed as maintenance. Further submission is that such high amount of maintenance can be justified only after looking into the merits of the case. The provisions of maintenance is basically meant to avoid the prospect of destitution and vagrancy of ignored wife or children. Learned counsel for the applicant has tried to elaborate upon the economic circumstances of the applicant and his other obligations and liabilities and has tried to show that fixation of such high amount is causing great hardship to the applicant. Counsel has also sought to place his criticism against the impugned order on various other grounds touching upon the factual as well as legal aspects of the matter.

4. Per contra learned A.G.A. states that the Court below passed the impugned order after considering the facts and circumstances of the case and the statements of the opposite party no.2, in such circumstances to meet the ends of justice, the impugned order does not require any interference. The trial court has passed the order dated 12.04.2023 as maintenance to be paid by the applicant to the opposite party No. 2. There is no illegality, impropriety and incorrectness in the impugned order and also there seems to be no abuse of court's process.

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

6. From perusal of the impugned order dated 12.04.2023 it is apparent that the trial court has clearly stated this fact that as per the allegations made in the application under Section 125 Cr.P.C. marriage of applicant and the respondent No. 2 took place on 05.04.2015 and since then she has been meted to cruelty and torture as her in-laws were not satisfied from the dowry given at the time of marriage and they used to make demand of money for purchasing a flat, on account of which she fell under depression and met to brain hemorrhage after only fifteen days of her marriage, on account of which she became partially paralyzed, but the applicant did not get her medically treated by leaving her in the hospital and went to his job, the opposite party No. 2 was having no option but to reside with her parents, but the applicant did not given any money for his treatment or maintenance. Thereafter, relations of applicant and the opposite party No. 2 became strange and he was not interested to keep her wife and he wants to marry with another woman. Moreover, the opposite party No. 2 filed a case under Section 12 of the Domestic Violence Act bearing Misc. Case No. 4288 of 2021 in which the court concerned passed an order granting maintenance of Rs. 42,000/- per month to the opposite party No.2 but the said amount is not being paid by the applicant to his wife which shows his malafide intention. Thereafter, the learned Additional Principal Judge passed the impugned order dated 12.04.2023 by allowing partly the application No. Ga-4 for interim maintenance moved by the opposite party No. 2 directing the applicant to pay Rs. 18,000/- per month until further orders on tenth day of every month. In the impugned

order the learned Additional Principal Judge has given its concurrent finding that as per the statement and evidence produced by the opposite party No. 2 the applicant is serving in a multinational company at Bangalore and is earning eighty eight lakh rupees per annum in the form of his salary, thus, the interim maintenance amount fixed by the learned Additional Principal Judge cannot be said to be excessive or disproportionate and the same can be said to be a petty amount in view of huge salary of applicant. The provisions of Section 125 of Cr.P.C are beneficial provisions which are enacted to stop the vagrancy of a destitute wife and to provide some succour to them, who are entitled to get the maintenance which has been wrongly denied. The fact that the applicant is the husband of opposite party no.2, has not been denied.

7. In view of above, the impugned order does not require any interference by this Court. The present application under Section 482 Cr.P.C. lacks merit and is liable to be **dismissed**.

8. **Dismissed** accordingly.

9. However, the court below is at liberty to proceed regarding recovery of the entire amount due in accordance with law.

(2023) 6 ILRA 194
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.05.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 4919 of 2023

Ram Saroj ...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Rajesh Kumar Singh, Vijayendra Prakash Tripathi

Counsel for the Opposite Parties:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 125, 128 & 482: - Application U/s 482 – challenging the order of Trial Court passed u/section 128 of Cr.P.C. – for recovery of entire amount of maintenance which was fixed by court below as Rs. 1200/- per month u/section 125 of Cr.P.C. - against which applicant-husband filed a Criminal Revision which was allowed and matter remanded back to decide the application of 125 Cr.P.C. afresh – against which wife filed criminal Revision before this Court, in which co-ordinate Bench of this court set aside the order of revisional court and affirm the order of court below passed u/s 125 of Cr.P.C. by giving relaxation not to pay the entire arrears at once, directed to pay Rs. 10,000/- per month – recovery – question of equity – court finds that, applicant is not intended to pay the amount of maintenance as directed by the court below or by this court - held, it is nothing but an abuse of process of the law and he is passing time by filing the present petition to avoiding to pay maintenance to his wife – hence, this court has to see the question of equity and equity goes in favour of wife - consequently, direction issued to recover the entire amount of arrears due against the applicant within two months – petition is dismissed accordingly. (Para – 6, 8, 9, 10)

Application u/s 482 Dismissed. (E-11)

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

1. Heard Sri Vijayendra Prakash Tripathi, learned counsel for the applicant and Sri Tilak Raj Singh, learned A.G.A. for the State.

2. This applicant under Section 482 Cr.P.C. has been filed for quashing of the

order dated 20.12.2022 passed by the Additional Principal Judge, Court No.1, Bahraich in Case No. 128/11/19 under Section 128 Cr.P.C..

3. Learned counsel for the applicant submits that the opposite party No. 2-Smt Vimla Devi filed application under Section 125 Cr.P.C. for maintenance which was allowed by order dated 31.08.2006 by which Rs. 1200/- was fixed as maintenance from the date of hearing.

4. Learned counsel for the applicant further submits that against the order dated 31.08.2006 the applicant-husband filed Revision bearing No. 769 of 2006: Ram Saroj Vs. Smt Vimla Devi, before the learned Second Additional Sessions Judge, Bahraich, which was allowed vide order dated 02.11.2007 and the order dated 31.08.2006 was set aside and the matter was remanded back to the court below to decide the application filed under Section 125 Cr.P.C. afresh.

5. Aggrieved by the order dated 02.11.2007 passed by the Second Additional Sessions Judge, Bahraich in Criminal Revision No. 769 of 2006, the opposite party No.2 preferred Criminal Revision No. 119 of 2010: Vimla Devi Vs. Sate of U.P. and others before this Court and a co-ordinate Bench of this Court by a detailed judgment dated 13.12.2018 disposed of the revision, set aside the judgment passed in Criminal Revision No.769 of 2006 and affirmed the judgment passed by the learned Magistrate in Criminal Case No. 252 of 2006 on 31.08.2006. The operative portion of the judgment passed in Criminal Revision No.769 of 2006 is being quoted herein-below:

"In the totality of circumstances, there was no sufficient reason warranting the learned Second Additional Sessions Judge to interfere with the impugned judgment of the learned Magistrate, thereby awarding maintenance @ Rs. 1200/- per month to the wife.

The impugned judgment accordingly cannot be allowed to stand and, therefore, the judgment passed in Criminal Revision No.769 of 2006 on 02.11.2007 is hereby set aside.

The judgment passed by the learned Magistrate in Criminal Case no.252 of 2006 on 31.8.2006 is hereby affirmed.

With these observations, this Criminal Revision no.119 of 2010 is hereby disposed of."

6. Learned counsel for the applicant further submits that thus the order dated 31.08.2006 passed in Criminal Case No.252 of 2006 was affirmed, thereafter the opposite party No.2-wife moved an application for recovery of the entire arrears amount since 31.08.2006, thereafter the court below vide order dated 20.12.2022 giving relaxation not to pay entire arrears at once directed to pay Rs. 10,000/- per month. Aggrieved by the impugned order the present application under Section 482 Cr.P.C. has been filed.

7. Learned A.G.A. whereas opposed the argument advanced by learned counsel for the applicant and submits that the present case filed by the applicant is nothing but an abuse of process of law and his intention is very clear that he is not intent to pay single penny to his wife. Only some marginal amount of Rs. 1500/-, 2500/- has been paid without any order, thus the application is liable to be dismissed and the court below may be directed to recover the entire amount within two months.

8. After hearing the arguments of learned counsel for the parties and after perusal of record, this Court is of the view that order of maintenance of Rs. 1200/- per month to the opposite party No.2-Smt. Vimla Devi vide order dated 31.08.2006, which was challenged by filing the Revision and the said revision was allowed vide order dated 02.11.2007 and the order dated 31.08.2006 was set aside and the matter was remanded back to the court below to decide the application filed under Section 125 Cr.P.C. afresh. Thereafter, the opposite party No.2 preferred Criminal Revision before this Court and a co-ordinate Bench of this Court by a detailed judgment and order dated 13.12.2018 allowed the revision and affirmed the judgment passed by the learned Magistrate in Criminal Case No. 252 of 2006 on 31.08.2006 passed in Criminal Revision No.769 of 2006. Thus, the maintenance is due from the date of order dated 31.08.2006 and the applicant was not paying the arrears amount, in spite of the fact that the learned Magistrate vide order dated 20.12.2022 relaxed the applicant in making the payment in one stock directed to pay Rs. 10,000/- per month, that too was not paid by the applicant to opposite party No.2 and the present application has been filed. Thus, in view of the Court it is nothing but an abuse of process of the law and the applicant is passing the time by filing the present petition and is not intending to pay the amount, as directed by the court below or by the order passed by this Court vide order dated 13.12.2018, thus the intention of the applicant appears to be very clear that he is avoiding to pay maintenance to his wife.

9. This Court has to see the question of equity and equity goes in favour of opposite party No.2-wife, who is deprived for the payment since 2006, when the order was passed on the application filed under Section 125 Cr.P.C.

10. In the interest of justice, the court concerned is directed to recover the entire amount of arrears, due against the applicant, within two months from today and proceed in accordance with law.

11. With the above observations/directions, this petition is **dismissed.**

12. Let the copy of this order be sent to the court below for its necessary compliance.

(2023) 6 ILRA 196
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2023

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 1511 of 2010
connected with
Writ A No. 6943 of 2007
and other connected cases

Prabodh Kumar Pathak ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sameer Kalia, Akash Deep Dubey, Anuj Singh, Ashish Verma, Deepak Srivastava, Deepanshu Dass, Garima Chauhan, Lalta Prasad Misra, Neel Kamal Mishra, Sarvesh Kumar Dubey, Siddharth Nandan, Upendra Nath Misra

Counsel for the Respondent:
C.S.C., P.K. Srivastava, Utsav Misra

A. Service Law – United Provinces Services of Engineers (Building & Road Branch)

Class-II Rules, 1936 – Rules 6 & 9 – Public Works Department – Promotion to the post of Asst. Engineers – Claim of Diploma holder Junior Engineer Vs claim of Degree holder Junior Engineer – Determination of vacancies arising in the direct and promotion quota – Held, number of vacancies under the promotion quota for the period during 1997-1998 to 2003-2004 ought to be determined as per the Service Rules of 1936, wherein rule 6(a) provides for promotional quota of 25% for promotion of Junior Engineers to the post of Asst. Engineers – However, the vacancies occurred w.e.f. 3.1.2004 to 30.6.2004, 50% are allocated in the quota of direct recruitment and 50% vacancies in the quota of promotion – High Court directed the St. authority to re-determine the number of vacancies by constituting a High Level Committee. [Para 141, 144 and 191 (a)]

B. Service Law – United Provinces Services of Engineers (Building & Road Branch) Class-II Rules, 1936 – Rule 3(b), 4(i), 5, 69, 17 & 19 – Public Works Department – Promotion to the post of Asst. Engineers – Claim of diploma holder JEs Vs claim of degree holder JEs – Amendment dated 11.01.1993 – Criteria for promotion as mentioned in Rule 12 was changed from 'merit' to 'seniority subject to rejection of unfit' – Qualifying examination – Not providing opportunity the diploma holder JEs to appear in examination – Effect – Held, qualification examination was a gate-way for promotion to the diploma holder JEs as by passing such qualifying examination, these diploma holder JEs would come within the consideration zone for promotion to the post of Asst. Engineers – Held further, very issuance of three promotion orders in 2008, 2009 and 2010 on the basis of a solitary qualifying examination held in August, 2007, which is evidently in violation of the procedure prescribed for determining eligibility of Diploma Holder J.Es appears to be not as per Law – The diploma holder JEs were wrongly ousted from the consideration zone of promotion – High Court directed the St. Authorities to hold the qualifying examination as provided under rule 9(ii) of the old rule, 1936 and other ancillary rules and provide equal opportunity to the diploma holder Junior Engineers forthwith, so as to enable them to come within the consideration zone for promotion to Asst. Engineers – High Court quashed all the three impugned promotions orders dated 02.08.2008, 03.07.2009 and 05.02.2010 in favour of degree holder JE. [Para 27, 156, 161, 168, 191 (b) and 191 (c)]

C. Service jurisprudence – Right to promotion – Claim as the Fundamental right – Permissibility – Held, right to promotion is not considered to be a fundamental right but consideration for promotion has now been evolved as a fundamental right – *Ajay Kumar Shukla's case* relied upon. (Para 112)

Writ petitions disposed of. (E-1)

List of Cases cited:

1. Anupal Singh & ors. Vs St. of U.P. & ors., (2020) 2 SCC 1

2. Paper Products Limited Vs CIT Mumbai, (2007) 7 SCC 352

3. Surendra Kaul Vs Jyoti Ranjan, (2001) SCC Online Cal. 237

4. P.D. Agarwal & ors. Vs St. of U. P. & ors., (1987) 3 SCC 622

5. Aruvendra Kumar Garg Vs St. of U.P. & ors.; 2002 (2) E.S.C. 148

6. CMWP No. 9127/2003; Vijay Kumar & ors. Vs St. of U. P. decided on 16.07.2004

7. Anjani Kumar Mishra & ors. Vs St. of U.P. & ors.; 2007(1) UPLBEC 260

8. Diploma Engineers Sangh Vs St. of U. P.; 2007(13) SCC 300

9. St. of Tripura Vs Nikhil Ranjan Chakraborty, (2017) 3 SCC 646

10. Union of India Vs Krishna Kumar, (2019) 4 SCC 319

11. St. of Orissa Vs Dhirendra Sundar Das; (2019) 6 SCC 270

12. Baleshwar Das Vs St. of U.P. & ors.; (1980) 4 SCC 226

13. Special Appeal No. 917/2006; Badri Prasad & 31 Ors Vs Satya Dev Sharma decided on 22.05.2015

14. W.P. no. 6530(S/S) 2004; Shiv Kumar Singh Vs Satya Dev Sharma decided on 01.11.2006

15. Madan Lal Vs St. of Pun. & ors. [AIR 1994 SC 647 para-6]

16. K.K. Khosla & anr. Vs St. of Har. & ors.; (1990) 2 SCC 199

17. A.N. Sehgal & ors. Vs Raje Ram Sheoran & ors.; 1992 Supp (1) SCC 304

18. Ajay Kumar Shukla Vs Arvind Rai; 2021 SCC Online SC 1195

19. Union of India & ors. Vs Krishna Kumar Others (2019) 4 SCC 319

20. Deepak Agarwal Vs St. of U.P.; 2011 (6) SCC 725

21. Baleshwar Das & ors. etc. Vs St. of U.P. & ors., AIR 1981 SC 41

(Delivered by Hon'ble Om Prakash Shukla, J.)

A. Introduction:

(1) The present issue, engaging the attention of this Court has a chequered history of litigation. Essentially, it revolves around the struggle relating to the promotion of Diploma holder Junior Engineer and Degree holder Junior Engineer to the post of Assistant Engineers in the Uttar Pradesh Public Works Department, wherein in the bandwagon, several other stake holders including the direct recruited Assistant Engineers, have also jumped to further complicate the whole issue. Evidently, the primary issue is relating to determination of vacancies arising in the direct and promotion quota for the period 1997-98 to 2003-04 and a secondary issue is relating to the manner this promotion quota can be filled in view of the prevailing United Provinces Services of Engineers (Building & Road Branch) Class-II Rules, 1936, its periodical amendment, Government Orders and most importantly the Judgments passed by this Court and the Hon'ble Supreme Court in that context.

(2) Although, several judgments and orders have been passed by this Court as well as the Hon'ble Supreme Court, which impacts the promotions of these Junior Engineers during the said litigations era of 1997-98 to 2003-04, however with the remand order dated 21.08.2019 by the Hon'ble Supreme Court in Civil Appeal No. 3695/2007 *"Aitbal Singh Vs. Pramod Shankar Upadhyaya & Ors."*, by virtue of which these writ petitions have been remanded for re-hearing before this Court, all the issues relating to the promotions including the quota stands revived. The relevant extract from the remanding order of the Hon'ble Apex Court can be profitably quoted as herein below:

"...A peculiar situation has arisen in this case. The decision which has been overruled by the High Court was affirmed by this court in Diploma Engineers Sangh V. State of U.P [(2007) 13 SCC 300]. It was brought to the notice of the High Court that a special leave petition

was pending consideration before this court and judgment was reserved. Notwithstanding the said fact, the High Court has overruled the decision which was affirmed by this High Court later on. Judicial Proprietary required that the High Court should have stayed its hands when the matter was heard and reserved by this court and the High Court should not have proceeded with the hearing of the matter.

Apart from that, we find that certain reliefs have been granted by the High Court which were not even prayed for in the writ petition. The High Court ought to have confined consideration to the reliefs prayed in the writ petition and also considering the subject matter and parties before it.

We, therefore, set aside the impugned judgment and order and remit the matter to the High Court. We request the High Court to decide the matter afresh within six months after hearing the parties afresh".

(3) Thus, the following writ petitions being remanded vide the aforesaid order dated 21.08.2019 passed in Civil Appeal Nos. 6569, 6570, 6571-6572, 6573, 6574 of 2019 (arising out of SLP (C) Nos.28395, 28917,28535-28536 & 33760 of 2011, 3435 of 2012 impugning the Judgment dated 08.09.2011 passed by a Division Bench of this Court) are being re-heard :-

Sr. No.	Writ Petition No.	Cause-title
1	1511(S/S) of 2010	Prabodh Kumar Pathak and others Vs. State of U.P. and others.
2	6943(S/S) of 2007	Diploma Engineers Sangh PWD and others Vs. State of U.P. and others
3	7232(S/S) of 2007	Arvind Kumar Pandey and others Vs. State of U.P. and others
4	7649(S/S) of 2007	Brajesh Chandra Mishra and others Vs. State of U.P. and others
5	3173 (S/S) of 2008	Diploma Engineers Sangh PWD and others Vs. State of U.P. and others
6	3422(S/S) of 2008	Yatendra Babu and others Vs. State of U.P. and others
7	3448(S/S) of 2008	Noorul Huda and others Vs. State of U.P. and others
8	3506 (S/S) of 2008	Madan Mohan Mishra and others Vs. State of U.P. and others
9	3578 (S/S) of 2008	Ram veer Singh and others Vs. State of U.P. and others
10	3594(S/S) of 2008	Madan Kumar and others Vs. State of U.P. and others
11	3660(S/S) of 2008	Bhavya Nidhi Vs. State of U.P. and others
12	3666(S/S) of 2008	Anil Kishore Pandey and others Vs. State of U.P. and others
13	4151 (S/S) of 2008	Ram Saran Mahto and others Vs. State of U.P. and others
14	4536(S/S) of 2008	Rajendra Kumar Mishra Vs. State

		of U.P. and others
15	5276(S/S) of 2008	Satyawan Singh Suman and others Vs. State of U.P. and others
16	5880 (S/S) of 2008	Serves Kumar Vs. State of U.P. and others
17	6017(S/'S) of 2008	Purushottam Dubey and others Vs. State of U.P. and others
18	7361(S/'S) of 2008	Noorul Huda and others Vs. State of U.P. and others
19	1698 (S/S) of 2009	Anoop Kumar Dwivedi Vs. State of U.P. and others
20	2366(S/S) of 2009	Arun Gupta and others Vs. State of U.P. and others
21	3314 (S/S) of 2009	Diploma Engineers Sangh PWD and others Vs. State of U.P. and others
22	4459 (S/S) of 2009	Umesh Prakash Srivastava Vs. State of U.P. and others
23	7702 (S/S) of 2009	Arvind Kumar Pandey and others Vs. State of U.P. and others
24	Writ-A No. 2000252 of 2009	Arvind Kumar Pandey and others Vs. State of U.P. and others
25	Writ-A No. 2000447 of 2009	Ashok Kumar Ram Jagat and others Vs. State of U.P. and others
26	Writ-A No. 2000622 of 2009	Swami Nath Puri Vs. State of U.P. and others
27	Writ-A No. 2000654 of 2009	Ashok Saxena Vs. State of U.P. and others
28	Writ-A No. 2000679 of 2009	Ashok Saxena Vs. State of U.P. and others
29	Writ-A No. 2000918 of 2009	Om Prakash and others Vs. State of U.P. and others
30	Writ-A No. 1212 (S/B) of 2009 withdrawn vide order dated 28.02.2023	Surendra Kumar Srivastava and others Vs. State of U.P. and others
31	Writ-A No. 2002018 of 2009	Ravindra Singh and others Vs. State of U.P. and others
32	Writ-A No. 200342 of 2010	Jang Bahadur Singh and others Vs. State of U.P. and others
33	Writ-A No. 200670	Jang Bahadur Singh and others Vs. State of U.P. and others
34	Writ-A No. 200676 of 2010	Jang Bahadur Singh and others Vs. State of U.P. and others

(4) The aforesaid writ petitions are being heard along with the following connected writ petitions, which are part of the aforesaid remand order passed in Civil Appeal No. 6576 of 2019 *(arising out of SLP (C) Nos. 479 of 2016 impugning the judgment dated 05.01.2016 passed by a Division Bench of this court) :-*

Sr. No.	Writ Petition No.	Cause-title
35	Writ-A No. 2001618 of 2015	Arun Kumar Mishra Vs. State of U.P.

		and others

And

The following connected writ petition, which is part of the aforesaid remand order, passed in Civil Appeal No. 6577 of 2019 *(Arising out of SLP (C) Nos. 13962 of 2016 impugning the judgment dated 01.04.2016 passed by a Division Bench of this court).*

Sr. No.	Writ Petition No.	Cause-title
36	Writ-A No. 2000967 of 2015	Shamsuddin and Ors Vs. State of U.P. and others.

And

The following connected writ petition, which part of the aforesaid remand order, passed in Civil Appeal No. 6575, 6580, 6581, 6582, 6583, 6584 & 6585 OF 2019 *(Arising out of SLP (C) no (s) 23856, 24083, 20259, 24084 & 21666 & 24071 of 2018 and 4574 of 2019 6577 of 2019 impugning the judgment dated 17.07.2018 passed by a Division Bench of this court).*

Sr. No.	Writ Petition No.	Cause-title
37.	24634 (S/S) of 2016 withdrawn vide order dated 04.02.2021	Manoj Kumar and others Vs. State of U.P. and others

And

The following connected writ petition, which is part of the aforesaid remand order, passed in Civil Appeal No. 6578-79 of 2019 *(Arising out of SLP (C) Nos. 20618-20619 of 2017 & 12631 of 2018 impugning the judgment dated 04.07.2017 passed by a Division Bench of this court).*

Sr. No.	Writ Petition No.	Cause-title
38.	Writ-A No. 9064 of 2017	Vimal Kumar Mishra and Ors Vs. State of U.P. and others.

Further, the following writ petition also came to be tagged along with the aforesaid matters, which have been filed challenging the consequential effect of the main issue to be determined by this court. This writ petition being

Sr. No.	Writ Petition No.	Cause-title
39.	29014 (S/B) of 2017 withdrawn vide order dated 29.04.2022	Vijay Bahadur Yadav and Anr. Vs. State of U.P. and others.
40.	Writ-A No. 12155 of 2018	Gulbir Singh & 2 others Vs. State of U.P. and others.
41.	Writ-A No. 26443 of 2019 withdrawn vide order dated 26.04.2022	Kaushal Kumar Jha & others Vs. State of U.P. and others.
42.	Writ-A No. 21573 of 2021 withdrawn vide order dated 01.03.2023	Patanjali Srivastav and others Vs. State of U.P. and others.
43.	Writ-A No. 3808 of 2022	Sunil Kumar Singh and Anr. Vs. State of U.P. and others.

44.	Writ-A No. 4141 of 2022	Vipin Kumar and 13 others Vs. State of U.P. and others.
45.	Writ-A No. 5811 of 2022	Nagendra Nath Yadav and 3 Others Vs. State of U.P. and others.

B. Genesis of Dispute

(5) Before adverting to the rules regulating appointment, promotions and other conditions of service of these Junior Engineers, it would be pertinent to mention that primarily three orders regarding promotion of Junior Engineers (Civil) to Assistant Engineer (Civil) in the Uttar Pradesh Public Works Department (UPPWD) are under challenge in these present bunch of writ petitions. These three orders being:

"(i) Order dated 02.08.2008 relating to 96 promotions;

(ii) Order dated 03.07.2009 relating to 27 promotions;

(iii) Order dated 05.02.2010 relating to creation of 97 more vacancies in promotions quota for 2003-2004 by applying "cadre principle" retrospectively, against which 78 recommendations for promotion were received from UPPSC in May, 2010, however the same could not be implemented due to the orders of this court."

(6) Apparently, all these promotion orders have been in favour of the degree holder Junior Engineers, wherein 96 promotees of order dated 02.08.2008 have joined and continued to work as Assistant Engineer since 2008, however, 27 promotees of order dated 03.07.2009 and 78 recommended promotees of order dated 05.02.2010 did not work on promoted post, but there seats are kept withheld as *"protected vacancies".*

(7) Thus, both the issues relating to (i) *number of post available for Asst. Engineer under the promotion quota and* (ii) t*he claim of the Degree holder J.E and Diploma holder J.E to the said post* are to be adjudicated by this Court.

(8) The other writ petitions connected with this bunch of matters have been filed either for consequential reliefs leading to the aforesaid promotion orders or relating to other service conditions arising from these three promotion orders.

(9) At the outset itself, learned Senior Counsel of the contesting private respondents have vehemently argued that the promotion order dated 02.08.2008 of 96 promottees, was not quashed vide judgment dated 08.09.2011 and therefore the Hon'ble Apex Court, while setting aside the judgment dated 08.09.2011, vide its remand order dated 21.08.2019 has not remanded the promotion order dated 02.08.2008 for rehearing of the matter afresh. In rebuttal, the learned Senior Counsel appearing for the petitioners have argued that the Hon'ble Supreme Court had remanded the entire bunch of writ petitions decided on 08.09.2011 along-with other cases for re-hearing, which included the two writ petitions, bearing nos. 6943 of 2007 and 3173 of 2008, vide order dated 21.08.2019. According to them, all the three promotion

orders dated 02.08.2008 (regarding 96 promotions), 03.07.2009 (regarding 27 promotions) and 05.02.2010 (regarding 78 recommendations) were assailed in about 40 writ petitions, which were decided by a common judgment and order dated 08.09.2011 and although this Court, vide judgment dated 08.09.2011 had only quashed the impugned orders dated 03.07.2009 and 05.02.2010 (while erroneously leaving order dt 02.08.2008) but it had also finally disposed off all the pending writ petitions, including the aforesaid two writ petitions no.6943 of 2007 and 3173 of 2008, in terms of the observations made in the judgment dated 08.09.2011.

(10) It is the contention of the petitioners that the Hon'ble Supreme Court vide order dated 21.08.2019, while setting aside the judgments dated 03.11.2006 passed in *Anjani Kumar's case* and order dated 08.09.2011 passed in *Diploma Engineers Sangh's case*, remanded all the matters for fresh hearing and since the aforesaid two petitions no.6943 of 2007 and 3173 of 2008 were also finally decided by the judgment dated 08.09.2011, therefore, they are fully covered by the remand order dated 21.08.2019 and they have to be heard afresh, together with this bunch.

(11) Having considered the rival submission, this court is of the view that no doubt the promotional order dated 02.08.2008 had not been specifically mentioned in the concluding paragraph of the earlier order dated 08.09.2011, however the observation and the conclusion arrived in the said judgment appears to be a holistic appreciation of all the three impugned promotion orders. This Court has specifically recorded in the said earlier order dated 08.09.2011, as follows;

"In the instant case, perusal of eligibility list dated 9.4.2008 reveals that names of certain persons were included, who, undoubtedly, at the relevant time were working on probation and have not become members of service. We are unable to accept the assertion of the private respondents that all the persons who have been appointed against substantive vacancy were fully eligible for promotion even without being confirmed on the post."

(12) Apparently, the said eligibility list dated 09.04.2008 *(mentioned supra)* along with eligibility list dated 25.04.2008 forms the basis of promotion order dated 02.08.2008, which this court had remarked to be unacceptable.

(13) Moreover, after final disposal of the entire bunch of cases by this court vide its judgment dated 08.09.2011, the aforesaid two writ petitions cannot be presumed to have been left out or decided in air, without there being any other order for the same. The Hon'ble Apex Court, in a recent judgment dated 30.09.2019, passed in **Anupal Singh and others Versus State of U.P. and others, (2020) 2 SCC 1**, has held that *"where a common judgment has been delivered in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leaves the entire dispute becoming subjudice once again".*

(14) Thus, when the matters are remanded to this Court by the Hon'ble

Apex Court, with a direction of hearing afresh i.e. de-novo hearing, then fresh hearing has to be conducted, as if, original hearing has not taken place at all and in such circumstances, such a remand is a complete remand and cannot be termed as limited/restricted remand. This aspect has been clarified by the Hon'ble Apex Court in the cases of **Paper Products Limited Versus CIT Mumbai,** (2007) 7 SCC 352; **Surendra Kaul Versus Jyoti Ranjan**, (2001) SCC Online Cal. 237.

(15) Further, from a perusal of the prayers of the SLP filed against the judgment and order dated 08.09.2011, it is revealed that entire judgment dated 08.09.2011 was challenged, which was passed on all the bunch of petitions including writ petition no. 6943 of 2007 and 3173 of 2008, in which the exercise of promotion on 96 vacancies culminating in the issuance of impugned promotion order dated 02.08.2008 was challenged. Thus when the judgment dated 03.11.2006 and all the subsequent judgments including the judgment dated 08.09.2011 have been set aside, with the direction of rehearing of the matters afresh, the contention & request of Mr. Dixit cannot be acceded to as all the writ petitions decided by judgment dated 08.09.2011, including the writ No. 6943/2007 & 3173/2008, would be revived along with their pleadings, and would be reheard afresh.

(16) Therefore, the submissions of the private respondents that the two writ petitions challenging their promotion order dated 02.08.2008 and the entire procedure of promotions, are not covered by the remand order dated 21.08.2019 of the Apex Court and therefore these two Writ Petitions do not require rehearing, deserves to be turned down. Thus, this court proceeds with deciding all the three impugned promotion orders.

C. The Old Service Rules of 1936

(17) That the rules regulating process of promotion from the post of Junior Engineer to the post of Assistant Engineer in the state of Uttar Pradesh is as per the United Provinces Service of Engineers (Building and Road Branch) (Class II) Rules, 1936, which has been amended from time to time (hereinafter referred to as the Old 1936 Rules). Apparently, after the commencement of the Constitution of India, the United Provinces Service of Engineers (Buildings and Roads Branch) Class-II Rules 1936 (for brevity 1936 Rules) continued to be in force by virtue of Article 313 of the constitution of India.

(18) The salient feature of the 1936 rules, which originally existed and are relevant to the context in these bunch of matters, inter-alia stated:

(a) Rule 3(b) related to as to who can be a member of the service and it invariably states; *"Those appointed in substantive capacity to a post in the cadre under the provisions of these Rules"*.

(b) Rule 4(i) says that there is no compulsion for the state Government to necessarily fill-up all the vacancies every year, so no right of promotion every year.

(c) Rule 5 relates to Source of Recruitment; which inter-alia says:

(i) *by direct appointment from amongst engineer students who have*

passed out of the Thomson Civil Engineering College, Roorkee, and who have completed a course of training in the Buildings and Roads Branch as engineer students after consulting a Permanent Board of Selection.

(ii) *by direct appointment after advertisement and after consulting a Permanent Board of Selection.*

(iii) *by the appointment of officers in the temporary Service of the United Provinces Public Works Department, Buildings and Roads Branch, after consulting a Permanent Board of Selection.*

(iv) *by promotion of members of the United Provinces Subordinate Engineering Service or of Upper Subordinates in the Public Works Department, Buildings and Roads Branch, who have shown exceptional merit.*

(d) Rule-6 relating to the number to be recruited from each source say, the Government shall decide in each case the source from which a vacancy shall be filled:

Provided that-

(a) Members of the United Provinces Subordinate Engineering Service or of upper Subordinates who are eligible for promotion under clause (iv) of rule 5 are debarred from applying for direct appointment under clause (ii) of that rule.

(b) In making appointments of the service, care shall be taken to secure reasonable representation of the different communities and to prevent the preponderance of any one class of community.

(c) In the case of direct appointment, other things being equal, weight shall be given to a candidate's family status.

(e) Rule-9 related to Qualifications of which rule 9(i) said that no person shall be recruited to the service under the provisions of rule 5(i), 5(ii), or 5(iii) unless-

(a) he holds the Engineering certificate of the Thomson college, or

(b) he is a fully qualified Associate Member of the Institution of Engineers (India), or

(c) he has obtained an Engineering degree of one of the Universities mentioned in the appendix under the conditions prescribed therein, or

(d) he has passed Section A and B of the Associate Membership *Examination* of the Institution of Civil Engineers, or

(e) he has passed the Associateship *Examination* of the City and Guilds Institute (Imperial College of Science and Technology, South Kensington) in Civil Engineering; and

(f) he has, if recruited under the provisions of rule 5(ii), had at least two year's practical experience on important works connected with roads and buildings.

Further, Rule 9(ii) says that no officer shall be promoted to the service under rule 5(iv) unless he has passed such qualifying *examination* which the Government may prescribe.

(f) Rule 17 said that probation shall be for a period of four years of satisfactory service and Rule 18 says that departmental *examination* was necessary for confirmation.

(g) Further rule 19 said that confirmation would be after completion of

probation period and passing of all the tests and satisfactory service. Rule 20 and 21 relates to extension of probation period and termination of service. Rule 23 says that seniority would be determined by their initial rates of pay and confirmation shall be subject to Rule 22 i.e passing of departmental *examination* where required.

(19) The earliest amendment to the aforesaid 1936 rules had been on 28.10.1936 itself, wherein Rule 6 (a) was inserted to mean that *"Not less than 20 percent of vacancies shall be reserved for selected qualified members of the Subordinate Engineering Service and the Upper Subordinate Engineering Service in promotion".*

(20) Further, Rule 23 was also substituted by an amendment of 18.06.1941 to mean that seniority would be given from the date of order of appointment and Rule 9(ii) was amended on 19.04.1943 by substitution to mean; *"No officer shall be promoted to the service under rule 5(iv) unless he has passed such qualifying examination as the Governor may prescribe, or possesses the technical qualifications prescribed in clause (i) of this rule."*

(21) Apparently, Rule 9 of Old 1936 Rules as initially existed provided technical qualifications required to be possessed for the post of Assistant Engineer. Sub-clause (ii) provided that no officer would be promoted under Rule 5(iv) unless he had passed any qualifying *examination*, which the Government may prescribe. However, vide the aforesaid amendment dated 19.04.1943, a provision was made that an officer could be promoted to the post of Assistant Engineer after having passed the qualifying *examination* as prescribed by the State Government or in case he possessed the technical qualification prescribed in Rule 9(i) of the 1936 Rules. The effect of the said amendment was that a Junior Engineer possessing any of the qualifications prescribed under Rule 9(i) was no longer required to pass the qualifying *examination* for promotion as he had also an alternate route to be promoted by achieving the qualification as mentioned in the rules. Thus, qualifying *examination* was necessary to be passed only by such Junior Engineers who did not possess the technical qualification specified under Rule 9(i).

(22) This Court finds that the aforesaid choice given to a Junior Engineer to either pass the qualifying *examination* or obtain a technical qualification for consideration in the promotion quota to the post of Asst. Engineer under the promotion quota has become a bone of contention between the Diploma holder JEs and Degree holder JEs, which has led to several rounds of litigation between these two groups. The present bunch of litigation appears to be largely between this two contesting groups.

(23) That this court would not go into great details of the other amendments, however suffice to say that again on 21.7.1959 a notification was issued by the State Government making amendment to the Old 1936 Rules whereby in Clause (iv) of Rule-5 the words 'upper-sub-ordinate' had been deleted and the existing Clause (a) of Rule-6 was substituted by new provisions containing 25% of vacancies in the service to be reserved or earmarked for

selected qualified members of Sub-ordinate Engineering Service and Computers. As per the said amendment, the vacancies so reserved had to be shared by members of Subordinate Engineering Service and Computers in approximate proportion of their relative cadre strengths at the time of selection in question.

(24) Certain amendments were also made to Rules 3(c), 5 and 6 of the old 1936 Rules on 28.7.1969 and in 1971 by means of another notification amendment was effected to Rule 23 of the 1936 Rules. The validity of amendments made to Rule 3(c), 5 and 6 by the 1969 notification and amendments effected in Rule 23 by the 1971 notification were subject matter of challenge in the case of **P.D. Agarwal & Ors. V/s State of Uttar Pradesh & Ors, (1987) 3 SCC 622**, wherein the Hon'ble Apex Court by means of its judgment and order dated 8.6.1987 while quashing Rules 3(c), 5, 6 and 23 of the Old Rules as arbitrary, directed the authorities concerned to prepare a fresh seniority list of all the members of the service in the cadre of Assistant Engineer in the PWD Department on the basis of their length of service from the date they have become members of the service fulfilling all the requirements laid down in the service rules. The Hon'ble Court observing the confusion being created by the rules vis-à-vis the judgment passed by the court, had observed, to quote :

"……We cannot but observe in this connection that though the temporary Assistant Engineers have been duly selected by the Public Service Commission after they are appointed as temporary Assistant Engineers yet in spite of several directions given by this Court, the authorities concerned did not think it fit and proper to prepare the seniority list in accordance with the directions given by this Court and as a result no seniority list in the cadre of Assistant Engineer has yet been prepared following the directions made even by this Court as embodied in the decision in ***Baleshwar Dass & Ors. v. State of U.P. & Ors, AIR 1981 SC 41.*** *On the other hand amendments have been made to the existing 1936 service rules which per se seem to be arbitrary and this led to a spate of litigations. We do hope and expect that considering all these, the Government will take effective steps for preparation of seniority list as early as possible in order to create incentive for the members of the service by holding out prospects of future promotions in the interests of the service."*

(25) It would be pertinent to mention herein that the Hon'ble Supreme Court while quashing Rules 3(c), 5, 6 and 23 of the Old Rules had directed the authorities to prepare a fresh seniority list of all the members of the service in terms of the Old service rules only, thereby recognising and acknowledging the existence of the old service Rules of 1936.

(26) The State Government made further amendment to the existing Old rules of 1936, wherein rule 5(i) to 5(iii) were inserted for providing quota for different sources vide an amendment dated 04.08.1987. As per the said amendment, rule 5(i) provided that 66.67% vacancies in Assistant Engineers were to be filled by direct recruitment, rule 5(ii) provided for 25% by promotion of diploma J.E and rule 5(iii) provided for 8.33% by promotion of Degree J.E. Rule 9(ii) relating to qualifying

examination for promotion was done away with or deleted and the new substituted rule 12 provided that promotion was to be made on *"merit"* as per promotion by selection(Procedure) Rules, 1970.

(27) Subsequently, vide an amendment dated 11.01.1993, the criteria for promotion as mentioned in Rule 12 was changed from *"merit"* to "seniority subject to rejection of unfit". Later, the separate promotion quota devised by the 1987 amendment in terms of rule 5 was changed vide another amendment dated 25.09.1997 to mean that 58.34% posts were to be filled by direct recruitment, 33.33% posts by promotion of diploma J.E and 8.33% post by promotion of Degree J.E.

(28) The validity of both the notifications dated 4.8.1987 and 25.9.1997 was subject matter of challenge before this court by means of four writ petitions including Writ Petition No. 42762 of 2000 Aruvendra Kumar Garg v. State of U.P. and Ors. A Division Bench of this Court while deciding all aforesaid writ petitions jointly in **Aruvendra Kumar Garg's case** vide judgment and order dated 22.3.2002, reported in 2002 (2) E.S.C. 148, has quashed the impugned notifications dated 4.8.1987 and 25.9.1997 being ultra vires of Articles 14 and 16 of the Constitution as creation of separate quota of promotion for Degree holder JEs and Diploma holder JEs was held to be discriminatory and illegal. Against the aforesaid judgment a Special Leave Petition was filed before the Apex Court by Aruvendra Kumar Garg and others but vide order dated 1st August 2006 the Hon'ble Apex Court, permitted the appellant of said case to withdraw the Civil Appeal No. 40195 of 2002 with Civil Appeal No. 4194 of 2002 and as such the judgment passed by the Division bench of this court attained finality.

(29) Apparently, after the passing of the Aruvendra Kumar Garg's case, as per the old rules of 1936, there remained a promotion quota of 25% to be filled from Junior Engineers/Computers satisfying the eligibility requirement specified by Rule 9 as per the 1943 amendment. As a further consequence Junior Engineer/Computers of Lok Nirman Vibhag who had either passed qualifying *examination* as envisaged under Rule 9(ii) or had passed Associate Membership *Examination* of the Institute of Engineers (India) or possessed a Bachelor degree in Engineering were eligible for consideration for promotion to the post of Assistant Engineer.

(30) The qualifying *examination* envisaged by Rule 9(ii) was a qualifying *examination* prescribed by State Government. Since the qualifying *examination* envisaged under Rule 9(ii) was the qualifying *examination* for treating candidates not possessing Bachelor of Engineering degree/Associate Membership of Institute of Engineers, at par with the aforesaid qualification and the rules governing the qualifying *examination* would demonstrate that the qualifying *examination* was envisaged as a written *examination* based upon a specified course curriculum for testing the technical knowledge of the candidates in Engineering, however on 11.2.2003 the State Government issued an office order making provision that the qualifying *examination* under Rule 9(ii) of the Rules would comprise only of an oral interview to be conducted by a three Member Committee.

D. Prelude to the Dispute

(31) Obviously, the office order dated 11.2.2003 seemed to have been issued contrary to the scheme of the 1936 Rules and to some extent to the benefit & favour of Diploma holder Junior Engineers and as such the same was subject matter of challenge by the degree holder J.E in **Vijay Kumar & Others V/s State of Uttar Pradesh** (CMWP No. 9127/2003) and other connected matters. A Division bench of this court vide a judgement & order dated 16th of July, 2004 quashed the Government order dated 11.02.2003 and a direction was issued to the state Government to make promotions at the earliest, strictly in accordance with the Rules, which means the concept of written *examination* was revived.

(32) Before the aforesaid order dated 16.07.2004, was passed by the Ld. Division bench of this court, two noticeable things transpired, firstly, not only the state government went ahead with the process of interview of the diploma J.E as per its office order dated 11.02.2003, dehors that the same was quashed vide order dated 16.07.2004 in Vijay Kumar's case (supra), but the state Government, presumably thinking that with the passing of the judgment in **Aruvendra Kumar Garg's case** the entire promotional quota stood wiped out, issued a G.O dated 20.02.2003, prescribing 41.66% promotional quota post and apparently laid down procedure for promotion to fill up existing backlog vacancies under the old rule 1936. In order to make the issue more complicated, the state Government vide another letter dated 21.02.2003, asked Uttar Pradesh P.S.C to decide the date for convening D.P.C for the purpose of promotion to the post of A.E against the existing backlog vacancies, which was estimated to be 219 post. It is this G.O dated 20.02.2003, prescribing 41.66% promotional quota post of the State Government, which has created lot of confusion and is also one of the hottest contentious issue in these bunch of writ petition.

(33) Secondly, vide Notification dated 3.1.2004, the State Government framed & notified the U.P. Public Works Department Group-B Civil Engineering Service Rules, 2004 (for short the Rule 2004). The notification was issued in supersession of existing rules and orders in this regard and the intent of the notification was to supersede the 1936 Rules which continuously governed recruitment to the post of Assistant Engineers from 1936 till date. Interestingly, under the 2004 Rules, Rule 5 prescribes the source of recruitment as 50% by direct recruitment through the Commission and 50% by promotion from amongst substantively appointed Junior Engineers (Civil) and Junior Engineers (Technical) who have completed seven years' service as such on the first day of the year of recruitment. The 50% quota for promotion was subject to the proviso that 90% of the post under the promotion quota would be filled up by promotion of Junior Engineers (Civil) and 10% posts under the promotion quota to be filled up from amongst Junior Engineer (Technical).

(34) Further, as per the new Rule 8, it prescribed that the academic qualification for direct recruitment as a Bachelor's degree in Civil Engineering or an equivalent qualifications. The language of Rule 8 stipulated that the educational

qualification envisaged therein does not apply to cases of promotion. In view of the aforesaid a Junior Engineer in the Department was now entitled to be considered for promotion in case he has been substantively appointed and has completed seven years as such on the first date of the year of recruitment without any further restriction as to possession of any technical qualification or passing any *examination* as had been prescribed under the old service rules of 1936. Thus, the notification has done away with the earlier requirement of possessing technical qualification or passing of a qualification *examination* for promotion to the post of Assistant Engineer.

(35) The new service Rules completely divest the requirement of possessing technical qualification or passing an *examination* for the testing of technical knowledge. Thus, the new service Rules has in a way abolished the distinction, which has always existed in the department between Junior Engineers possessing bachelor degree of Engineering or Associate Membership of Institute of Engineers and such Junior Engineers who do not possess the said qualification. However, the notification would have prospective operation only and it would not be given retrospective operation. The notification would be applicable for filling up vacancies of Assistant Engineer arising subsequent to 3.1.2004 and the same has no applicability with regard to vacancies for promotion which have already come into existence in the department prior to 3.1.2004. The mere fact that there has been delay in finalizing the promotion either on account of the litigation pending before this Court or even otherwise is wholly irrelevant and promotion against the vacancies which have arisen prior to 3.1.2004 are required to be filled in accordance with the 1936 Rules and the same cannot be the subject matter of promotion under the notification dated 3.1.2004. In case the notification is made applicable to earlier vacancies the same would amount to granting retrospective operation to the notification, which cannot be the purview of law nor the intent of the legislature in framing the new rules.

(36) Coming back to the factum of order dated 16.07.2004 passed by this court in **Vijay Kumar & Others V/s State of Uttar Pradesh** (CMWP No. 9127/2003) and other connected matters, wherein the Government order dated 11.02.2003 was quashed, it is available from records that Diploma Engineer Sangh filed a special leave petition before the Hon'ble Apex Court, wherein vide an order dated 27.09.2004 passed in SLP(Civil) CC No 8440 of 2004, the Hon'ble Apex Court stayed the operation of the Judgment dated 16.07.2004 passed by this court and made all subsequent promotions subject to the final outcome of the SLP.

(37) In the interregnum, various writ petitions came to be filed, wherein various issues were raised including the inter-play between the old service rules of 1936 and new service rules of 2004, validity of Government order dated 20.02.2003 and the prescription of promotion quota etc. This court heard these matters at length, wherein Anjani Kumar Mishra was considered the lead matter. Apparently, although in the SLP filed against Vijay Kumar's judgment by the "Diploma Engineers Sangh" arguments were completed & judgment was reserved by

Apex court, but instead of waiting for the final judgment & deferring the hearing, this court proceeded to decide Anjani kumar Mishra's bunch case vide an order dated 03.11.2006 and 'reported as **2007(1) UPLBEC 260**, wherein this court directed the following :-

(i) The vires of the new Service Rules of 2004 was upheld.

(ii) All the 73 promotions (30.06.1998, 02.05.2002, 06.12.2004 and 25.05.2005) made only from Degree holder JEs by 04 promotion orders, issued between 1998- 2002, without considering any senior diploma JE's, were declared bad in law & were quashed.

(iii) It held that nothing would survive including rule 5,6,9 from old Service Rules of 1936 after setting aside of 1987 & 1997 amendments, except Rule 12 i.e. promotion by seniority, & hence composite promotion quota of 41.66% would apply as per G.O dated 20.02.2003 for the interregnum period.

(iv) This Court, while applying G.O dated 20.02.2003 on total 446 vacancies of the old period, also proceeded to determine total vacancies of Assistant Engineer during the period 1997-1998 to 2003- 2004, as 186 for promotion quota & 260 for direct quota applying the 41.66 theory.

(v) The State Government was directed not to give direct quota vacancies to promotion and to fill up the aforesaid vacancies, as determined by this court in accordance with law, after determining the year-wise vacancies accordingly. "

(38) The judgment in *Anjani Kumar's Case*, whereby 73 promotions were set aside, was challenged in a separate SLP titled Atibal Singh V/s state of Uttar Pradesh, preferred by reverted degree holder JEs (Atibal Group), wherein the Apex Court passed an interim order on 27.11.2006 for not reverting them. Further, another SLP came to be filed against the Anjani Kumar Mishra's case in so far as validity of new Service Rules of 2004 was concerned, in the case of Dileep Kumar Garg V/s State of U.P. & others, in which the order of status quo was initially passed on 04.01.2007. However, when the State filed an Interim application seeking vacation of status quo order & permission that old vacancies may be filled by the Old service Rules, 1936, the status quo order was vacated, but, subsequently vide an order dated 01.04.2008, the Hon'ble Apex Court dismissed the said SLP itself and upheld the judgment of this court as far as the vires of the new Service rules, 2004 were concerned.

(39) In the interregnum, the Special leave petition filed by the Diploma Holder Engineers' Sangh against the order dated 16.07.2004 passed by this court in **Vijay Kumar & Others V/s State of Uttar Pradesh**, was converted into Civil Appeal No. 3228 of 2005 and although initially, an interim order was granted by the Hon'ble Supreme Court providing that any promotion made would be subject to the outcome of the Special Leave Petition, however, finally, the said SLP/Civil Appeal was dismissed vide judgment and order dated 20/3/2007 reported as **"Diploma Engineers Sangh V/s State of Uttar Pradesh, 2007(13) SCC 300**, by upholding the judgment of the Division Bench of this Court with a further direction to the State Government to hold the qualifying *examination* qua diploma holders Junior

Engineers within a period of four months apparently indicating the existence of the old service rules of 1936 of pre-1969 amendment. It was further provided that any Junior Engineer who has been promoted in pursuance of the interim order granted by the Hon'ble Supreme Court referred to above would continue on the promoted post on ad hoc basis only subject to his being regularly promoted in accordance with the Rules, 1936 and in case they fail to clear the qualifying *examination* such persons shall stand reverted to the original post of Junior Engineers.

E. **The Dispute**

(40) Pursuant to the direction of the Hon'ble Apex Court in the **Diploma Engineers Sangh V/s State of Uttar Pradesh, 2007(13) SCC 300**, the Engineer-in-Chief on 15.5.2007, issued a letter notifying that qualifying *examination* would be conducted by the U.P. Technical Board of Education. Subsequently, the *examination*s were held on 18.07.2007 and 19.7.2007 at the U.P.S.C. Centre, Lucknow. Later on, due to some discrepancies, the *examination* held on 18 & 19.7.2007 was cancelled by the State Government vide order dated 30.7.2007, wherein it was estimated that about 711 diploma JE's had appeared. Consequently, a notice was published on 3.8.2007 that the *examination* would be now held on 12, 14 and 16th August, 2007. In the notice, it was also provided that the admit card which was issued at the time of qualifying *examination* by the U.P. Technical Board would be treated to be valid and no separate admit card would be required.

(41) However, candidates, who were posted in remote areas of the State of U.P., could not be made aware with the date of *examination* as no proper communication could be made by the concerned authorities of Department and as such large number of candidates could not participate in the *examination*. Apparently, only one candidate was able to appear in the first paper in forenoon and two others joined in the second paper in the afternoon for the qualifying *examination*. Similarly, on the next day only 9 candidates appeared in the first session and 11 in the second session. It has been claimed, that although, the State had provided that the admit card issued earlier will be treated as valid wherein the centre of *examination* was mentioned as U.P.S.C. Lucknow but the *examination* was actually changed and held at Allahabad. Thus these all deprived/prevented bonafide and eligible candidates to participate in the *examination*. This court finds that the conduct of this qualifying *examination* is also an issue in the present bunch of matters, which accordingly would be dealt with in the subsequent part of this Judgment.

(42) Apparently, in the meantime, the department without awaiting for the result of the upcoming qualifying *examination*, sent a requisition dated 24.09.2007 against 84 (186-73-29) promotion quota vacancies relating to the period of 1997-98 to 2003-2004 by including only degree holder JEs, although ironically even the results of the qualifying *examination* came to be declared only on 24.10.2007. It may be clarified that the aforesaid 84 requisition was arrived by the department, possibly by deducting the 73 promotion quashed in Anjani Kumar Mishra's case but which later came to be stayed in terms of status quo order granted

by the Apex Court and 29 promotion seats granted to the diploma holder JEs vide promotion dated 30.06.1998 from the total number of 186 promotion seats determined in Anjani Kumar Mishra's case. Thus, the first genre of writ petition like the W.P No. 6943(S/S) of 2007 came to be filed by the Diploma Sangh seeking (i) quashing of G.O dated 24.09.2007 relating to 84 promotion quota and (ii) to hold fresh qualifying *examination.*

(43) There had been topsy-turvy in the whole promotion issue, in as much as suddenly the department declared the promotions of 29 diploma holder JEs, made on 30.06.1998, as null and void, which was again later approved by the State government on 25.04.2008, wherein after they added 29 more vacancies in earlier requisition making it for 113 vacancies i.e. (84 + 29) vide an eligibility list dated 09.04.2008. Both these orders dated 25.04.2008 and the list dated 09.04.2008 was challenged by the Diploma Sangh vide a second genre of writ petition like the W.P No. 3173(S/S) of 2008.

(44) Seemingly, against the aforesaid 113 vacancies which were included in the 186 vacancies determined for the period of promotion i.e. 1997-98 to 2003-04 in *Anjani Kumar's case*, 96 (95 +1) promotions were made on 02.08.2008 and 03.02.2009, but all the promotions were given only to Degree holder JEs, which has been alleged to have been not even members of the service as they were *probationers*. Apparently, since the list was prepared without considering the eligibility of Diploma holder JEs, as allegedly no qualifying exam under Rule 9(2) was lawfully held for ascertaining the eligibility of Diploma Holder JEs, therefore these 96 promotions were challenged by amendment in the second genre of writ petition *(mentioned supra)*, on the ground of ineligibility of Degree Holder JEs and non-consideration of Diploma Holder JEs. Pertinently, the order dated 02.08.2008 was also challenged in several other petitions like W.P No. 4459(S/S) of 2009 and others, which are part of the instant bunch of Writ Petitions.

(45) In furtherance of a representation dated 27.11.2008 preferred by two Degree Holder JEs namely Vimal Kumar Mishra and Ishwar Pal Singh, about existence of 219 vacancies under the old rules as mentioned in the letter dated 06.02.2003 of E-in-C, the department sent a fresh requisition for 33 (219-186) vacancies vide an order/list dated 27.02.2009, while completely ignoring the fact that 186 vacancies was a final determination of number of promotion seats in Anjani Kumar Mishra's Judgement and that too the same were filled up. The state, while wrongly taking into account the letters dated 06.02.2003/20.02.2003 proceeded for excess promotion on the ground that Anjani kumar Mishra's case had given them the liberty to determine the actual number of seats in the promotion quota. In any case, the requisition order dated 27.02.2009 was challenged by the Diploma Holder Junior Engineers by filling a third genre of petition, like Writ petition No.3314 of 2009 i.e. Diploma Engineers Singh Vs. State of U.P and others, which is pending before this Hon'ble Court along with the instant bunch of writ petitions.

(46) Further, in Anjani Kumar Mishra's case, though this court had fixed

186 vacancies, however it had opened for the state government to re-determine the vacancies. The state government relying on the letter dated 20.02.2003 addressed by the state government to the PWD suggesting 219 vacancies, proceeded to make promotions on the remaining 219-186=33 vacancies. As per records, a total of 27 promotions were made only from Degree Holder JEs against the aforesaid 33 vacancies without considering any of the Diploma holder JEs vide promotion order dated 03.07.2009. Thus, these promotions were challenged by the Diploma Holder Junior Engineer by filling an amendment application in the aforesaid third genre of petitions, like the writ petition No. 3314 of 2009 i.e Diploma Engineers Sangh V/s. State of U.P and others. This promotion order dated 03.07.2009 was also challenged in several other petitions like W.P no. 4459(S/S) of 2009, which are part of the instant bunch of writ petitions.

(47) Although this court in Anjani mishra's case had determined the number of promotional quota seats to be 186 and against which 10 seats were estimated to be vacant, however the State Government, dehors the said determination went ahead in making 96 promotions vide order dated 02.08.2008, 27 promotions vide order dated 03.07.2009 and if that was not enough, the state government in the most surreptitious manner, went ahead to now calculate the "promotional quota" seats on the basis of "cadre strength principle" which was apparently against the old rules of 1936. The state government by applying the said cadre strength principle determined about 97 seats available for promotional quota vide requisition order dated 05.02.2010. Thus the aforesaid requisition order dated 05.02.2010 was challenged by the Diploma Holder JEs in fourth genre of petitions, like the writ petition being No. 1511 of 2010 i.e Prabodh Kumar Pathak Vs. State of U.P and others as the old rules did not provide cadre strength principle. It was contended that the principle of "cadre strength" came to be introduced for the first time under the new Service Rules of 2004, hence it cannot be applied for vacancy determination under the old service rules of 1936.

48) This Court, in a connected W.P no. 2018 of 2009 titled Ravindra Singh V/s State, vide interim order dated 28.04.2010, allowed the Respondent authorities to proceed with the DPC, but restrained them from issuing promotion orders and consequently 78 more Degree Holder JEs were considered and recommended for promotion against the aforesaid 97 vacancies but their promotion orders were never issued.

(49) Subsequently, after hearing the parties at length, all the connected 36 writ petitions (with leading writ *Diploma Engineers Sangh's case*), which were primarily filed by aggrieved Diploma holder JEs against the aforesaid promotions of Degree holder JEs was decided vide a judgment dated 08.09.2011 of this court. The Division bench quashed the promotion order dated 03.07.2009 and the requisition order dated 05.02.2010. All the 3 contentions of the diploma holder JEs were accepted i.e. (a) 105 promotions (27+78) were declared as excess promotions (i.e beyond 186), (b) the promoted 105 degree holder JEs (27+78) were declared as not members of service and hence ineligible for promotion; and (c) qualifying *examination* of 2007 was not held as per law.

(50) Various SLPs were filed challenging the aforesaid judgment and

order dated 08.09.2011 before the Hon'ble Apex Court. However, the Hon'ble Apex Court, refused to pass any interim orders and directed that any promotions or reversion shall be subject to the outcome of the pending proceedings. The state Government on the heels of the said refusal by the Hon'ble Apex Court, vide an order dated 02.01.2012, passed the reversion order, whereby promotion granted to 27 Degree Holder JEs to the post of AEs vide an order dated 03.07.2009 was reverted to the post of Junior Engineer. Simultaneously the order dated 05.02.2010 regarding creation of 97 vacancies against which 78 recommendations of Degree holder JEs was received from the DPC was also quashed and no promotions of these 78 JEs were made, thus all the 105 promotions (27+78) of Degree JEs were set aside and they were reverted as no protection was given to them by the Hon'ble Apex Court.

(51) The State Government also vide an Affidavit dated 04.01.2012 admitting that all the 186 vacancies arising during the litigation era i.e. 1997-98 to 2003-04 were already filled up and in absence of any old vacancy prior to 1.7.2004, no further promotion can be made on the basis of the old Rules of 1936, although later vide an Affidavit dated 10.08.2018, the state despite admitting that 186 vacancies were filled up, tried to take a contradictory stand and went on to justify 105 vacancies as old vacancies on the basis of cadre principle.

(52) Nevertheless, for the recruitment year 2013-14, though there were a total of 235 vacancies of A.E. (civil). However, the state government sent a requisition dated 25.10.2013 for filling up only 130 vacancies by promotion and 105 vacancies (27+78) of Assistant Engineers were kept reserved and were kept out of the purview of promotion of eligible Diploma Holder JEs in that Recruitment year without assigning any reason. These 105 vacancies (27+78) were referred to as "protected vacancies" by the state for protecting 105 excess promotions of Degree holder (27+78), though there was no stay of the judgment dated 08.09.2011, since no protection was given to these 105 degree holder JEs by the Hon'ble Apex Court as mentioned above.

(53) Since some eligible and senior diploma Holder JEs were not being considered for promotion on account of withholding of 105 vacancies as aforesaid, a writ petition No. 967 (S/B) of 2015 i.e. Shamusddin and others V/s State of U.P & others was filed for claiming promotion against the aforesaid withheld 105 vacancies, with a prayer for release of these 105 withheld vacancies to be filled under the new service rules 2004. This Court vide an order dated 01.04.2016 directed the State to fill up the existing vacancies on the basis of eligibility list dated 25.01.2016 in accordance with law expeditiously. However, the Degree holder JEs, challenged the said order in SLP (Swami Nath Puri V/s Shamsuddin), wherein the degree holder JEs impressed upon the Hon'ble Apex Court as if promotions on 105 vacancies were going to be made against those same 105 vacancies which were reserved for them by the State. Although, initially the Hon'ble Apex Court vide its order dated 02.05.2016 stayed the said order dated 01.04.2016 passed by this court, however subsequently vide an order dated 3.10.2017, the Hon'ble Apex court, without touching the 105 withheld vacancies at that stage permitted the state

government to fill up the remaining vacancies in accordance with the new Service Rules of 2004.

(54) Subsequently, while hearing a clarification application filed by Degree Holder JEs in the pending SLP No.28395/2011(Om Prakash Singh V/s. State), seeking vacation of the aforesaid interim order dated 03.10.2017, the Hon'ble Apex Court, vide an order dated 09.02.2018, directed that since the impugned judgment (i.e. Judgment dated 08.09.2011) had not been stayed by it, the court permitted the State Government to fill the seats by promotion in accordance with the impugned Judgment (i.e. Judgment dated 08.09.2011). However, the State Government again prepared an eligibility list dated 19.07.2018 by treating the 105 vacancies as old vacancies of recruitment year 2003- 04 and included the same old 27 Degree holder JEs of the order dated 03.07.2009 and 78 Degree holder JEs of order dated 05.02.2010 in the said list, despite the fact that they were already declared ineligible for promotions against the said vacancies of 2003-04 and were included without holding any qualifying exam for diploma JEs. Further, a DPC was also convened by UPPSC on 02.08.2018 for proceeding with promotions on the basis of the said eligibility list dated 19.07.2018.

(55) The said eligibility list dated 19.07.2018 as well as the DPC had been a subject matter of challenge before this court, wherein vide an order dated 02.08.2018 this court although refused to stay the aforesaid DPC, however granted a stay on the declaration of result. Further, an SLP filed against the said interim order before the Hon’ble Apex Court did not find any luck and merely this court was directed to decide the said pending Writ Petition on merits expeditiously.

(56) In the meantime, all Civil Appeal pending before the Supreme Court were allowed vide judgment dated 21.08.2019 and the Apex Court while setting aside the judgment dated 03.11.2006 and other consequential orders including Judgment dated 08.09.2011, remitted all the matter to this Court with a direction to decide all the matters afresh within the duration of Six Months. The validity of **Diploma Engineers Sangh V/s State of U.P.** (2007) 13 SCC 300 was also reaffirmed by the Hon’ble Supreme Court in the said Judgment.

(57) In the aforesaid background, the present bunch of writ petitions were heard on several occasion and parties were allowed to file their respective written submission, which are on record. This court has not extracted the facts of any particular case as the parties chose to argue on the common issue raised in these petitions. However, in order to complete the chain of events, it would be pertinent to mention herein that on the basis of a seniority list, the degree holder JEs, who were earlier promoted vide order dated 03.07.2009 relating to 27 promotional seats, but was later cancelled because of the judgment dated 08.09.2011 and these promottees were actually reverted on 01.01.0212, has now been promoted from the post of JE(Civil) to Asst. Engineer (Civil) by means of order dated 31.12.2021 and 31.05.2022 and there promotion has become final in the sense that there had been no protest.

F. Contention of the Parties

(58) Heard Shri Upendra Nath Mishra, Shri Sandeep Dixit, Shri Asit Chaturvedi, Shri H.G.S Parihar, learned Senior Advocates along with Shri Anuj Kudesiya, Shri Neel Kamal Mishra, Shri Deepanshu Dass, Shri C.B. Pandey Learned advocates for the parties and Shri Ravi Singh Sisodiya, Ld. Counsel for the State.

(59) Shri Upendra Nath Mishra, ld. Senior counsel appeared along with Mr Neel Kamal Mishra and in his usual erudite manner placed his argument in a sequential manner. According to the Ld. Sr. Counsel, there were basically five issues, which needs to be addressed by this court viz. (i) as to what is the vacancy for promotion quota under old service rules of 1936 and its effect in the light of G.O. dated 20.02.2003. (ii) Issue about fairness of qualifying *examination* for promotion quota *"held under old Rules 1936"* (iii) Issue about amending part of already suspended old rules by a GO to bring in the concept of "Cadre Principle" for vacancy determination. (iv)Issue about promotion of *probationers* and (v) Issue about moulding of reliefs.

(60) As far as the first sequential point raised by the Shri Mishra is concerned, it has been argued by the Ld. Senior Counsel that Pre-1969 Rule position of the old Service Rules of 1936 would revive, with old Rule 5(iv) and 6(i) of 1959, after setting aside of 1969, 1971, 1987 and 1997 amendments by the Hon'ble Courts, therefore only 25% promotion quota vacancies can be filled up as provided in 1959 amendment of the old Rules of 1936, instead of applying 41.66% promotion quota, as provided in G.O. dated 20.02.2003.

(61) According to the learned Senior Counsel, from a perusal of the State's affidavit dated 25.07.2006 and also the latest counter affidavit dated 12.12.2022 filed in Writ A no. 4141 of 2022 (Vipin Kumar Vs. State), it is abundantly clear that according to the state's submission, out of total of 446 vacancies belonging to the period 1997-1998 to 2003-2004, only 112 vacancies (wrongly shown as 128 vacancies), belonged to the promotion quota as per 25% quota prescribed under Rule 6(1) of old rules of 1936. According to him, out of the total 112 vacancies, 102 posts were already filled up and hence only 10 vacancies were actually in existence. Thus, merely 10 seats were to be filled under the promotion quota, however the state against these 10 vacancies and in view of the judgment of *Anjani Kumar's case*, initially made 96 promotions of Degree Holder J.Es on 02.08.2008 and thereby filled up 186 promotion quota vacancies as determined in *Anjani Kumar's case*. Thereafter respondent authorities while wrongly relying on a letter dated 6.02.2003 which indicated, a total of 219 promotion quota vacancies declared 33 more vacancies (219-186) in promotion quota, on which 27 promotions were made on 3.07.2009. According to the Ld. Senior Counsel, all this promotion of degree holders were done without holding any qualifying *examination* under Rule 9(2) either in 2008 or 2009. Further, according to the Ld. Sr. counsel, 97 more vacancies were created for the period prior to 2004, vide requisition order dated 05.02.2010, by retrospectively applying *cadre principle of vacancy determination* in the already

superseded old Rules of 1936, against which 78 recommendations for promotion were received from UPPSC but thankfully the same was never implemented due to the order of this court. Thus, he submits that all these 191 promotions (86+27+78) were excess promotions sought to be made under the old Rules, which, after setting aside of Anjani Kumar's judgment, cannot be sustained in the eyes of law.

(62) The learned Senior Counsel has also submitted that the private respondents including the State Government, while taking a 'U' turn from their earlier stand, are now, in the instant bunch of cases, placing reliance on the Constitution Bench judgment of *ATB Mehtab Majid etc.*, so as to contend that after quashing of amendment by substitution of 1969 and 1971, pre-1969 Rule position would not revive, and thereby is trying to avoid application of 25% promotion quota on the vacancies belonging to the period prior 1997-98 to 2003-2004. According to the Ld. Sr. counsel, the said submission is *merely an argument of convenience* because the Hon'ble Apex Court in *Diploma Engineers Sangh's case* had already refused to apply the aforesaid constitution bench judgment on the ground that in P.D. Agarwal's case, the pre-1969 Rule position was already revived, restored and applied between the parties. Therefore, according to him, the general case law relied upon by the respondents regarding non-revival of pre- 1969 amendment position are not applicable in this case because *'principle of res- judicata'* provides that issue decided between the parties cannot be allowed to be reopened and the parties should not be vexed twice over with the same kind of litigation.

(63) It has been further submitted that all the 03 promotion orders dated 02.08.2008, 03.07.2009 and 05.02.2010 making 201 promotions against 10 vacancies under the old Rules of 1936 (i.e. 191 excess promotions), that too, without holding valid qualifying *examination* and illegally presuming all the Diploma Holder J.Es as ineligible, are not tenable in law. Therefore, these illegal orders regarding excess 191 promotions (86+27+78) deserve to be set aside and these 191 new vacancies may kindly be directed to be filled up by promotions under the provisions of new Service Rules of 2004 as they were not covered under the old Rules of 1936.

(64) Further, as far as the second sequential point relating to the Issue about fairness of qualifying *examination "held under old Rules 1936"* is concerned, the Ld. Senior Counsel submitted that in pursuance of Rule 9 (ii) of the old Service Rules, 1936, a statutory G.O. dated 26.10.1969 was issued providing for 'annual qualifying *examination*' to be conducted by U.P. Technical Board at 03 or more centres. Clause-IV clearly provided an option to the candidates to either appear in one group of paper or the 03 group of papers in a year and to clear one or more groups of paper in one year.

(65) According to him, in continuation of the aforesaid statutory G.O. dated 25.11.1969, another G.O. dated 01.02.1972 was issued, which further clarified that option to clear one or more group of papers in one attempt would be available as before and in other words it was not to be necessary for a candidate to clear all the 03 groups of papers in one attempt. This means that under the aforesaid statutory

prescription unless 3 attempts are provided by the state a candidate cannot be presumed to be unsuccessful in qualifying exam. Thus minimum 03 attempts were mandatorily to be given to every participant (diploma holder JEs) to clear all the 03 group of papers and a candidate cannot be presumed to be ineligible for promotion, if he fails to clear all the 03 group of papers in one attempt.

(66) The learned Senior Counsel further elaborated his argument by submitting that the last qualifying *examination* under Rule 9(ii) was held in 1970 and no qualifying *examination* was held from 1971 till 2007. Even in the year 2007, it was held for the first time in compliance of the Apex Court judgment dated 20.03.2007 in Diploma Sangh's case and thereafter there was no second or third or for that matter any qualifying *examination* held by the respondent-State. Therefore, it was argued by the learned Senior Counsel that for all the Diploma Holder Junior Engineers, it was the first and only qualifying *examination* ever held in their career.

(67) While presuming but not admitting that the qualifying *examination* of 2007 was legally held, however in absence of the other 2 attempts being offered to diploma JEs, no candidate could have been presumed to have failed in qualifying *examination* and therefore diploma JEs have been arbitrarily presumed to be ineligible for promotions. The learned Senior Counsel buttressed his point by submitting that without even holding 03 successive qualifying *examination*, the office memorandum dated 15.04.2007 arbitrarily insisted that the Diploma J.Es, who have either appeared in 03 different years of *examination* or have cleared all 03 groups in one year, shall be considered eligible, only if they have successfully passed all the 03 groups of paper by the year 2007, so as to be considered eligible in the promotions proposed in the year 2007-2008, which was done without considering the fact that 2007 *Examination* was the only *Examination* held by the respondents in 35 years.(1972-2007).

(68) According to the learned Senior Counsel, all the Diploma holder J.Es were illegally compelled to clear all the 03 group of papers in one attempt/one year which was in evident violation of the aforesaid 02 statutory Government order dated 26.10.1969 and 01.01.1972, which meant the vested rights given to the Diploma J.Es to clear 03 group of papers in 03 attempts under the aforesaid statutory prescription was arbitrarily taken away by the respondent authorities, who had arbitrarily proceeded to presume all the senior most Diploma Holder J.Es. as ineligible by merely holding one exam in 35 years between 1972 to 2007 and proceeded to deny consideration of their candidature in the promotions held repeatedly in 2008, 2009 and 2010, which amounts to unfairly holding qualifying *examination*, illegally presuming the diploma JEs as ineligible for promotion on the post of AE and hence complete denial of petitioners' fundamental rights of fair consideration in the matter of promotion.

(69) It was strenuously argued that a Confusion was created by the Authorities about *Examination* Centre at Lucknow. He further states that in compliance of the Hon'ble Apex Court judgment dated

20.03.2007 in ***Diploma Sangh's Case(Supra)***, the State Government authorized the U.P. Technical Board (UPTB) to hold the qualifying *examination*, which issued the first guidelines in June, 2007 prescribing for "objective type question papers" and providing "03 *examination* centres" but allotting UPPSC centre Lucknow to all the 711 participants, who appeared in the qualifying *examination* held on 18 & 19.07.2007 at Lucknow. However, on an application of the State, the Hon'ble Apex Court allowed the state to hold the qualifying *examination* through UPPSC within next one month, therefore, the earlier exam of July, 2007 was cancelled by the State on 23.07.2007.

(70) Subsequently, UPPSC issued its advertisement providing for the *examination* to be held at UPPSC centre at Allahabad. However, the Diploma Engineers Sangh meanwhile filed I.A. No. 8 & 9 on 08.08.2007 before the Apex Court for seeking modification of its order dated 19.07.2007 and for restoration of the previous exam held by UPTU but the said application was dismissed in limine on 10.08.2007. Thus, the State Government in the meantime circulated fresh guidelines of UPPSC on 8.08.2007 for the qualifying *examination* scheduled from 12 to 16.08.2007, clause-I and III of which required the candidates to appear for exams on their allotted centres which included two centres of UPPSC situated in State of U.P at Lucknow and Allahabad respectively. According to the Ld. Sr. Counsel, since all 711 candidates were allotted only UPPSC centre at "Lucknow" in earlier *examination* held in June, 2007 and there had never been any other allotment of any other *examination* centre by the authority, therefore, the only option available for the candidates was to appear at Lucknow centre and thus when the Diploma J.Es appeared at Lucknow centre in the morning of 12.08.2007, they were informed that the only *examination* centre is at Allahabad. Thus no candidates except one could appear at Allahabad in the first session. Despite repeated requests for an assurance of re-exam of the first session paper, the authorities denied the same and thus authorities ensured that no Diploma J.Es could not pass all the 03 group of papers in one year i.e. in the qualifying *examination* held in the August, 2007 which was the statutory opportunity of clearing qualifying exam given to them in 35 years. According to the Ld. Sr. counsel, this amounts to complete denial of fair and reasonable opportunity of participation of the Diploma Holder J.Es in the sole qualifying *examination* held by the respondents in the last 50 years till date, under Rule 9(ii) read with Rule 5(iv) of the old Service Rules.

(71) Further, though in the last 50 years, till date i.e. (1972 to 2022) only one qualifying exam was held in 2007 and thereafter no exam was followed in 2008, 2009 and 2010 and though it was statutorily mandated for the authorities to hold annual qualifying *examination* every year but the State authorities, without holding the annual qualifying *examination* in 2008, 2009 and 2010, proceeded to issue 03 promotion orders dated 02.08.2008 (96 promotions), 03.07.2009 (27 promotions), and 05.02.2010 (78 recommendations), exclusively from Degree Holder J.Es, while completely denying right of participation to Diploma Holder J.Es. Therefore, all the 03 promotion orders, which were, though made under old Service Rules, did not even follow the procedure prescribed for promotion under the old Rules of 1936.

Thus, it has been contended by the Ld. Sr. Counsel that in absence of any valid qualifying *examination*, the state authorities had arbitrarily presumed all the Diploma Holder J.Es as ineligible for promotion and claimed that they have not successfully passed the qualifying *examination*, without actually holding any exam in 2008, 2009 & 2010 which was absolutely illegal and unjustified.

(72) Shri Mishra, learned Senior Counsel, further submitted that though *criteria for promotion* was *"seniority subject to rejection of unfit"* under Rule 12 of the old Rules and though all the members of the Sangh/Diploma Holder J.Es were placed between 1500 to 2000 places in the seniority list and whereas the selected Degree Holder J.Es were placed between 4500 to 6000 i.e. about 4000 places below the diploma holder JEs in the seniority list and almost all of them were working on probation on the cut-off date of eligibility i.e. 01.07.2003 but even then senior most Diploma Holder J.Es., who had about more than 25 years of service experience to their credit, were arbitrarily denied consideration for promotion on the ground of their presumed ineligibility to pass qualifying *examination*, which was never held in 2008, 2009 and 2010 and which was offered only once in 35 years. Thus, it has been contended that the qualifying *examination* held in 2007 was not only a farce but the entire procedure for promotion followed by the respondents in issuing impugned orders dated 02.08.2008, 03.07.2009 and 05.02.2010 was absolutely arbitrary and even de hors the old Service Rules of 1936, though the said Rules at the first place should not have been applied on these new vacancies, which occurred after 2004 and which should have been filled under the new Service Rules of 2004.

(73) The Learned Senior counsel relying on an Apex Court decision reported in Deepak Agarwal V/s State of U.P. 2011 (6) SCC 725 had submitted that *"Rules in-force"* on the date of promotion should apply. According to him, there were only 10 vacancies in promotion quota under the old rules prior to 2004, however promotions were sought to be made by the state on 96 post of AEs on 02.08.2008, 27 post of AEs on 03.07.2009 and then 97 more vacancies were created on 05.02.2010 for which 78 recommendation for promotion were made under the provision of Old Service Rules of 1936 which were not applicable after 2004. Therefore, the Ld. Counsel submits that all these promotions were illegally made against the new vacancies which occurred after 2004 and the same should have been filled up in accordance with the provisions of New Service Rules of 2004 i.e strictly according to the principle of seniority-cum-fitness and without applying separate promotion quota of degree holder JEs. The judgment passed in **State of Tripura v. Nikhil Ranjan Chakraborty, (2017) 3 SCC 646, Union of India v. Krishna Kumar, (2019) 4 SCC 319 and State of Orissa Vs. Dhirendra Sundar Das, (2019) 6 SCC 270** were also relied for the said proposition of law.

(74) As far as the issue raised by the Ld. Sr. Counsel relating to statutory provisions of Rule 6(i) of old Service Rules of 1936 providing for "vacancy principle" could not have been replaced by merely

issuing a G.O. dated 05.02.2010 for introducing "Cadre principle" in the already superseded rules, he submits that the same is a colourable and arbitrary exercise of power by the state and is also against the basic rule of interpretation. The Ld. Sr. Counsel has further submitted that it is a settled position of law that where the statutory Rules are clear and unambiguous, nothing should be added or inserted by means of interpretation of the Rules by the Courts. Moreover, it is a settled position of law that when something has been prescribed under law, to be done in a particular manner, it has to be done in that manner alone and not otherwise. In this case, when Rule 6(i) of the old Rules clearly provide 25% "vacancies" as promotion quota, it cannot be interpreted as 25% "cadre posts" by unnecessarily misinterpreting the old Rules of 1936. The judgement passed by the Hon'ble Apex Court in UOI Vs. Charanjeet S. Gill, (2000) 5 SCC 742 and PSC, Uttaranchal Vs. JCS Bora, (2014) 8 SCC 644 has been relied upon for the proposition that a government order cannot supersede provisions of an Act or a statutory rules. The Ld. Sr. Counsel also relied on the judgment of Chandra Kishore Jha Vs. Mahavir Prasad, (1999) 8 SCC 266, Diploma Engineers Sangh Vs. State of U.P. and Ors, (2007) 13 SCC 300 and Kesari Devi VS. State of U.P, 2005 (3) ESC 2209 (ALL) for the proposition that when something has been prescribed under law to be done in particular manner, then it has to be done in that manner alone and not otherwise.

(75) That as to the fourth issue formulated by the Ld. Sr. Counsel for the petitioner relating to "*Probationers*" in service could not have been lawfully considered for promotion as per the applicable service Rules, he submits that the Concept of lien also required confirmation before promotion. According to him, if the incumbent is not confirmed on his feeding cadre posts on the date of consideration for promotion to the next higher post, then he would not have any lien, either on the parent post i.e the feeding cadre post or on the promoted post, in case of subsequent failure to clear probation and therefore in service jurisprudence, it is insisted for confirmation of the probationer before his promotion to the next higher post.

(76) Further, he submits that Old Service Rules of 1936 provided for confirmation before promotion. Thus, he submits that the petitioners/Diploma Engineers Sangh have challenged all the three orders dated 02.08.2008, 03.07.2009 and 05.02.2010 regarding promotion as AE also on the ground that under the Service Rules, the "*probationers*" in service of J.E. (Civil) could not have been considered for promotion to the post of A.E. (Civil), therefore the mere inclusion of such *probationers*, who were not even confirmed on their feeding cadre post of J.E. (Civil) on the cut-off date of eligibility i.e 01.07.2003 for the alleged promotion quota vacancies of 2003-04, could not have been lawfully considered for promotion to the next higher post of A.E. (Civil) as they were ineligible. The judgment passed in the case of Baleshwar Das Vs. State of U.P. and others reported in (1980) 4 SCC 226, Badri Prasad & 31 Ors Vs. Satya Dev Sharma (Special Appeal No. 917/2006 decided by this court vide an order dated 22.05.2015) and Shiv Kumar Singh Vs. Satya Dev Sharma (W.P. no. 6530(S/S) 2004 Decided on 1.11.2006 by this court) has been relied upon by the Ld. Sr. counsel

for the proposition that unless an incumbent completes the probationary period required under the Rules successfully, it shall be unlawful for the state to make promotion of a probationer on the higher post, in violation of specific prescription of the service rules.

(77) As to the last limb of argument relating to reading down G.O. dt.20.02.2003 by moulding the relief, so as to do complete justice between the parties, it was submitted that under the consistent judgments of the Hon'ble Apex Court passed in the case of *P.D. Agarwal's case, Aruvendra Kumar Garg's case* and *Diploma Engineers Sangh's case*, when pre-1969 rule position stood revived, which included Rule 5(iv) (providing promotions of J.Es.) and Rule 6 (i) (providing 25% promotion quota) and the same was fully applicable on all the parties for the promotion quota vacancies of the period 1997-98 to 2003-2004 and when the State Government itself implemented 25% promotion quota while issuing promotion order dated 02.05.2002 of Atibal Singh group and applied provisions of Rule 5(iv) while issuing G.O. dated 11.02.2003, then it is not open for the State Government to claim that composite promotion quota of 41.66% as provided in G.O. dated 20.02.2003.

(78) It was emphatically submitted that it is a settled position of law that provisions of the statutory Rules cannot be amended by issuance of a mere Government order. Since under the orders of the Hon'ble Apex Court pre-1969 Rule position stood revived which included 25% promotion quota provided under Rule 6(i) of 1959 amendment, which was also applied by the State Government while making promotions on 02.05.2002. He has explained that since it was categorically admitted by the State in writing in para 20 of the Affidavit dated 15.07.2006 that after quashing of the amendments in *Aruvendra Kumar Garg's case on 22.03.2002, "the earlier quota of recruitment i.e. 75% for direct recruitment and 25% by way of promotion was revived"*. Therefore, it was not open for the respondent to insist for application of G.O. dated 20.02.2003 and composite promotion quota of 41.66% for promotion under the old Rules of 1936.

(79) Thus, a point has been tried to be made that a government order, even if not challenged, if found contrary to statutory Rules and Regulations, should be quashed by the Court under its power of moulding of relief and no exception can be taken to that approach of the High Court. Therefore, the G.O. dated 20.02.2003 which is contrary to Rule 6(i) of the 1959 amendment of the old Rules of 1936 deserves to be read down and cannot be applied in the instant case.

(80) As far as the other side of the argument is concerned, the same was led by Ld. Senior Advocate Shri Sandeep Dixit, who in a very emphatically and stoutly manner drew the attention of this court to the fact that all the writ petitions which have been filed and are under consideration of the High Court by way of remand, were admittedly filed seeking a challenge to the alleged holding of the qualifying *examination* and the process of promotion and with a further direction to hold the fresh qualifying *examination* and till such time no promotion to be made on the post of Assistant Engineer (Civil). According to

him, the Diploma Engineers Sangh had no occasion to make any other pleading or prayer or to take a ground on account of the fact that the entire exercise was by State Government in accordance to judgement and order dated 22-03-2002 passed by this Court in Aruvendra Kumar Garg's case and judgement and order dated 20-03-2007 in *Diploma Engineers Sangh's case* passed by Hon'ble Supreme Court and also the judgement and order dated 03-11-2006 passed in Anjani Kumar Misra's case. The Ld. Sr. Counsel submits that the entire exercise of the state was based on these judgements considering rule 5 & 9 of the 1936 rules and also the vacancies which were determined in Ajani Kumar Misra's case to be 186. He also submits that the figure of 186 has been mentioned in the minutes of meeting dated 03-05-2007 held under the chairmanship of secretary PWD for holding the qualifying *examination* for 186 vacancies.

(81) The Learned Senior Counsel giving a bird view of the matter submits that all the writ petitions from 2007-09 which are the subject matter before this court came to be decided by judgement and order dt. 08-09-2011. Since, the promotion order 02.08.2008 was made strictly in accordance to the rules as determined in *Diploma Engineers Sangh's case* and also the vacancy so determined in Anjani Kumar Misra's case to be 186, the division bench on dated 08-09-2011 did not interfere with promotions of the answering respondents so made on dated 02-8-2008. According to Shri Dixit, by virtue of Judgment 08-09-2011 the promotions of the 27 Degree Holder Junior Engineers made on 03-07-2009 and the selection of 78 Degree Holder Junior Engineers dated 05-02-2010 was merely set aside and as such various SLP's were filed against these two orders only. He submits that even the state also filed SLPs relating to the said two promotion orders only and the Ld. Sr. Counsel has tried to rely on the contents of SLP filed by the state before the Hon'ble Apex Court.

(82) According to the Learned Senior Counsel the promotion order dated 02-08-2008 by means of which the Degree Holder JEs were promoted was not interfered with by the division bench vide its Order dated 08-09-2011 and as such the same was not challenged by anyone including the Diploma Holder Junior Engineers Sangh before the Hon'ble Supreme Court. Thus, according to him the remand order dt. 21-08-02019 passed by the Hon'ble Apex Court is a remand with regard to the parties who had gone before the Hon'ble Supreme Court by filing the SLP and was relating to those persons whose promotion and selection were set aside by division bench. Thus, it has been submitted that since the case of promotion of degree holder JEs vide impugned order dated 02.08.2008, having been already adjudicated upon and not being remanded as no one had put a challenge in the Hon'ble Supreme Court, the same cannot be subject matter to be adjudicated afresh in view of judgement and order dated 21-08-2019. According to the Ld. Sr. Counsel, the judgement and order dt. 08-09-2011 by the High Court has become final and the limited remand which can be the subject matter to be adjudicated in writ petitions would be only with regard to promotion order dated 03-07-2009 and selection dated 05-02-2010 and the judgement so relied by the other side in Anupal Singh vs State of UP [(2020) 2 SCC 173] was apparently distinguishable on facts.

(83) The Learned Senior Counsel continued further to argue that the 711 Diploma Holder Junior Engineers who registered themselves to appear in the qualifying *examination* held in 2007 are apparently making the prayer to hold a fresh qualifying exam for them, so as to be qualified to be considered in the zone of eligibility for promotion to Assistant Engineer (Civil) under the 1936 rules. However, according to him, out of these 711 diploma holder JEs, everyone had been promoted on the post of Assistant Engineer (Civil) as in when they became eligible on the criteria of seniority subject to the rejection of unfit under the 2004 Rules and 627 out of them have peacefully retired, 84 presently are working, 55 out of them are going to retire in the year 2023 and remaining 19 will retire next year. Thus, as on today no Diploma Holder Junior Engineer out of these 711 intend to appear in the qualifying *examination* for promotion to the post of Assistant Engineer (Civil), when they have already been promoted to the post of Assistant Engineer (Civil) on their turn. Thus, according to him, the entire exercise by this court would be futile as no writ is required to be issued in the aftermath of the changed circumstances. He further submits that as far as the 96 Degree Holder Junior Engineers, who have been promoted vide impugned order dated 02-08-2008, 48 have already retired either without promotion or after being promoted in 2022 to the post of Executive Engineer (Civil), remaining 42 are working on the post of Executive Engineer (Civil) having been promoted in 2022 and about 12 will further retire by the end of 2024.

(84) Shri Dixit also relied on the Judgment of **Madan Lal versus State of Punjab and Others [AIR 1994 SC 647 para-6]** to argue that the judgement and order dated 20-03-2007 is binding between the parties and diploma holder Junior Engineers will have to pass the Qualifying *Examination* so as to be eligible for being considered for promotion on the post of Assistant Engineer (Civil). According to him, the earlier mandamus even if assumed to be not correctly decided, has to be construed as final and binding between the parties and as such as long as the orders are operative then same are to be treated as law for the case and obeyed. He also submits that the judgement applies in full force as far as the mandamus issued in Vijay Kumar's cases and *Diploma Engineers Sangh's case* is concerned, which goes on to show that so far as the Diploma Holder Junior Engineers are concerned with regard to the vacancy existing prior to 2004, they cannot come in the zone of eligibility unless and until they pass the qualifying exam which had been directed by this Court and the Hon'ble Supreme Court.

(85) Further, according to the learned Senior Counsel, under Rule-5 and Rule-9 of 1936 Rules, there is no requirement or prescription for confirmation and completion of probation period for being considered for promotion on the post of Assistant Engineer (Civil). Shri Dixit also relied on a Clarification Order issued on 17-07-2008 by Government on representation made by Diploma Engineers Sangh to U.P.P.S.C., clarifying that requirement of completion of probation period on or before 01st July 2003 was not a precondition for the purpose of promotion to the post of Assistant Engineer (Civil) under 1936 Rules against the vacancies of recruitment year 2003-04. The Ld. Sr. Counsel also relied on paragraph 7 of the

judgment passed by the Hon'ble Supreme Court in the matter of **K.K. Khosla and Another versus State of Haryana and Others [(1990) 2 SCC 199**, for the proposition that, if there is no specific provision in the Rules requiring completion of probationary period for the purposes of promotion within the service, the non-completion of probationary period of two years on the post of Assistant Executive Engineer did not affect the validity of promotion to the post of the Executive Engineer under the Rules. He also relied on para 8 of the Judgment passed in the Hon'ble Apex Court in the matter of **A.N. Sehgal and Others versus Raje Ram Sheoran and Others [1992 Supp (1) SCC 304]** to contend that confirmation and appointment to a substantive vacancy are always an inglorious uncertainty and would take unduly long time. Therefore, the confirmation or appointment to a substantive capacity would not normally be a condition precedent to reckon the continuous length of service for the purpose of seniority. Thus, according to him in view of the Rules, Facts and Law in the subject, none of writ petitions so far as the promotion order dated 02-08-2008 is concerned survives and merits to be dismissed.

(86) Sri Anuj Kudesiya appeared for one of the private respondents and strenuously argued that the Diploma Engineers Sangh has no locus to challenge the promotion order dated 3-7-2009 as they have not passed the qualifying *examination* held on 12th to 18th August 2007, as per the judgment and order dated 20-3-2007 passed by the Hon'ble Supreme Court in Civil Appeal No.3228/2005 (Diploma Engineers Sangh Vs. State of U.P. & Ors) reported in 2007 (13) SCC 300, wherein the Hon'ble Supreme Court has given one time opportunity to pass qualifying *examination*. The Ld. Counsel extending his arguments wishes to suggest that as none of the Diploma Holder Junior Engineer passed the qualifying *examination*, they were not eligible to enter into the zone of consideration for promotion to the post of Assistant Engineer along with the decree holders Junior Engineers, therefore their writ petitions challenging the promotion orders were not maintainable. According to him, amongst all the 711 Diploma Holder Junior Engineers, who have participated in qualifying *examination*, most of them have retired and few of them have already been promoted to the post of Assistant Engineer and are going to retire, therefore, no cause remains to maintain the writ petition. He also submitted that nowhere the sangh had disclosed the list of members of the sangh and as such has no locus to approach this Hon'ble Court seeking reliefs and infact no cause of action survives qua them.

(87) Further, according to him, 27 degree holder JEs, who were promoted by G.O dated 3.7.2009 are appointees of August 2001 against substantive vacancies by regular selection by U.P.P.S.C., Allahabad and they were confirmed in service by confirmation orders dt. 26.2.2008 and dt. 22.1.2009 and their D.P.C. was held by U.P.P.S.C, Allahabad on 4.5.2009 for the purpose of promotion from the post of J.E. to the post of A.E. According to the Ld. Counsel, since they became Member of Service on the very first day of their appointment against substantive vacancies under Rule 3(g), 16, 17, 24 & 25 of Rules 1951, these people were rightly promoted to the post of Assistant Engineer under Rules 5(iv), 9(i)

of Rules 1936 as amended from time to time. The Ld. Counsel submits that since there is no condition for completion of probation period & confirmation for eligibility of promotion in service Rules 1936, the Graduate JEs were fully eligible for promotion on the cut-off date i.e. 1st of July 2003 for recruitment year 2003-04 and as such were rightly promoted vide G.O. dated 3.7.2009.

(88) The learned Counsel further submitted that for determination of eligibility and vacancies a Three Members Expert High Power Committee was constituted by the principal Secretary, Public Works Department on the direction of Chief Secretary of the State, in view of complaints regarding eligibility and promotion of 27 Graduate JEs in 33 vacancies. The said committee found that 219 vacancies on the basis of cadre strength during 1-7-1997 to 30-6-2004, were to be filled by promotion and further that 27 Graduate JEs have been rightly promoted as AEs in accordance with the old Rules of 1936 and relevant Notifications. According to the Ld. Counsel, those recommended by UPPSC are substantively appointed in permanent posts which are permanently vacant and according to him, only those who are appointed substantively are put in probation while others are not. The Ld. Counsel has taken this court through the various rules to buttress his point that a probationer is appointed against a substantive vacancy on a post in the cadre of service and is a member of service from the very inception and as such has rightly been considered for promotion. The Ld. Counsel also relied on the judgment passed by the Hon’ble Apex Court in K. K. Khosla v/s State of Haryana, (1990) 2 sec 199 and A. N. Sehgal and Others V/s Raje Ram Sheoram and Others, (1992) 1 SCC 304.

(89) The learned Counsel in order to drive home his point relating to the number of vacancies has submitted that vide Government order dated 20.02.2003, a total vacancy of 219 post has been intimated for the period of 1997-98 to 2003-04, against which only 186 posts were filled. According to the Ld. Counsel, the bunch of writ petitions allowed vide order dated 8-9- 2011 by Hon'ble Division bench of this Court, merely quashed the promotion order dated 03-07-2009 and DPC of 05-02-2010 and the consequential order of promotion and posting of private respondents and directed the State Government to conduct the exercise for promotion afresh up to recruitment year 2003-2004 with utmost expedition. According to him, although the Hon'ble Supreme Court vide judgment and order dated 21-8-2019 has quashed Judgment and order dated 3-11-2006 passed in Anjani Kumar Mishra's case, however the respondents herein were not promoted in pursuance of the judgment and order dated 3-11-2006 passed in Anjani Kumar Mishra's case but have been promoted against 219 vacancies determined by G.O. dt. 20-2-2003 and till date G.O. dated 20-2-2003 has not been challenged by any one. According to the Ld. Counsel, even after setting aside of the judgment dt. 8-9-2011 of this Court by the Hon'ble Supreme Court, the petitioners have not been placed till date on the promotional post though their promotional order dated 03-07-2009 has to be revived but on the instance of Diploma Engineers Sangh, till date promotion order of the respondents have not been revived.

(90) The learned Counsel, Mr. Deepanshu Dass, appearing in Writ No. 3314/2009, 1511/2010, 3808/2022, 4141 of 2022 and 5811 of 2022 has submitted that after quashing of the 1969, 1971, 1987 and 1997 amendments of the Old Rules of 1936, rule position as existing prior to 1969 amendment, stood revived as per the findings returned by the Hon'ble Apex Court in the case of Diploma Engineer Sangh V/s State (2007) 13 SCC 300 and hence the promotion quota under the old rules of 1936 will be 25% only and not 41.66% as relied earlier. He further submits that the vacancy determination principle under Rule 6(1) of the Old Rules of 1936, is that of *"occurred vacancy"* and therefore merely on the basis of the G.O. dated 05.02.2010, *"cadre principle"* for determination of vacancy cannot be introduced in the already superseded rules, as that will amount to superseding the Rule by means of a G.O and that too retrospectively.

(91) Shri H.G.S Parihar, Ld. Senior Advocate appearing for some of the private respondents has succinctly submitted that there was no locus for the diploma holder JEs to challenge the impugned promotion orders as none of them have been able to qualify in the qualification *examination* as mentioned in rule 9(2) r/w rule 5(4) of the old rules of 1936. According to him, the diploma holder JEs were ineligible for promotion, whereas there was no shortcoming in the eligibility of the degree holder JEs as they were appointed as JE on 10.08.2001, confirmed on 26.02.2008, but with effect from 14.05.2003. Thus, he submits that no interference is required in their impugned promotion order.

(92) The fulcrum of the argument as narrated by Shri Ravi Singh Sisodiya, learned Chief standing Counsel appearing for the State rests on the fact that after the judgment and order dated 22.03.2002 passed in *Arunendra Kumar Garg Case (supra)*, the State government issued an Office Order dated 11.02.2003 thereby providing that since the amendments brought in Rules-1936 in the year 1987 and 1997 were set aside by this Court, it was obvious to make promotions as per the remaining Rules and accordingly the state provided that for the purpose of making promotions on the post of Assistant Engineer (Civil), interview of diploma holders would be conducted for qualifying *examination*, which was however set-aside in the Vijay Kumar's case by a Division bench of this court and upheld vide order dated 20.03.2007 passed in the case of Diploma Engineers Sangh and others Vs. State of U.P. and others by the Hon'ble Supreme Court.

(93) The learned Counsel has stated that in the meanwhile in furtherance to office order dated 11.02.2003 (which was later set aside by the this Court on 16.07.2004), the State Government had issued a letter dated 20.02.2003 in regard to promotions of Junior Engineer (Civil) to the post of Assistant Engineer (Civil). That in the letter dated 20.02.2003 it was merely stated that the State Government had got legal advice that the promotions should be made on the basis of Rules which remained after the judgment delivered by the Hon'ble Supreme Court in P.D. Agarwal case and by this Court in *Arunendra Kumar Garg case*. In the letter, it was expected that 41.66% quota should be applied and accordingly 219 vacancies should be filled by promotion. It was stated that it was merely a communication letter addressed by the State Government to the Public Works

Department interpreting the Rules, 1936, as subsequent amendments in the year 1969, 1971, 1987 and 1997 were set aside. While issuing letter dated 20.02.2003, the current position in view of the setting aside of the amendments in the Rules, 1936 were considered and accordingly promotion quota was interpreted and determined. According to the ld. Counsel, this court held that letter dated 20.02.2003 would prevail and accordingly concluded that there were 186 posts to be filled by promotion applying 41.66% quota in the Anjani Kumar Mishra's case, wherein the court also directed the State Authorities to re-determine the vacancies for years 1997-1998 to 2003-2004 according to Government Order (as stated by the this Court but in fact it was an office correspondence letter addressed to the PWD department) and take further steps accordingly.

(94) The learned Counsel has further submitted that in course of hearing of the bunch of writ petitions leading to which was Anjani Kumar Mishra (supra), the State Government filed a Supplementary Counter Affidavit on 25.07.2006 sworn by Engineer-in-Chief, Head of department Sri Tribhuwan Ram in Writ Petition No. 5313 of 2004; Prabodh Shankar Upadhyay and others Vs. State of U.P. and others. In the said Supplementary Counter Affidavit dated 25.07.2006 the State had taken stand to determine the vacancies for promotion keeping in view 25% quota because it was considered that after setting aside of amendments incorporated in 1969, 1971 and 1987 and 1997, the amendments incorporated in Rules, 1936 in the year 1959 had got revived and as such the same should be considered for determination of the vacancies. In this Supplementary Counter Affidavit, the stand was taken by the state that in fact the total vacancies as regard the year 1997- 1998 to 2003-2004 were 130.

(95) Thus, it has been submitted by the Ld. Counsel for the state that in Anjani Kumar Mishra case, the State Government had taken a stand of revival of 1959 amendments in Rules, 1936 but this Court did not agree to this stand of the State Government on 03.11.2006 and it had considered the letter dated 20.02.2003 written by the State Government to the Public Works Department which determined the vacancies applying 41.66% quota calculating the vacancies to be 219 and determined quota to be 186 only. Now on 21.08.2019, the Hon'ble Supreme Court has set aside the judgment and order dated 03.11.2006 passed in Anjani Kumar Mishra case and as such a peculiar situation has been created.

(96) Thus, the learned Counsel submits that it was clear that the department had made 73 promotions before the judgment of Anjani Kumar Mishra case and after the judgment the entire 186 promotions were made up to 02.08.2008 in as much as the judgment and order dated 03.11.2006 passed in Anjani Kumar Mishra case was applicable because the judgment and order dated 03.11.2006 was, though challenged before the Hon'ble Supreme Court in bunch of petitions leading to which was 3695 of 2007; Atibal Singh and others Vs. Prabodh Shankar Upadhyay and others;, no restraint order as regard filling of 186 posts was passed.

(97) That it had been further argued that in Anjani Kumar Mishra case, though

this Court had fixed 186 vacancies, it had opened for the State Government to re-determine the vacancies, relying the letter dated 20.02.2003 addressed by the State Government to the Public Works Department suggesting 219 vacancies. The State Government hence proceeded to make promotions on the remaining i.e. 219-186= 33 vacancies and made promotions on 27 posts on 03.07.2009.

(98) Further, interpreting the judgment and order dated 03.11.2006 rendered in Anjani Kumar Mishra case, the State Government yet again re-determined the vacancies and decided that as many as 78 more promotions were required to be made as against the vacancies relating to year 1997-98 to 2003-2004. In pursuance to this determination, process was initiated conducting DPC on 05.02.2010 but the final result was not declared as the said DPC held on 05.02.2010 was challenged before this Court and this Court had passed an interim order restraining declaration of final result. This Court finally decided the said matter as well as bunch of connected 33 writ petitions filed in the connected issue on 08.9.2011 and set aside the impugned order dated 3.7.2009 and 5.2.2010 and made certain observation for promotion and posting as assistant engineer (civil), which was challenged before the Hon’ble Supreme Court.

(99) However, during pendency of petitions before Hon'ble Supreme Court against judgment and order dated 08.09.2011 passed by this Court, 27 Assistant Engineers (Civil), who were promoted on 03.07.2009, were reverted to the post of Junior Engineer (Civil) on 02.01.2012 because this Court had set aside the promotion order dated 03.07.2009. Since the promotion order dated 03.07.2009 as regard 27 promotions and order dated 05.02.2010 as regard DPC of 78 Junior Engineers (Civil) were set aside, the State Government had reverted 27 promotees and now after the judgment and order dated 21.08.2019 passed by the Hon'ble Supreme Court while quashing the order dated 03.11.2006 passed in Anjani Kumar Mishra case and order dated 08.09.2011 passed in diploma Engineer Sangh case, the position as emerges is that Diploma engineer sangh case was decided on 8.9.2011 in the light of judgement and order dated 3.11.2006 rendered in Anjani Kumar Mishra case and the promotion on 27 vacancies were made in the light of Anjani Kumar Mishra case and as such the re-determination of the posts for promotion in view of Anjani Kumar Mishra case also stands cancelled and as such the promotion made on 03.07.2009 on 27 posts automatically stands cancelled and in this regard the State Government had already passed as order on 02.01.2012 cancelling the order dated 03.07.2009 and 05.02.2010 whereby the promotee of 30.07.2009 order were reverted.

(100) It has been further argued by the Ld. CSC that a promotion list of Junior Engineers (Civil) was prepared by the department and on the basis of the said seniority list, the petitioners who are out of 27 promotees vide order dated 03.07.2009 which was later cancelled and promotees were reverted on 02.01.2012, were promoted from the post of Junior Engineer (Civil) to the post of Assistant Engineer (Civil) by means of orders dated 31.12.2021 and 31.05.2022, wherein all the promotees accepted the promotion made in view of the aforesaid orders without any

protest and it has been requested by the Ld. Counsel that since the said promotions has become final, the same may not be disturbed at this stage. Further, he has also submitted that a seniority list of assistant Engineer (Civil) was prepared on 09.09.2016 in which the name of the petitioners did not find mention. On the basis of the said seniority list of 09.09.2016 as many as 170 promotions have been made from the post of Assistant Engineer (Civil) to the post of Executive Engineer (Civil) by means of order dated 30.06.2022. The present petitioners have also assailed the promotion order dated 30.06.2022 without any legal basis and as such the same cannot be accepted.

(101) The next scholarly argument was addressed by Shri Asit Kumar Chaturvedi Ld. Senior Counsel, who in his usual impeccable manner attacked the question of validity of *"Qualifying Examination"* held in the year 2007 concluded on 24.10.2007 i.e. the date when the result of the *"Qualifying Examination"* was declared and other ancillary issues (i) relating to *examination* centre at Allahabad, (ii) the body conducting the qualifying *examination*, (iii) *examination* being conducted without any prescribed rules / syllabus,(iv) hardship etc. which all existed as on 29.09.2007 i.e. the date of I.A. No. 10. According to the Ld. Sr. counsel, all the aforesaid issue were raised in the said I.A filed before the Hon'ble Supreme court by Diploma Holders Junior Engineers, who are members of the Diploma Engineers Sangh and since the said I.A was rejected by the Hon'ble Supreme Court through an order dated 03.12.2007, now it was not open for this Court to decide the said issue again, especially when no liberty was granted by the Hon'ble Supreme Court by the order dated 3.12.2007.

(102) It was further submitted by the Shri Chaturvedi Ld. Sr. Counsel that the Diploma Engineer Sangh and its members i.e. Junior Engineer Diploma holders have no locus to challenge the promotion orders as well as the promotion process for the vacancies between 01-07-1997 to 30-06-2004 i.e. 255 vacancies on any ground as the Junior Engineer Diploma holders have not passed the 'Qualifying *Examination*' held in the year 2007 in compliance of the Hon'ble Supreme Court judgment and order dated 20-03-2007. According to him, the four Writ Petitions filed by the Diploma Engineer Sangh and its members are not Public Interest Litigation and in service matters Public Interest Litigation is not maintainable. He further states that the Junior Engineers who have been awarded Degree in Engineering after 01-07-2003 i.e. the cut-off date for eligibility for the vacancy period 01-07-2003 to 30-06-2004 will also not have any locus to claim any right of consideration for promotion for the posts of Junior Engineers to Assistant Engineers Civil for the Vacancy Period 01-07-2003 to 30-06-2004 or for a prior period form 01-07-1997 to 30-06-2003. Even the direct recruits Assistant Engineer Civil appointed in the year 2009 will have no locus with respect to challenging the promotion orders as well as promotion process from Junior Engineers to Assistant Engineers for the vacancy of the period 01-07-1997 to 30-06-2004. Further, the provisions of order II rule 2, section 11 of the civil procedure Code has been pressed into action for arguing that the principle of res judicata would apply.

(103) According to the Ld. Sr. Counsel, the Government Order / letter dated 20-02-2003 has not been challenged by the Diploma Engineers Sangh or its members i.e. Diploma holders Junior

Engineers till date but contrary to the same they were claiming the benefit of the aforesaid before the State Government, this Hon'ble Court and the Hon'ble Supreme Court, till they were declared unsuccessful in the qualifying *examination* held in the year 2007 through result dated 24-10-2007. It has been argued that the stand of the diploma holder JEs were contradictory to their own stand and as per the Ld. Sr. Counsel, these diploma holder's changed their stand only after they were declared unsuccessful in the qualifying *examination* in 2007, leading to a series of writ petitions filed by them. Thus, the Diploma Engineer Sangh and its members filed the first Writ Petition No.6943 (S/S) of 2007 (Diploma Engineer Sangh versus State of U.P. and others) on 26-10-2007, second Writ Petition No.3173 (S/S) of 2007 (Diploma Engineer Sangh versus State of U.P. and others) on 26-06-2008, third Writ Petition No.3314 (S/S) of 2009 (Diploma Engineer Sangh versus State of U.P. and others) on 27-05-2009 and fourth Writ Petition No.1511 (S/S) of 2010 (Diploma Engineer Sangh versus State of U.P. and others) on 16-03-2010, turning around and pleading keeping in view the judgment and order dated 03-11-2006 in Anjani Kumar Mishra's case, however after the Hon'ble Supreme Court Judgment and order dated 21-08-2019, the same became meaningless.

(104) Shri Chaturvedi, Ld. Sr. Counsel has stressed and articulated his argument on the provisions of *'The U.P. Service of Engineer (Building and Road Branch) Class II Rules, 1936'* and argued that the said rules with subsequent amendments read with the Government Order / letter dated 20-02-2003, except to the extent struck down keeping in view the judgments in P.D. Agarwal's case and Aruvendra Kumar Garg's, case remained undisturbed and continued to apply and according to the Ld. Sr. counsel has to be complied with and the questions raised on behalf of the Diploma Engineers Sangh and its members contrary to the same is not tenable. The Additional Grounds raised before the Hon'ble Supreme Court in Civil Appeal No.3228 of 2005 (Diploma Engineers Sangh versus State of U.P. and others) has been rejected through judgment and order dated 20-03-2007 and as such the same cannot be reopened. The questions raised by the Hon'ble Supreme Court through order dated 24-10-2013 in Civil Appeal No.3695 of 2007 (Atibal Singh versus State of U.P. and others) has been ultimately put to rest through judgment and order dated 21-08-2019.

(105) According to the Ld. Sr. Counsel, the stand of the State Government with respect to promotion quota of 41.66% through (i) affidavit dated 13-10-2009 of Shri Kapil Dev, then Principal Secretary, Works, Public Works Department, Government of Uttar Pradesh, Lucknow, (ii) Short Counter Affidavit dated 13-10-2009 of Shri Tribhuwan Ram then Engineer-in-Chief, Public Works Department, Government of Uttar Pradesh, Lucknow affirming the Counter Affidavit dated 13-10-2009 of Shri Kapil Dev, (iii) Supplementary Counter Affidavit dated 06-01-2011 of Shri Isht Dev Prasad Rai then Special Secretary, Public Works Department, Government of Uttar Pradesh, Lucknow, is correct as the stand would be only the Government Order / letter dated 20-02-2003 and none else, whereas the Affidavit dated 25-07-2006 of Shri Tribhuwan Ram then Engineer-in-Chief, Public Works Department, Uttar Pradesh, totally ignores the Government Order /

letter dated 20-02-2003 and was merely in compliance of the Court's interim order dated 20-07-2006 in Civil Miscellaneous Writ Petition No.53133 of 2004 (Pramod Shankar Upadhyay and others versus State of U.P. and others) pending at Allahabad. According to the Ld. Sr. Counsel, the Counter Affidavit dated 01-02-2023 of Kamta Prasad Singh, Special Secretary, Public Works Department, Government of Uttar Pradesh, Lucknow filed in Writ Petition No. 4141 of 2022 cannot be relied upon as the State Government after Government Order / letter dated 20-022003 till date has never taken decision to overturn the same and if any decision has been taken then the same has not been produced before this Court. He has further relied on the judgment of the Hon'ble Supreme Court in the case of M.I. Builders Pvt. Ltd vs Radhey Shyam Sahu and Others reported in *(1999) 6 SC 464*, wherein it was held that the Government will be estopped from changing its stand except when the government finds later on that the stand of government is contrary to the provision of law, as there is no estoppels against law.

(106) Further, the Ld. Sr. Counsel has referred to a Committee report dated 21-04-2010, which was accepted by the State Government with respect to 41.66% promotional quota and relating to the number of vacancies being 219 in the promotional quota. He has also relied on the report to argue that the report mentions that there was no requirement of confirmation for Degree holder Junior Engineers for being promoted from Junior Engineers to Asst. Engineers. Thus, he submits that any stand of the State contrary to the same could not be taken even in the Counter Affidavit dated 01-02-2023 of Kamta Prasad Singh, Special Secretary, Public Works Department, Government of Uttar Pradesh, Lucknow filed in WRIT-A No. 4141 of 2022, which in any case is silent on the said aspect. He submits that since the promotion has to be on the post of A.E, the relevant service rule of the same cadre i.e. "United Province Service of Engineers (building & Roads) branch class-II Rules' 1936 rules, will prevail for the same, as is evident from U.P Promotion by selection in consultation with Public Service Commission (Procedure) Rules-1970 (these rules have an overriding effect on all service rules of the state). Thus, according to him, it was evident from rules that seniority solely depends on the date of substantive appointment and is not connected in any way to the probation & confirmation. But the promotion invariably depends on the seniority list, which bears the names of persons in the order of their appointment as per P.S.C. select list and comprises the names of persons who are on probation.

(107) Shri Chaturvedi has immensely stressed on the fact that till year 1987, the condition of eligibility was to have technical qualification under rule 9(ii) and there was no clause of confirmation in the rules. However, for the first time in pursuance of the G.O. dated 7th January1980, the required eligibility condition of possessing technical qualification under rule 9(ii) was done away by 1987 Amendment, and the eligibility clause was changed to a fixed quota between diploma holders & degree holders requiring confirmation on the post. According to the Ld. Sr. counsel, even if confirmation was not a necessary condition within the relevant rules but, all the persons either promoted or awaiting promotion have already qualified professional

examination by the year 2004 itself and have been confirmed retrospectively. Hence a person who is declared fit from a retrospective date that too before the date of issuance of promotion orders in 2008 and thereafter cannot be construed to be unfit during the probationary period. For a person on probation, who is otherwise eligible as per rules, if promoted and subsequently found unfit, the wrong can be rectified by reverting him from the post. But the same probationer, if ignored at the time of promotion and subsequently declared fit by way of confirmation, the wrong cannot be undone as he would have lost the seniority by the time even being eligible as per rules and the valuable right of his to be considered for promotion would have been jeopardized by that action. He, further clinched on the issue that confirmation, on successful completion of period of probation is neither a fresh appointment nor completion of appointment and that is for this reason it was the required technical Qualification that was made mandatory and not the confirmation on the post for possessing the eligibility criterion. Thus, he concluded that 1936 rules did not have any clause of confirmation as a pre-requisite for promotion and the same was introduced for the first time by 1987 amendment which was later quashed in Aruvendra Kumar& Atibal Singh's case.

(108) Further, he contended that appendix 25, which prescribed for qualifying *examination* to be conducted thrice in three years before making any promotion is a mere instructions of rules prescribed for conducting of Qualifying *Examination* and does not carry the weight of statutory rules. Also the same is not applicable for such Diploma Holders/ Degree Holders that acquire degree in Civil Engineering from the recognized institutions. He also submits that as per Appendix 25, the Qualifying *Examination* should possibly be conducted every year, however in the present case it continued so till the year 1971 after which it stopped, initially due to, boycott of diploma holders and later due to amendment in the rules waiving off its requirement to suit diploma holders.

(109) According to the Ld. Sr. counsel, the Qualifying *Examination* has nothing to do with the number of vacancies as the same was conducted every year irrespective of vacancies available or not. The objective of Qualifying *Examination* was to provide eligibility to the candidate passing it so that he can be considered as & when the vacancy arises and promotional exercise is undertaken. Further, sub rule 4 under "Eligibility" section clearly allows the candidate to choose one or more sections in one attempt but is made clear that he will be qualified only after passing all the three categories.

(110) Thus, the Ld. Sr. counsel had contended that the letter / order dated 05-02-2010 was liable to be upheld, resulting which the Writ-A No.918 of 2009 (Om Prakash and another versus State of U.P. and others) was liable to be allowed as for the Recruitment Year 2003-2004 for the first time selection was held and accordingly promotion order dated 02-08-2008 promoting 95 Degree holder Junior Engineers was issued and with respect to the same review Departmental Promotion Committee was held and accordingly promotion order dated 03-07-2009 promoting 27 Degree holder Junior

Engineers was issued and as such the petitioner of the aforesaid Writ Petition along with others i.e. total 78 are liable to be promoted from a date prior to the persons promoted or directly appointed under the new Uttar Pradesh Public Works Department Group 'B' Civil Engineer Service Rules, 2004 with consequential benefits and accordingly are liable to be placed in the seniority list of Assistant Engineer (Civil) amongst the persons who have been promoted against the Recruitment year 1997-1998 to 2003-2004.

G. Discussion & Findings

(111) Admittedly, in all these writ petitions, the dispute revolves amongst the Junior Engineers Degree Holders with Diploma holders with regard to promotion on the vacancies pertaining to the year 1997-98 till selection year 2003-04. The said dispute has several facets, which shall be dealt as and when they resurrect in the later part of this Judgment.

(112) Recently, the Hon'ble Supreme Court in the case of **Ajay Kumar Shukla V/s Arvind Rai, 2021 SCC Online SC 1195**, has set aside the seniority list prepared by the department of Minor Irrigation, U.P on finding the list to be in contravention of statutory mandate. The bench held that although right to promotion is not considered to be a fundamental right but consideration for promotion has now been evolved as a fundamental right. The Apex Court arriving at the said conclusion has held; to quote:

"37. This Court, time and again, has laid emphasis on right to be considered for promotion to be a fundamental right, as was held by K. Ramaswamy, J., in the case of Director, Lift Irrigation Corporation Ltd. v. Pravat Kiran Mohanty [(1991) 2 SCC 295] in paragraph 4 of the report which is reproduced below:

"4… There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with relevant rules. From this perspective in our view the conclusion of the High Court that the gradation list prepared by the corporation is in violation of the right of respondent/writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent/writ petitioner was unjustly denied of the same is obviously unjustified."

38. A Constitution Bench in case of Ajit Singh v. State of Punjab [(1999) 7 SCC 209], laying emphasis on Article 14 and Article 16(1) of the Constitution of India held that if a person who satisfies the eligibility and the criteria for promotion but still is not considered for promotion, then there will be clear violation of his/her's fundamental right. Jagannadha Rao, J. speaking for himself and Anand, CJI., Venkataswami, Pattanaik, Kurdukar, JJ., observed the same as follows in paragraphs 21 and 22 and 27:

"21. Articles 14 and 16(1) : is right to be considered for promotion a fundamental right.

22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws". Article 16(1) issues a positive command that "there shall

be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State".

It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

"Promotion based on equal opportunity and seniority attached to such promotion are facets of fundamental right under Article 16(1)

xxx xxx xxx

27. In our opinion, the above view expressed in Ashok Kumar Gupta and followed in Jagdish Lal and other cases, if it is intended to lay down that the right guarantee to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta right from 1950."

(113) The Hon'ble Supreme Court in the matter of **Union of India and Others Vs. Krishna Kumar Others (2019) 4 SCC 319** has held that there is no vested right to promotion but there is only a right to be considered for promotion in accordance with law. While placing reliance on earlier judgments it has been held that the right to be considered for promotion is in accordance with law which is enforced on the date of consideration. In other words law is thus clear that a candidate has a right to be considered in the light of existing Rules, namely, the Rules enforced on the date of consideration takes place.

(114) Having enumerated the facts and the law on the subject, this court has given a very patient & thoughtful hearing to all the contesting parties. The Ld. Senior Counsels as well as the Ld. Counsel's appearing for the contesting parties have rendered great assistance to this court. Having heard the parties, this court is of the view that the issue to be decided by this court can be formulated as herein under:

A. Whether the number of vacancies under the promotion quota for the period during 1997-1998 to 2003-2004 ought to be determined as per the Service Rules of 1936 or as per the Government Order dated 20.02.2003;

B. Whether "cadre Principle" of vacancy determination can be applied for the period 1997-98 to 2003-2004;

C. Whether the "qualifying examination" in terms of rule 9(ii) of the service rules have a bearing to the promotion during the period of 1997-98 to 2003-2004 and as to whether it has been fairly conducted to facilitate promotion for the diploma holder JEs;

D. Whether the consideration of "Probationers in service" in terms of rule 21 of the service rules have a bearing to the promotion during the period of 1997-98 to 2003-2004;

(115) This court in a bunch of matters decided through the lead matter in **Anjani Kumar Mishra and others vs. State of U.P. and others** (2007) 1 UPLBEC 260, disapproved the allocation of vacancies in the quota of promotion for the recruitment years 1997-98 to 2003-04 based on the existing old rule of 1936 and directed for allocation of vacancies in accordance with quota as provided in the G.O. dated 20.2.2003, which prescribed 41.66% quota for promotion and 58.34% quota for direct recruitment and ultimately calculated the number of vacancies in the quota of promotion as 186. Paragraphs 117 to 120, which are relevant to the present context are reproduced herein:-

"117. In view of the aforesaid settled legal position we further hold that there exists no statutory rule 5 and 6 in old 1936 rules with regard to the allocation of quota of direct recruitment and promotees and in our considered opinion the field is occupied and supplemented by executive order issued by the Government in this regard on 20.2.2003, as contained in Annexure 7 of Writ Petition No. 53133 of 2004 Pramod Shanker, which provides 58.34% quota for direct recruitment and 41.66% quota for promotees without demarcation of any separate quota for graduate and non-graduate incumbents of feeder cadre within the quota of promotion. It appears that the aforesaid Government order has been issued in compliance of direction of this Court contained in the decision of Aruvendra Kumar Garg's case, thus the vacancies falling in the quota of promotion were intended to be filled by the incumbents of feeder cadre without allocating any separate quota for promotion for graduate and non-graduate incumbents. The aforesaid Government order dated 20.2.2003 was still in force prior to commencement of new 2004 Rules as there is no material on record to show that the said Government order has ever been modified or superseded till 3.1.2004 by the Government itself. Therefore it is necessary to examine the determination of vacancies in the quota of promotion under old existing law occupying the field.

118. From the perusal of supplementary counter affidavit sworn by Sri Tribhuwan Ram, Engineer-in-Chief, Government of U.P. on 25.7.2006 on behalf of State-respondents filed in the writ petition No.53133 of 2004. Pramod Shanker Upadhyay and others Vs. State of U.P. and others, it indicates that break up of year-wise vacancies on the post of Assistant Engineer in question has been given in chart enclosed as Annexure S.C.A-I and S.C.A.II which demonstrates that w.e.f. 1.7.1997 to 30.6.2004, total 446 vacancies have occurred on the post in question. Out of which total 316 vacancies are allocated in the quota of direct recruitment and only 130 vacancies are allocated in the quota of promotion for feeder cadre. Against 316 vacancies falling in the quota of direct recruitment 62

vacancies have been filled up by regularisation and remaining 254 vacancies are left for selection through Commission, whereas against total 130 vacancies falling in the quota of promotion only 102 vacancies are shown as filled up while 28 vacancies are still remaining to be filled up. From perusal of Annexure S.C.A.III enclosed with the aforesaid supplementary counter affidavit, it transpires that in respect of total vacancies occurred for the year 1997-98, 66.67% vacancies allocated in the quota of direct recruitment, 33.33% vacancies in quota for promotion, whereas in respect of vacancies occurred during the year 1998-2003, 75% vacancies allocated in the quota of direct recruitment and remaining 25% vacancies in the quota of promotion. Thereafter for year 2003-2004, total vacancies are divided and split into two parts, first part for the period w.e.f.1.7.2003 to 2.1.2004 and out of total vacancies occurred during this period, 75% vacancies are allocated in the quota of direct recruitment, whereas 25% vacancies are allocated in the quota of promotion. However the vacancies occurred w.e.f. 3.1.2004 to 30.6.2004, 50% are allocated in the quota of direct recruitment and 50% vacancies in the quota of promotion.

119. Thus there appears no legal basis for such determination and computation of vacancies. We have already held that on declaration of rule 5 and 6 of old 1936 rules as ultra-vires of the provisions of Articles 14 and 16 of Constitution of India by Hon'ble Apex Court in P.D. Agrawal's case as brought about by 1969 amendment rules there exist no statutory rules under aforesaid 1936 rules for allocation of different quota for different sources of recruitment. Rule 5 and 6 of old 1936 Rules as stood while 1969 amendment rules came into force could not be revived automatically without their fresh enactment for the purpose of determination of rights and obligations arise therefrom, as the substituted rules were declared ultra-vires after their substitution for the aforesaid rules, therefore, aforesaid earlier rules could not be treated to be revived as existing before their substitution without fresh enactment. Similarly, Rule 5 (iii) brought about by1987 and 1997 was also declared ultra-vires of the Part III of the Constitution in Aruvendra Kumar Garg's case, thus no rights and obligations arise therefrom. Therefore, prescription of quota for direct recruitments and promotees existing in the rules 5 and 6 of old 1936 Rules prior to the aforesaid amendments for substituting the said rules cannot be revived for the same reasons. Thus, the approach of Government while computing and determining the vacancies in question and in doing so taking assistance from rule 5 and 6 of old 1936 rules as stood at the time of amendment of rules by amending rule 1969 palpably incorrect and demonstrably wrong, therefore, cannot be sustained. Thus, in view of the aforesaid discussion, we are of the considered opinion that except the Government order dated 20.2.2003 there existed no statutory rule or Government order during 1997 to 2004 for determination and allocation of the aforesaid vacancies in the quota of promotion and direct recruitment. By the aforesaid Government Order, the Government has intended to fill up vacuum in existing statutory rules and the existing vacancies in the said quota, we are of the further opinion that all the vacancies in the quota for promotion from year 1997 to 30.6.2004 are liable to be filled up according to the quota prescribed under Government order dated 20.2.2003. As we have already held that vacancies falling in the quota of promotion earlier and also

w.e.f. 3.1.2004 to 30.6.2004 are also liable to be filled up under old law occupying the field, thus, according to the Government order dated 20.2.2003.

120. Applying the aforesaid Government order in respect of prescription of different quota for direct recruitment and promotion out of total 446 vacancies of Assistant Engineers occurred during the aforesaid period, 58.34% quota for direct recruitment and 41.66% quota for promotion, the total number of vacancies would come to 260 in the quota of direct recruitment and 186 in the quota of promotion. Since 62 vacancies in the quota of direct recruitment have already been filled by regularisation as shown in the chart contained in Annexure S.C.A. -II of the Supplementary Counter Affidavit. Thus only (260-62) = 198 vacancies are still remaining to be filled in the quota of direct recruitment and total 186 vacancies in the quota of promotion are liable to be filled up according to the G. O. dated 20.2.2003 and rule 12, of rules 1936 prescribing criterion seniority subject to rejection of unfit as amended by U.P. Service of Engineers (B. and R.B.) class II (Amendment Rules) 1992. Therefore, determination of vacancies in the quota of direct recruitment and promotion is wholly erroneous and illegal, thus cannot be sustained, consequently requisition dated 2.2.2006 sent by the Government to the Commission for holding selection on the posts of Assistant Engineers through direct recruitment and pursuant advertisement published in daily newspaper Amar Ujala dated 5.9.2006 so far as it pertains to the aforesaid posts are hereby quashed. The State Government is directed to undertake re-exercise of determination of vacancies under quota of direct recruitment and promotion both according to the observations made herein before and take further steps to hold selection for direct recruitment and promotion as indicated herein before."

(116) Thus, it was concluded vide paragraph 171 of the Judgment rendered in Anjani Kumar Mishra's case [supra] as herein under:

"171. In view of foregoing discussions and observations our conclusions are summarized as under:

(1) The provisions of Rule 5(ii) and Rule 16 of new 2004 Rules are held to be valid.

(2) Although, the provisions of new 2004 Rules are prospective in operation and shall apply w.e.f. 3.1.2004 but the vacancies occurred on or after 1.7.2004 only shall be filled up under new 2004 Rules and vacancies occurred prior to 30.6.2004 in the quota of promotion shall be filled up under old 1936 Rules. However, the existing vacancies prior to 30.6.2004 in the quota of direct recruitment shall be filled up as backlog vacancies under new 2004 Rules as the process of selection for direct recruitment were not initiated prior to commencement of new 2004 Rules, but without any further allocation of vacancies in the quota for promotion for period in question.

(3) There exists no statutory rule for prescription of quota for direct recruitment and promotion after decision of Hon'ble Apex Court in P.D. Agrawal's case and this court in **Aruvendra Kumar Garg's case** under old 1936 Rules. However, in order to fill up vacuum and supplement the remaining existing provisions of old 1936 Rules, the G.O. dated 20.2.2003 has been issued to fill up

the remaining existing vacancies available at relevant time by prescribing 41.66% quota for promotion which shall be applicable to fill up the existing vacancies alone not covered by new 2004 Rules as indicated in judgement.

(4) The respondent-State authorities are directed to re-determine the vacancies for years 1997-1998 to 2003-2004 according to G.O. dated 20.2.2003 and take further steps within a month from the date of production of certified copy of the order passed by this court before Secretary, P.W.D., Government of U.P.

(5) While undertaking re-exercise for determination of remaining vacancies for year 1997-98, the promotions made at Sl. No. 32 to 40 by G.O. No. 4023/23-4-98 N.G./97 T.C. Lucknow dated 30th June 1998 shall be ignored. Similarly 53 promotions made vide G.O. No. 2220/23-4-2002-24 N.G./2002 Lucknow dated 2.5.2002 in respect of vacancies of years 1998-99 to 2000-2001, 10 promotions made vide G.O. No.8651/23-4-2002-24 N.G./02 dated 6.12.2004 pertaining to vacancies of year 1998-99 and 1999-2000 and one promotion made vide G.O. No. 8021/23-4-05-24 N.G./02 dated 25.5.2005 shall also be ignored.

(6) As a result of striking down the promotions made on the post in question from Sl. No. 32-40 contained in G.O. dated 30.6.1998, G.O. dated 2.5.2005, G.O. dated 6.12.2004 and G.O. dated 25.5.2005 the degree holder junior engineers who were promoted by the aforesaid Government orders shall not be reverted at once to their original posts until the vacancies against which they were promoted shall be filled up according to rule-12 of old 1936 Rules by incumbents of feeder posts irrespective of their having diploma or degree in engineering.

(7) Against total remaining vacancies falling in the quota of promotion for year 1997 and for year 1998-2004 as indicated herein above, separate year wise eligibility and select list shall be prepared in respect of vacancies of each recruitment year.

(8) While preparing year wise eligibility list, the persons whose promotion have been quashed, shall also be considered and placed in the eligibility lists if fall within zone of consideration according to their seniority position in the seniority list irrespective of their having degree in engineering or equivalent qualification and while considering their case the period of services rendered by them on higher post shall be taken into account while computing their seniority on feeder cadre and their Annual Confidential Reports and other service records shall also be taken into account on notional basis on feeder cadre.

(9) However it is made further clear that rejection of relief to the petitioners in separate quota for promotion for degree holders on alleged ground of discrimination would not disentitle them to be considered for promotion provided they are otherwise found eligible for consideration for promotion according to their seniority position under rule 12 of old 1936 Rules, in that event of the matter they will also be considered along with other eligible candidates irrespective of their degree in engineering or equivalent qualification.

(10) The respondents-State authorities are directed to undertake aforementioned exercise and complete it within a period of three months from the date of production of certified copy of order passed by this court before Secretary of concern department of the Government.

(11) After aforesaid exercise is over, if the claim of promotions of degree holder junior engineers whose promotions have been quashed, are found not acceptable either because of their lower seniority position or found otherwise not suitable according to the rules of promotion, they shall be reverted to their original posts forthwith on completion of aforesaid exercise."

(117) This court in earlier round of litigation in this bunch of matters, vide order dated 08.09.2011 has recorded as herein under:

"As regard the vacancies, the consistent stand of the State Government, as comes out from various affidavits and letters including the letter dated 22.4.2009, is that there were only 186 vacancies in the quota of promotion for the period 1997-98 to 2003-04. In the case of Anjani Kumar Mishra, the Court has determined the total vacancies to be 186. It is admitted fact that the State Government has promoted 29 persons vide order dated 30.6.1998, 1 by order dated 20.8.2007, 95 by the order dated 2.8.2008, 1 by the order dated 3.2.2009 and 27 persons were lastly promoted by the order dated 30.7.2009. It is also not in dispute that 73 persons are working under the Court's Order. It may also be pointed out that 21 vacancies were carried forward by the authorities. Thus, in all, 249 promotions have already been made. Therefore, there was no justifiable and valid reason for the authorities to act when the Court in the case of Anjani Kumar had already adjudicated the vacancies.

We are of the considered opinion, the vacancies existing in promotional quota as on 30.6.2004 are to be filled in accordance with provisions contained in United provinces Service of Engineers (Buildings and Roads Branch) Class-II Rules, 1936 in view of the judgment and order passed by this Court in the case of Anjani Kumar Mishra, which has been approved by the Apex Court.

Even at the cost of repetition, it may be stated that once the determination of vacancies, i.e. 186 after the judgment in Anjani Kumar Mishra's case had attained finality, which was determined applying the quota of 41.66% on the occurred vacancies during the period. There was no occasion or valid reason for the Government to make selection in excess of the determination. Moreover, it is not open for us to re-determine the vacancies as it would amount to review of the aforesaid final judgment."

(118) Apparently, both in Anjani Kumar Mishra's case as well as the order dated 08.09.2011*(mentioned supra)*, this court has determined the vacancies to be filled on the basis of promotional quota to be 41.66% as per the alleged communication/ Government order dated 20.02.2003. The said communication/ Government order was construed to be holding the ground for prescribing the promotional quota under an impression that their existed no statutory rule for prescription of quota for direct recruitment and promotion after decision of Hon'ble Apex Court in P.D. Agrawal's case and this court in **Aruvendra Kumar Garg's case** under the old 1936 Rules. This court, therefore in Anjani Kumar Mishra's case arrived at a decision that in order to fill up the vacuum and supplement the remaining existing provisions of the old 1936 Rules, the G.O. dated 20.2.2003 had been issued to fill up the remaining existing vacancies available at relevant time by prescribing 41.66% quota for promotion which shall be

applicable to fill up the existing vacancies not covered by new 2004 Rules as indicated in the said judgement.

(119) Shri Sandeep Dixit, the Ld. Senior counsel has also argued his case on similar lines. According to him nothing survives from old rules after amendments of 1969, 1971, 1987 & 1997 brought by substitution, as the same were quashed in P.D Agarwal's case and Aruvedra Kuamr Garg's case. According to him since nothing survived in the old rules relating to the promotional quota, the state issued the Government order dated 20.03.2003 to fill the gap and in any case, the said Government order was never challenged by any of the contesting parties. Thus, according to him the Government order dated 20.2.2003 holds the field even as on today.

(120) However, this court is afraid to accede to the aforesaid argument of Shri Sandeep Dixit for various reasons. Firstly, it appears from records that the Hon'ble Apex Court, in P.D. Agarwal's case has not only quashed 1969 & 1971 amendments brought by substitution but had also directed for preparation of seniority list as per the pre-1969 Rule position i.e. according to 1959 amendment. Since a new seniority list dated 17.07.1995 of Asst. Engineers (civil) was actually prepared by the state therefore old Rules as amended upto 1959 always existed in the rule book as per the Judgment of the Apex Court. Secondly, this Court, vide its judgment dated 22.03.2002, passed in Aruvendra Kumar Garg's case, took notice of the contention of Degree Holder JEs that the amendment brought by substitution, if voilative of Article 13(2), is void from the very inception and is admittedly a 'still borne law, i.e an invalid substitution, hence pre-amendment rule position would revive. In contrast, contention of Diploma Holder JEs, at that time was that pre-1969 rule position, which provided qualifying exam under rule 9(2) (and which was removed in 1987 amendment), would not revive again, after quashing of 1969 to 1997 amendments. This Court, vide judgment dated 22.03.2002 of Aruvendra Garg's case, though referred A.T.B. Mehtab Mazid's judgment, Bhagat Ram Sharma's and several other judgments in para 18 and 19 of Aruvendra Kumar Garg's judgment, but it proceeded to hold in para 20 that the issue before it was not about the revival of 1959 amendment because 1987 and 1997 amendments were brought by substituting 1969 amendment (and not the amendment of 1959), which was already quashed in P.D. Agarwal's case, therefore, no finding about revival of pre-1969 rule position was given in Aruvendra Kumar Garg's case. It would be rather wrong to say that this Court in Aruvendra Kumar Garg's case, had quashed all the provisions of old Service Rules of 1936, rather this court merely quashed the two notifications regarding amendments of 1987 and 1997 because the entire Rules of 1936 were not under challenge.

(121) Moreover, the question regarding revival of old Rules upto 1959 amendment was actually answered by the Hon'ble Apex Court vide judgment dated 20.03.2007 passed in *Diploma Engineers Sangh's case*. In that case the Diploma Holder J.Es while relying ATB Mehtab Mazid's case, contended that pre- 1969 Rule position would not revive after setting aside of the four amendments. The Degree Holder J.Es argued to the contrary. The

Hon'ble Apex Court in para 5 and 7 of the said judgment observed that after setting aside of four amendments from 1969 to 1997 which were void-ab-initio, the Rules of 1936, as they stood before such amendments (including Rule 5(4) and 9(2)) had revived and therefore direction was given for holding of written qualifying *examination* as per Rule 5(4) and 9(2) of the old Rules.

(122) Apparently, after revival of old Rules as existed upto 1959 amendment, 25% promotion quota as per Rule 6(1)(a) had revived or rather always existed and therefore the promotion quota vacancies could not had been determined as per G.O. dated 20.02.2003 because G.O dated 20.02.2003 came into existence as a stop-gap arrangement under the impression that there existed no rules determining the promotion quota. However, now that in view of the string of Judgment passed by the Apex Court in P.D. Agarwals's case, Diploma Engineer's Sangh as well as the Aruvendra Garg's case, there is not an iota of doubt about the existence of rules relating to the promotion quota on the date of determining the number of vacant seats for the promotional quota. In any case, this court does not wishes to further burden this judgement with the precedents which invariably have held that Government orders cannot supersede the statutory Rules, suffice to say that recently the Hon'ble Apex Court vide a Judgement dated 15.03.2023 delivered by HMJ Sanjay Kishan Kaul in *"Ashok Ram Parhad V/s State of Maharashtra, 2023 SCC OnLine SC 265"* has held that government resolutions cannot override statutory rules. The Hon'ble Apex Court while dismissing an appeal arising from a Judgment of the Bombay high Court observed that service rules are liable to prevail, and that there can be government resolutions in consonance and not in conflict with those rules.

(123) With regard to the contention of Shri Dixit relating to their being no challenge to the Government order dated 20.03.2003, is concerned, we must first understand as to what is a Government Order. As has been argued by Shri Upendra Nath Misra, ld. Senior Counsel ably assisted by Shri Neel Kamal Mishra, Advocate, that a Government order has to undergo the twin test of being in consonance with Article 162 and also with the Rules of business issued by the State Govt, while exercising powers under Article 166(3) of the Constitution. Apparently, the State Government issued the Rules of business 1975 in exercise of powers under Article 166(2) and 166(3). Clause- 4(2)(Ga) of the Rules of business, which clearly provided that no Government order can be issued where the strength of the cadre is increased or service condition of any cadre is changed, without taking multi department consultations (specially the approval of finance department). Rules of business is sacrosanct in the matter of issuance of a G.O or a direction by the State as held in the case of Pancham Chand Vs State of HP, 2008(7) SCC 117. Since, the letter dated 20.02.2003 was neither issued in the name of His Excellency the Governor, nor it was issued after Multi Departmental consultations, especially Finance Department, as shown by no endorsements made to any other Department, in that letter, the same cannot be construed as a Government order.

(124) Further, the letter dated 20.02.2003 was issued while referring to

the earlier letter dated 06.02.2003, which mentioned in Clause-1 that the total sanctioned cadre strength of A.E. (Civil) in the Department is 1225 posts. Then Clause 2(ba) of the said letter says that if promotion quota of 41.66% is applied as per 1997 amendment, though there will be a shortage of 219 vacancies in promotion quota but if these 219 vacancies are filled up by promotion, then the total cadre strength would be increased from 1225 to 1250. Thus, while referring to the aforesaid letter dated 06.02.2003 and 219 promotion quota vacancies mentioned therein, the letter dated 20.02.2003 was sent by the Secretary of the Department to the E-in-C, whereby the process of interview as provided by office order dated 11.02.2003 was laid down. Therefore if these 219 vacancies were being filled up, while exceeding the total sanctioned cadre strength of A.E. (Civil) from 1225 to 1250, the Secretary PWD ought to have undertaken multi-departmental consultation as per Clause 4(2)(Ga) of the Rules of Business, 1975, (specially the approval of law department and finance department. In absence of following such procedure, the issuance of letter dated 20.02.2003 by the Secretary, PWD to the E-in-C, without endorsing it to any other department, does not make this letter a "Government order" as per Article 162 and 166(3) as the same is not in consonance with Rules of business and therefore it remains a letter only.

(125) There is a second aspect of the matter, in as much as, letter dated 20.02.2003 was based on office order dated 11.02.2003, whereby the mode of qualifying *examination* was changed from written exam to interview. For this reason, para 5 of the letter dated 20.02.2003 provided the time line as to how interviews are to be held for determining eligibility under Rule 9(2). Since the office order dated 11.02.2003 has been set aside by this Court in Vijay Kumar's case on 16.07.2004 and by Hon'ble Apex Court in *Diploma Engineers Sangh's case* on 20.03.2007 and the procedure of interview was disapproved while maintaining the earlier procedure of written exam as per Rule 9(2) of the old Rules, therefore, the letter dated 20.02.2003 providing for procedure and time line etc, of the said interviews would also become non-existent and redundant. Hence there was no need to challenge such a letter in the Court as no rights can be conferred through letters/internal communications.

(126) Further, when this Court, vide order dated 17.07.2006 directed the Principal Secretary and E-in-C for filing their affidavits for giving a clear picture about total number of vacancies available for promotion, year-wise, commencing from year 1997-1998 till 30.06.2004, so as to avoid confusion about conflicting claims regarding existence of promotion quota vacancies given by Degree Holder J.Es and Diploma Holder J.Es., the State Government filed a detailed affidavit dated 25.07.2006 and in para-20 of the same, it categorically held that old Rules as existed upto 1959, which provided 25% promotion quota, have revived. Thus when the State Government itself was following Rule 6(1) of old Rules as existing 1959, as late as in 2006 while filing Affidavit dt 25.07.2003, there was no need, occasion and justification for anyone to challenge the letter dated 20.02.2003 before this Court. Even the letter dated 20.02.2003, not only refers to the office order dated 11.02.2003 and letter dt 06.02.2003, which was issued while treating the 'unamended old Rules upto 1959 in existence', but even the letter

dated 20.02.2003 also categorically holds that the promotion shall be made according to the 'unamended provisions of the old Rules', which were left over after setting aside of 1969 to 1997 amendments, i.e. upto 1959 amendment. Therefore, the mere proposed claim of application of 41.66% promotion quota and consequent 219 vacancies was merely due to some misconception and self-contradiction, hence there was no need to challenge the letter dated 20.02.2003. Lastly, even if for the sake of arguments, the said letter dated 20.02.2003 is considered to be a Government Order, the said G.O. cannot supersede the provisions of statutory Rules. (Please see Union of India Vs Charanjeet S. Gill (2000) 5 SCC 742 (Paragraph 25) and PSC, Uttaranchal Vs JCS Bora, (2014) 8 SCC 644 (Page 28).

(127) Last but not the least, the stand of the State, who had been the author of the said letter dated 20.02.2003 is also remarkable and could be found in the submission of the Ld. Chief Standing Counsel, wherein Shri Ravi Singh Sisodiya has in unequivocal terms has addressed the government letter dated 20.02.2003 as a mere letter dated 20.02.2003. According to the state the letter dated 20.02.2003 was issued in regard to promotions of Junior Engineer (Civil) to the post of Assistant Engineer (Civil) and it was merely stated in the said letter, that the State Government had got legal advice that the promotions should be made on the basis of Rules which remained after the judgment delivered by the Hon'ble Supreme Court in P.D. Agarwal case and by this Court in *Arunendra Kumar Garg case*. According to the state, in the letter, it was merely stated that the state expected that 41.66% quota should be applied and accordingly 219 vacancies should be filled by promotion and it was merely a communication letter addressed by the State Government to the Public Works Department interpreting the Rules, 1936, as subsequent amendments in the year 1969, 1971, 1987 and 1997 were set aside. Thus, it can be safely concluded that even as per the understanding of the state, the said Government order or letter or communication dated 20.02.2003 was a mere communication between the state and PWD and nothing more. In view of the above, the letter/communication dated 20.02.2003 loose its sheen of a Government order and it does not make any difference as to whether the same was challenged or not by any of the contesting parties as it was a mere recommendation, which may or may not have been acted upon the recipient.

(128) Thus, in the peculiar facts, when the Hon'ble Apex Court, vide order dated 20.03.2007, had earlier ordered for revival for old Rules as existed upto 1959, which was reiterated vide its latest judgment dated 21.08.2019, therefore, only Rule 6(1) of the old Rules upto 1959 amendment, providing for 25% promotion quota, would apply for determination of promotion quota vacancies upto the recruitment year 2003-2004, hence the said letter dated 20.02.2003 has no relevance in view of the latest developments stated above and hence it has no application whatsoever.

(129) Further, as already stated herein above, during the period 2004 to 2007, contesting parties were claiming different number of vacancies to be allegedly existing in promotion quota, therefore, this Court, while hearing *Anjani Kumar's case* passed an order dated 17.07.2006 &

20.07.2007, directed the Principal Secretary of the Department and Engineer-in-charge, PWD to file affidavit giving total number of vacancies available in promotion quota year-wise, commencing from the year 1997-1998 till 30.06.2004.

(130) The State Government, in compliance of the said direction, filed a detailed supplementary counter affidavit dated 25.07.2006, categorically mentioning that after setting aside of the impugned amendments of 1969 to 1997, the 25% promotion quota (as provided under Rule 6(1) of 1959 amendment) stood revived. Since state was clear in its understanding that Rule 6(1) of the old rule providing 25% quota for promotion had revived, therefore letter dt 20.02.2003 was consciously not relied/mentioned by the state in the said affidavit. Moreover, a chart was annexed with the said affidavit to explain the year-wise vacancies from 1997-1998 till 2003- 2004. In the said chart, the State Government had clearly mentioned that by applying 25% promotion quota over these years, a total of 130 vacancies were created against which 102 vacancies were filled up and only 28 vacancies were in existence which could be filled under the old Rules of 1936, though infact there were only 10 vacancies in promotion quota upto 2003-04 as held in Anjani Kumar Mishra's case.

(131) Thus, the state always believed and never doubted the existence of 25% promotion quota as per the Old rules of 1936, however, this Court in para 118 to 120, of the judgment dated 03.11.2006 passed in *Anjani Kumar's case* refused to accept the aforesaid stand of the State that earlier Rules existed prior to 1969 would revive after setting aside of all subsequent amendments and therefore it held that after quashing of 1969 to 1997 amendment, nothing would revive from old Rules and only letter dated 20.02.2003 providing for 41.66% promotion quota shall apply for promotion to be made upto 2003-2004.

(132) As rightly submitted by the Ld. Chief Stating Counsel of the state, the State Government, merely in compliance of Anjani's judgment dated 03.11.2006 and Diploma's Sangh's judgment dated 20.03.2007 had made the impugned promotions in 2008, 2009& 2010. However, when the promotion orders dated 03.07.2009 and 05.02.2010 were quashed by this Court on 08.09.2011, which was based on the precedential value of the Anjani Kumar's Judgment and which was holding the field at that point of time, the State Govt., apparently to defend its actions, filed an SLP before the Hon'ble Apex Court against the judgment dated 08.09.2011. In this SLP, the averments were also made by the State, obviously by relying Anjani Kumar's Judgment and its direction about application of G.O. dated 20.02.2003 and application of composite promotion quota of 41.66%, which cannot be faulted with.

(133) However, this court finds that the stand of the state in the aforesaid process rested on a slippery ground as on the one hand it ought not to be an adversarial litigant and rather it should have taken a stand which was as per the prevailing law and not as a contesting party, however at the same time, the state was obliged to follow the judgment of this court without any reservation.

(134) Unfortunately, the state was not able to balance the aforesaid two rival situation as Anjani Kumar's judgment was

not stayed by the Hon'ble Apex Court and it continued to remain in operation till it was set aside on 21.08.2019 by Hon'ble Apex Court and as such all the post- Anjani Mishra's judgment, all the affidavits of the State filed from 2007 to 2019 had relied upon Anjani Kumar's judgment dated 03.11.2006, i.e letter dated 20.02.2003 and promotion quota of 41.66% for justifying the excess promotions made from 2008 to 2010 from Degree Holder J.Es. All these State affidavits including the affidavit of then Principal Secretary Sri Nitin Ramesh Gokaran filed on 10.08.2019, referred by private respondents were nothing but "post Anjani Affidavits of the State". Since Anjani Kumar's judgment was in existence at that time, therefore, it could not have been ignored at that time.

(135) However, now when the Hon'ble Apex Court, in its remand order dated 21.08.2019 has not only set aside Anjani Kumar's judgment dated 03.11.2006 and Diploma's judgment dated 08.09.2011 etc. and has also reiterated about correctness of the two Judge judgment dated 20.03.2007 passed in Diploma Holder J.Es. case, nothing remains to be decided and accordingly old Rules of 1936 except the amendment of 1969 to 1997, stood revived.

(136) Thus, as a result of the aforesaid development, after the Anjani Kumar's judgment is set aside with a direction for rehearing, all the pleadings of the parties in the pending writ petitions, including the State's affidavit dated 25.07.2006 stood revived. Therefore, all "post-Anjani affidavits of the State" became redundant and meaningless and the only affidavit of the State which can be relied upon now is the State's affidavit dated 25.07.2006 which is the solitary "pre-Anjani affidavit" containing the "pre-Anjani stand of State". Therefore when the re-hearing started as a result of remand order dated 21.08.2019, the State Government relied upon its pre-Anjani Affidavit dated 25.07.2006.

(137) This Court finds that during the hearing of the present bunch of matters, in the year 2022, 27 private respondents of W.P. No.3314 of 2009 filed a fresh writ petition no.4141 of 2022 for a direction to the respondents to treat them as having been promoted as A.E. (Civil) w.e.f. 03.07.2009.This Court vide order dated 22.08.2022 directed the State Government to file an affidavit as to why their promotion order shall not been restored, wherein the State Government filed an affidavit dated 09.12.2022 in W.P. no. 4141 of 2022 and in para-6, 13 and 23, it was categorically held that, after Anjani Kumar's judgment is set aside, the position prior to 03.11.2006 stood revived and therefore the letter dated 20.02.2003 containing 41.66% quota can no longer be applied. All the post Anjani Affidavit filed by the State have also become redundant and the only relevant stand of the State is its pre-Anjani Affidavit dated 25.07.2006 which says application of 25% promotion quota only. The state also took a stand that since the matter has been remanded for rehearing and the validity of promotion orders of the private respondent is still under challenge, therefore, in absence of Anjani's judgment, promotion quota vacancies have to be decided afresh, and till then the promotion orders of private respondents cannot be straight away revived.

(138) Further, the State Government also filed another affidavit through the Secretary/ Special Secretary on 01.02.2023

as a composite affidavit in Pending Petitions i.e. 3314 of 2009 and 1511 of 2010 and also in the new petition of 4141 of 2022, wherein the earlier stand was reiterated and the pre-Anjani affidavit of the State dated 25.07.2006 was again relied upon which says application of only 25% promotion quota.

(139) From the above, it is clearly established that there has been no change in the stand of the State as has been argued by Shri Dixit, ld. Sr. counsel. In fact, after setting aside of 1969 and 1971 amendment in P.D. Agarwal's case and 1987 and 1997 amendment in Aruvendra Kumar Garg's case, the State Government consistently relied upon the revival of the old Rules as existed in 1959. Consequently, while issuing office order dated 11.02.2003 and letter dated 20.02.2003, pre- 1969 Rules position was relied upon by the State. Similarly, while making promotions on 02.05.2002 after Aruvendra Kumar's judgment, only 25% promotion quota was applied. This stand was also taken in the affidavit dated 25.07.2006 (pre-Anjani Affidavit) which has again been relied upon by the State after Anjani Mishra's Judgment was set-aside and therefore while discarding all the post Anjani affidavits, the same earlier stand of 2006 has been reiterated.

(140) Thus, this court is of the view that from the three judgments of the Hon'ble Apex Court on the subject of revival of old rules, 1936, *(i.e. Diploma's sangh's case, Aruvendra garg's case and P.D. Agarwal's case)* it is absolutely clear that if Rule 5(i) to 5(iv), which existed only prior to 1969 (and which due to repeal, never existed in the statute books from 1969 to 2004), got revived & clarified under the aforesaid judgments of the Hon'ble Apex Court, therefore when Rule 9(ii) read with Rule 5(iv) of the old service rules were revived under the aforesaid judgments, Rule 6(i) providing 25% promotion quota as per 1959 amendment, would also be revived and applied on the parties. This is because promotion as a mode of recruitment provided under 5(iv) is meaningless without revival of 25% promotion quota provided under Rule 6(i) of old rules of 1959. Moreover, Rule 9(ii) of the old rules providing qualifying *examination* which was omitted by substitution through 1987 amendment got revived under the judgment of the Hon'ble Apex Court. If qualifying *examination* provided under rule 9(ii) for making promotions under rule 5(iv) of the old rules as amended upto 1959 amendment would revive, then Rule 6(1) of 1959 amendment providing 25% quota would also revive, after setting aside of 1969, 1971, 1987 and 1997 *amendments brought by substitution'* by Hon'ble Courts. Therefore, revival of rules 9(2) and 5(4) with 6(1) of the old rules of 1936 as amended upto 1959 already done by the Hon'ble Apex Court, is a binding precedent between the parties.

(141) Thus, it can be safely concluded that the number of vacancies under the promotion quota for the period during 1997-1998 to 2003-2004 ought to be determined as per the Service Rules of 1936, wherein rule 6(a) provides for promotional quota of 25% for promotion of Junior Engineers to the post of Asst. Engineers.

(142) The next incidental question related to the aforesaid issue, which falls

for determination is as to the number of the promotional quota seats available for the period during 1997-98 to 2003-2004.

(143) The Engineer-in-Charge in his letter dated 06.02.2003 to the State, determined 219 vacancies in promotion quota on the cadre strength basis, but he cautioned the state government that by doing this, the total sanctioned strength on such determination would increase from 1225 to 1250 and therefore the said principle is not applicable.

(144) Anjani Kumar Mishra's case specifically records at paragraph 118 that 446 vacancies have occurred on the post of Asst. Engineer for promotion during the period of 1997-98 to 2003-04 as per the affidavit filed by the state. Although, the court gave a different direction to the whole athematic relating to the number of post available for direct recruit as well as the promotional post by applying the G.O dated 20.02.2003 and doubting the existence of the Old service rules, 1936. However the fact of the matter remains that the state had filed an affidavit along with a chart on 25.07.2006 as recorded in paragraph 118 of the said judgement, narrating inter-alia that there existed 446 vacancies, out of which total 316 vacancies are allocated in the quota of direct recruitment and 130 vacancies were allocated in the quota of promotion for feeder cadre. Against 316 vacancies falling in the quota of direct recruitment 62 vacancies have been filled up by regularisation and remaining 254 vacancies are left for selection through Commission, whereas against total 130 vacancies falling in the quota of promotion only 102 vacancies are shown as filled up while 28 vacancies are still remaining to be filled up. The said number of vacancies was arrived by the state on the basis of existing old rules of 1936, in as much as for the year 1997-98, the state had shown 66.67% vacancies allocated in the quota of direct recruitment, 33.33% vacancies in quota for promotion, whereas in respect of vacancies occurred during the year 1998-2003, 75% vacancies allocated in the quota of direct recruitment and remaining 25% vacancies in the quota of promotion. Thereafter for year 2003-2004, total vacancies were divided and split into two parts, first part for the period w.e.f.1.7.2003 to 2.1.2004 and out of total vacancies occurred during this period, 75% vacancies were allocated in the quota of direct recruitment, whereas 25% vacancies were allocated in the quota of promotion. However the vacancies occurred w.e.f. 3.1.2004 to 30.6.2004, 50% are allocated in the quota of direct recruitment and 50% vacancies in the quota of promotion.

(145) As far as the judgment of this court in Anjani Kumar Mishra's case is concerned, it held that 41.66% of the seats were available under the promotional quota by applying the G.O dated 20.02.2003 and as such arrived at a figure of 186 seats under the promotional quota and also left it open for the state government to re-determine the number of seats available under the promotional quota. Further, all the 73 promotions (30.06.1998, 02.05.2002, 06.12.2004 and 25.05.2005) made only from Degree holder JEs by 04 promotion orders, issued between 1998-2002, without considering any senior diploma JE's, were declared bad in law & were quashed.

(146) However, as already recorded hereinabove, the 73 promotions which was

declared bad in law and quashed, were able to obtain a status quo order from the Hon'ble Apex Court and as such the Engineer-in-Chief vide a requisition dated 03.06.2008 sent for filling remaining 113 vacancies. Against the said 113 vacancies, which were included in the 186 vacancies determined for the period interregnum i.e. 1997-98 to 2003-04 in *Anjani Kumar's case*, 96(95+1) promotions were made on 02.08.2008 and 03.02.2009 but all the promotions were given only to Degree holder JEs only and the remaining 17 vacancies were carried forward due to non-availability of reserved category candidates, which were filled up in the subsequent recruitment years.

(147) Thus all the 186 vacancies for the interregnum period i.e. 1997-1998 to 2003-2004 were already filled up under the old Service Rules of 1936, leaving no vacancy to be further filled up as per the old Service Rules. However, taking a cue from the letter dated 06.02.2003 issued by the Engineer-in-charge, the department again sent a fresh requisition dated 27.02.2009 for 33 (219-186) vacancies, while completely ignoring the fact that the calculation of 186 vacancies as determined in Anjani Kumar Mishra case. As a matter of fact against this 33 vacancies, 27 promotions were made vide impugned order dated 03.07.2009.

(148) If that was not enough, the State Government, again sent a fresh requisition for filling up 97 more vacancies of Assistant Engineer (over and above 186+27 promotions already made), while calculating the same on the basis of "cadre strength principle" which was against the old rules of 1936, wherein 78 more degree holder JEs were considered for promotion vide impugned requisition dated 28.04.2010.

(149) Thus, there seems to be an arithmetical issue relating to the number of vacancies in the promotional quota. Even the enquiry committee report dated 24.04.2010 is of no help relating to the number of vacancy available in the promotional quota for the period 1997-98 to 2003-04. Although Shri Chaturvedi, ld. Sr. Advocate made an endeavour to explain and justify that 97 is the left over vacancies under the old rules of 1936 by taking a cue from G.O dated 20.02.2003, however the same was not verifiable, especially when a simple calculation would show that in case there are 446 vacancy for Asst. Engineers, applying the existing old rules, 75% would go for direct recruit, which would translate into 334 seats and the rest 25% towards promotional quota would translate into 112 seats. Apparently against this 112 seats, 102 undisputedly stands filled (29 promotions of diploma JEs on 30.06.1998 & 73 promotion of degree JEs vide four promotion orders dated 30.06.1998 (9 promotion), 02.05.2002 (53 promotions), 06.12.2004 (10 promotions) and 25.05.2005 (01 promotion). Therefore, there would be only 10 vacancies only available for the promotional quota. Since, almost 191 excess promotions have been made by the state vide the three impugned promotion order dated 02.08.2008 (86 excess seats), 03.07.2009 (27 excess seats) and 05.02.2010 (78 excess seats), the question of actual determination and justification for this excess seats has to be given by the state Government, which is not forth coming. Further, although, there is no justification for the excess promotion seats as stated herein above, however a

feeble ground has been taken by the state that 97 promotion sought to be requisitioned vide impugned order dated 05.02.2010 is being justified on the basis of cadre principle, which has sought to be made applicable to the Old service rules of 1936 retrospectively vide G.O dated 05.02.2010.

(150) The Ld. Sr. counsel Shri Mishra has relied on the judgment of Deepak Agarwal V/s State of U.P. 2011 (6) SCC 725 and other related judgments to propagate the proposition of law that the *"Rules in-force"* on the date of promotion should apply. There is no doubt on the said proposition of law as referred by Shri Mishra, however it seems that he has only relied on the said Judgement by presuming that there is only 10 vacancies in promotion quota for the year 1997-98 to 2003-04 and the other promotions made vide impugned order dated 02.08.2008, 03.07.2009 and 05.02.2010 were for vacancies which had arisen after the new service rules, 2004 came to be enforced. Although, in the first blush the argument of Shri Mishra looks attractive but on a closer look, it seems the whole theory is based on an erroneous belief that there are only 10 vacancies arising in the promotion quota for the year 1997-98 to 2003-04. Since, the number of vacancies occurring for the promotion quota for the year 1997-98 to 2003-04 itself is controversial and is a task still unfulfilled, this court is unable to agree to the said proposition put forth by the Ld. Sr. Counsel.

(151) In view of the above, a controversy remains as to the actual number of vacancy existing in the promotion quota by applying the 25% rules as is to be found in the old service rules of 1936. Thus, it is imperative that the state constitutes a High Level Committee, headed by the Chief secretary of the state and preferably having the principal secretary of the competent department and such other members, who according to the chief secretary can render active assistance in determining the actual number of promotion seats available for the period 1997-98 to 2003-04, so that a quietus is given, keeping in view that the issue has been lingering and pending for more than two decades.

H. Whether "cadre Principle" of vacancy determination can be applied for the period 1997-98 to 2003-2004;

(152) Therefore, the next question to be decided by this court is as to whether "*cadre principle of vacancy determination*" can be applied retrospectively for the period 1997-1998 to 2003-04 on the already superseded old Service Rules of 1936, by merely issuing a G.O. dated 05.02.2010, even though Rule 6(i) of the superseded old Rules of 1936 did not provide for the same and it was provided under the new service rules of 2004 only, which was implemented w.e.f. 3.1.2004 only.

(153) It has been submitted by Shri Mishra, Ld. Senior counsel and as rightly so, that rule 6(1) of old Rules of 1936 provided for *"25°% vacancies"* as promotion quota. The State tried to amend the word *'vacancies'* by the word 'posts' by 1997 amendment but it was quashed in Aruvendra Garg's case. Finally these old Rules of 1936 were superseded in 2004,

when new rules came and since then old rules of 1936 were no longer in existence. Despite that, the State Government, by merely issuing a G.O. dated 05.02.2010, tried to amend Rule 6(i) and inserted the word *'cadre post'* in Rule 6(i) of the already superseded Rules of 1936, by a retrospective amendment of the said Rule through a G.O., which is impermissible in law because it is the settled position of law that G.O. cannot supersede statutory Rules. Moreover, this court cannot be oblivious to the fact that it is also a settled position of law that where the statutory Rules are clear and unambiguous, nothing should be added or inserted by means of interpretation of the Rules by the Courts. Further, the law stands settled that where a power is given to any authority do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden (Nazir Ahmed Vs King Emperor (1936 SCC Online PC 41). The said principle has also been followed by a three-judge bench of the Supreme Court in a judgment, reported as Chandra Kishore Jha v. Mahavir Prasad & Ors. [(1999) 8 SCC 266] and in Cherukuri Mani v. Chief Secretary, Government of Andhra Pradesh & Ors. [(2015) 13 SCC 722] wherein the Hon'ble Apex Court held as under:

"14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law without deviating from the prescribed procedure……

(154) In this case, when Rule 6(i) of the old Rules clearly provide 25% "vacancies" as promotion quota, it cannot be interpreted as 25% "cadre posts" by misinterpreting the old Rules of 1936. Thus, in the view of this court, the "cadre Principle" of vacancy determination cannot be applied retrospectively for the period 1997-98 to 2003-2004, especially when nothing contrary to that can be found on the records of this case.

Whether the *"qualifying examination"* in terms of rule 9(ii) of the service rules have a bearing to the promotion during the period of 1997-98 to 2003-2004 and as to whether it has been fairly conducted to enable the diploma holder JEs to come within the consideration zone for promotion;

(155) As available from records, rule 9 of Old 1936 Rules as initially existed provided technical qualifications required to be possessed for the post of Assistant Engineer. Sub-clause (ii) provided that no officer would be promoted under Rule 5(iv) unless he had passed any qualifying *examination*, which the Government may prescribe. However, vide amendment dated 19.04.1943, a provision was made that an officer could be promoted to the post of Assistant Engineer after having passed the qualifying *examination* as prescribed by the State Government or in case he possessed the technical qualification prescribed in Rule 9(i) of the 1936 Rules. The effect of the said amendment was that a Junior Engineer possessing any of the qualifications prescribed under Rule 9(i) was no longer required to pass the qualifying *examination* for promotion as he had also an alternate route to be promoted by achieving the qualification as mentioned in the rules.

(156) However, as per the rules, all such Junior Engineers who did not possess the technical qualification specified under

Rule 9(i) were mandatorily required to appear and qualify in the qualification *examination* to be qualified for promotion to the post of Asst. Engineers. In fact this qualification *examination* was a gate-way for promotion to this diploma holder JEs as by passing such qualifying *examination*, these diploma holder Junior Engineers would come within the consideration zone for promotion to the post of Asst. Engineers. It is one thing to say that the diploma holder junior Engineer were not able to pass in the qualifying *examination* and another to say that this qualifying *examination* could not be conducted by the state for any reason whatsoever, for a diploma holder junior Engineer can only appear and then qualify/pass in the qualifying *examination* only and only if it is conducted as per the rules. However, the present case is something else. Strangely, enough, although the state has not conducted the aforesaid qualifying *examination*, but still it went ahead with the issuing the promotion order by erroneously construing that all the diploma holder Junior Engineers are disqualified/not qualified for the said promotions, which cannot be permitted as per law.

(157) Apparently, it is available from records that qualification *examination* was not conducted by the state between 1972 to 2006 and it was only in the year 2007 that this qualification *examination* was conducted under a direction of the Hon'ble Apex court in Diploma Engineers Sangh V. State of U.P (2007) 13 SCC 300. The said qualifying *examination* was marred with controversy, which shall be dealt in later part of the judgment, however, interestingly, after the said controversial qualifying *examination* of 2007, no steps had been taken by the state to conduct any further qualifying *examination* in the year 2008 or 2009 or 2010 or for any other successive year, although impugned promotion order and requisition for promotion was issued for the year 2008, 2009 and 2010 for promoting degree holder JEs on the ground of non-availability of qualified diploma holder JEs.

(158) It has been argued that Qualifying *examination* was fairly held as one time affair and the qualifying *examination* was held only once in 2007 because the Hon'ble Supreme Court vide order dated 20.03.2007 had given direction for holding exam as "one time affair only" and according to the Ld. Sr. Counsels appearing for the degree holder JEs, all the issues relating to the manner, in which the said qualifying *examination* was conducted had been raised by the Diploma Holder JEs as on 29.09.2007 vide IA No. 10 in the Diploma Sangh case before the Hon'ble Supreme Court and since these diploma holder JEs were not given any indulgence by the Hon'ble Apex Court nor any liberty was sought by them for re-agitating the said issue before this court, it was not open for this court to decide the self-same issue again, which according them had been already decided by the Apex Court. According to them, if any issue relating to the conduct of qualifying *examination* was raised in the said IA, then the same cannot be raised before this court until and unless, liberty was granted by the Hon'ble Supreme Court by the order dated 3.12.2007.

(159) This court finds that the Hon'ble Apex Court, vide its judgment dated 20.03.2007, in *Diploma Engineers Sangh's case*, directed the respondent authorities to

conduct the qualifying *examination* as per the provisions of the service rules and relevant G.Os prescribing the mode and method of qualifying *examination*. Thus, it was incumbent on the State authorities to hold the *examination* "as per existing Old Rules", which were contained in Rule 9(2) of the old Rules of 1936. Since, rule 9(2) provided for a qualifying *examination* "which the Government may prescribe", it is available from the records that the said Government prescription could be found in Appendix-IV of irrigation manual 1936, which invariably provided for holding of qualifying *examination* in October "each year". This was further clarified by the State vide G.O. dated 25.10.1969 for laying down qualifying *examination* Rules. Clause-I to IV of the said G.O. required holding of annual qualifying *examination* in October- November every year through U.P. Technical Board in its three or more centres. Candidates were given liberty to qualify one of the three group of *examination* in one attempt which means three attempts for three group of *examination*. This means liberty was given to the candidates to pass each of the three groups of papers in one attempt (meaning thereby three attempts to pass for three groups of papers). Similarly, office order dated 01.01.1972 clarified the earlier G.O. dated 25.10.1969 and specifically provided that passing of one group of papers in one attempt would mean that candidates cannot be compelled to pass all the three group of papers in one attempt only. This court finds that the question before the Hon'ble Supreme Court in the Diploma Sangh case was relating to the issue as to whether a *"qualifying examination"* as prescribed under rule 9(ii) of the old rules of 1936 can be in the form or an interview or in the form of a written *examination* as envisaged under the rules and the effect of G.O dated 11.02.2003 on the said existing rules. The Hon'ble Apex court while upholding the judgment of this court, wherein the G.O dated 11.02.2003 was quashed, merely directed the state-respondent to conduct the qualifying *examination* within four months from the date of the order. The Hon'ble Apex Court neither observed nor held that the said qualifying *examination* was to be a one time affair as has been contended by the Ld. Senior counsels.

(160) Moreover, the department did not hold qualifying *examination* after the year 1970 and although initially no quota had been fixed for recruitment on the post of Assistant Engineers through promotion, but latter quota was fixed for recruitment on the post of Assistant Engineers through promotion and, therefore, the vacancies which were falling within the promotion quota were to be filled up only by way of promotion but the same could not be filled as the department did not hold qualifying *examination*s after the year 1970. The Rules referred to above, were subjected to various amendments, which led to several round of litigation and ultimately the controversy was set at rest, on 3.11.2006, in Anjani Kumar Mishra's case (2007)1 UPLBEC 260, wherein this Court has determined the vacancies of promotion quota from the year 1997-98 till selection year 2003-04.

(161) It is an admitted fact between the parties that written *examination* was held only once in 2007 and the state without holding any other qualifying *examination* observed in its office order dated 15.05.2007 that the candidates, who have passed all the three groups of papers, whether in one year or in different groups

in different years, would only be considered eligible for promotion. The said conditions apparently seems to be incongruous as it amounts to putting a condition of impossibility because unless three attempts as provided in the Rules to pass three group of papers is not offered to the diploma holder JEs in 2007, 2008 and 2009, it was not open for the respondent authorities, to straight away presume all the Diploma Holder J.Es to be ineligible for promotion, against the promotion quota vacancies under the old Rules of 1936. Thus, the very issuance of three promotion orders in 2008, 2009 and 2010 on the basis of a solitary qualifying *examination* held in August, 2007, which is evidently in violation of the procedure prescribed for determining eligibility of Diploma Holder J.Es appears to be not as per law. Therefore it is a self-defeating argument of private respondents that for not succeeding in the qualifying *examination*, the diploma holder JEs have no locus to challenge the 3 illegal promotion orders, especially when adequate opportunity of 3 attempts was not afforded to the Diploma Holder J.Es to qualify the *examination* under the old Rules of 1936. It would be rather wrong and over reaching to interpret in any manner the lucid judgment passed by the Hon'ble Apex Court in Diploma Sangh' case, wherein it has been specifically directed to 'hold the qualifying *examination* within four months in accordance with the Rules' and it had only changed the agency of the *examination* i.e. from U.P. Technical Board to U.P.P.S.C. Thus, this court is of the view that except of the holding of the qualifying *examination* within four months and change in the examining agency, all the remaining procedure of qualifying *examination* was to be followed, "strictly in accordance with the Rules". The Apex Court had granted four months' time only to conduct the first *examination* but to pass it in 3 attempts was a legal requirement and it is noteworthy here that by fixing this time limit, the legal requirement of giving three attempts to pass qualifying *examination* under the Rules was never waived off by Hon'ble Apex order, especially when the order specifically insisted to follow the rules.

(162) Further, this court does not wishes to enter into the arena of allegation regarding any boycott of qualifying *examination* in August, 2007 by members of Diploma Engineers Sangh or to the factum of as to whether 711 Diploma Holder J.Es had participated in the qualifying *examination* held from 17 to 19.07.2007 or not. Although, there are allegation and counter-allegations relating to non-participation of Diploma Holder J.Es in the qualifying *examination* held in August, 2007 due to alleged change in *examination* centre by the State by suddenly changing the *examination* centre from Lucknow to Allahabad, wherein only one candidate was able to appear in the forenoon session and seven in the afternoon session. The manner and the way in which this *examination* was conducted is not far from controversy and the facts apparently speaks for itself.

(163) No doubt, the qualifying *examination* of 2007 was although marred with controversy, however it was still a qualifying *examination*. However, the non-conduct of any successive *examination* by the state-authorities thereafter seems to be absolutely not condonable. There is is no explanation as to how and in what manner 96 promotions could be made on 02.08.2008, only from Degree Holder J.Es

and all the Diploma Holder J.Es. could be presumed to be ineligible by not even holding any qualifying *examination* that year or on the ground that one qualifying *examination* was conducted in 2007 and all the diploma holder JEs failed in that qualifying *examination*, leave alone the rules, which prescribed giving them three attempts to pass the *examination*, especially when the Apex Court has held in diploma Engineers Sangh case, that "Qualifying *examination*' in the context of promotion refers to an *examination* which when passed, qualifies or makes the candidate eligible for promotion and the purpose of a qualifying *examination* is not to determine the comparative inter se merit of the candidates. Thus, according to this court, the qualifying *examination* was not to decide merit for promotion, rather it was meant to be a gateway for the diploma holder JEs to come within the consideration zone for promotion, which as held by the Apex court is a fundamental right of an employee. In any case, the state-respondent in not conducting the said qualifying *examination* has shut the door for these diploma holder JEs for their rightful consideration, which cannot be permissible as per law and appears to be discriminatory.

(164) Further, the impugned promotion order issued in favour of degree holder JEs only and not providing equal opportunity for diploma holder JEs, so as to enable them to come within the consideration zone of promotion cannot seems to be justified as per law and is in breach of the fundamental rights of the diploma holder JEs to be considered in the promotion quota. Further, the state continued with the said illegality in issuing two more promotion orders dated 03.07.2009 and 05.02.2010 without holding any qualifying *examination* in 2008 and 2009, which apparently was in violation of the procedure prescribed under the old Service Rules of 1936.

(165) Therefore, the issue does not merely boils down to the issue of determining as to whether *"qualifying examination"* of August, 2007 provided reasonable and fair opportunity of participation to the Diploma Holder J.Es or not, but the said issue have several rippling effect, including as to whether the action of the Government in issuing the impugned promotion order can be justified in view of firstly not holding any qualifying *examination* in 35 years i.e.(1972-2007), secondly in creating confusion for all diploma JEs to clear all 3 groups of papers in an attempt and thirdly by creating an evident confusion about *examination* centre at Lucknow or Allahabad, in violation of statutory prescription. Further, this court cannot be obvious of the fact that the State Government, without holding *"annual qualifying examination"* in the year 2008, 2009 & 2010, have went on to treat these Diploma Holder J.Es as *'ineligible for promotion'* and thus restricted their chance of coming within the consideration zone for promotion, while issuing impugned promotion orders dated 02.08.2008, 03.07.2009 & 05.02.2010.

(166) Further, this court finds that though the criteria of promotion was 'seniority subject to rejection of unfit' under rule 12, even then, by not offering 3 attempts to pass qualifying exam to the diploma holders JEs and while presuming them unfit after one exam only, these senior Diploma holder J.E's, were illegally superseded in the aforesaid promotions,

who were placed above the Degree Holder J.E's/private respondents in the seniority lists.

(167) This court finds that specific prayer has been made by the diploma holder JEs that they have not been treated fairly and equal opportunity was not afforded to them to pass the qualifying *examination*, so as to come within the consideration zone for promotion to the post of Asst. engineers. The petitioners have argued challenging all the three promotional orders passed by the state Government and have prayed for correct determination of vacancies to be filled up by promotion under the old Rules of 1936 and about quashing of unfair qualifying *examination*, including 03 illegal promotion orders dated 02.08.2008, 03.07.2009 and 05.02.2010.

(168) Thus, in view of the overwhelming circumstances this court is of the view that there was no justification for the State for not holding the 03 successive qualifying exam in 2008, 2009 and 2010, before making 191 promotions from amongst Degree holder JEs only in all these years and arbitrarily presuming all the senior Diploma holder JEs' as ineligible, on the basis of holding only one failed and unfair attempt of qualifying *examination*s. The diploma holder JEs were wrongly ousted from the consideration zone of promotion. This illegal & arbitrary conduct of the respondent state vitiates all the 3 impugned promotions orders dated 02.08.2008, 03.07.2009 and 05.02.2010.

I. Whether the consideration of "*Probationers* in service" in terms of rule 21 of the service rules have a bearing to the promotion during the period of 1997-98 to 2003-2004;

(169) Further, it is available from records that impugned orders and requisitions for promotion were also sent for various degree holder JEs, who were appointed as *probationers* in the said service. One of the contention raised by the diploma holders JEs is that these *probationers* cannot be held to be in the feeder post for promotion to Asst. Engineers post until and unless their services are confirmed, whereas on the other hand it has been argued by the degree holder JEs that there is no concept of confirmation in the said post as they were always appointed in a substantive post and further confirmation can also be made retrospectively.

(170) This court finds that the eligibility for the post of Junior Engineer is governed by Uttar Pradesh Public Works Department Subordinate Engineering Services, 1951 (in short hereinafter to be referred as '1951 Rules'). Further, rule 3(g) defines 'Member of the Service' and it means a person appointed in substantive capacity under the provisions of these rules. Rule 19 talks about the probation period of two years. Rule 22 provides about the departmental *examination* which is required to be passed within the prescribed period with condition that if any candidate does not pass the departmental *examination* within the said period the increment in pay shall be withheld. Rule 23 deals with confirmation and provides that the confirmation after completing a probation period would be subject to passing the

departmental *examination*. Relevant rules reads as under:-

"19. Probation:- A person on appointment in or against a substantive vacancy shall be placed on probation for a period of two years.

Provided that officiating and temporary service, is it is continuous, shall count towards the period of probation to the maximum extent of one year.

22. Department *examination*- (1) All temporary and officiating overseers must pass the department *examination* prescribed in the Manual of Orders, Public Works Department, Volume I, within three years of jointing their appointment. If they fail to pass the above *examination* within the prescribed period their increment in pay shall be withheld. Subject to the orders of the Chief Engineer a stopped increment may be allowed to be drawn when the overseer has passed the *examination*, with effect from the first day of the month following that in which the *examination*, with effect from the first day of the month following that in which the *examination* is held, and the period during which the increment was withheld may also be allowed to be counted for purposes of further the increment in the time-scale. Arrears of increments may also be granted in special cases where failure to pass the *examination* was due to circumstances beyond the overseer's control.

(2) Candidate appointed to a substantive vacancy shall be required to pass the *examination* during the period of probation, if they have not already done so.

23. Confirmation- Subject to the provisions of rule, 22 a probationer shall be confirmed in his appointment at the end of his period of probation, or extended period of probation, if the Chief Engineer considers him fit for confirmation and his integrity is certified."

(171) Apparently, a person becomes a member of service when he is appointed in substantive capacity. For being substantively appointed, an incumbent has to at least complete the period of probation and a person who is not substantively appointed cannot be treated to be a member of service. This aspect of the matter has been considered by the Hon'ble Supreme Court in the case of ***Baleshwar Das and others etc. V/s State of U.P. and others, AIR 1981 SC 41***, wherein in paragraph 33 of the said judgment, the Apex Court held as under :-

"33.Once we understand 'substantive capacity' in the above sense we may be able to rationalize the situation, if the appointment is to a post and the capacity in which the appointment is made is of indefinite probation, if the Public Service Commission has been consulted and has approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been approved, one may well say that post was held by the incumbent in a substantial capacity."

(172) In the instant case, perusal of eligibility list reveals that names of certain persons were included, who, undoubtedly, at the relevant time were working on probation and have not become members of service. Thus, this court is unable to accept the submission of the Ld. Sr. Advocate that all the persons who have been appointed

against substantive vacancy were fully eligible for promotion even without being confirmed on the post due to their long duration of service or due to post facto effect of confirmation.

(173) The submissions of Shri Dixit, Ld. Senior Counsel that 'confirmation before promotion is not required', is not correct. The reliance on para-7 of the Hon'ble Apex Court judgment of K.K. Khosla Versus State of Haryana, reported in (1990) 2 SCC 304 is also out of context as the same is not applicable to the facts of the present case. The said Judgment of the Hon'ble Apex Court was based on the interpretation of Rule-11 of Haryana Service of Engineers Class-I P.W.D. (Public Health Branch) Rules, 1961, wherein at para-7 of the said judgment, it was unambiguously mentioned that "there is "no specific provision in the Rules" requiring completion of probationary period for the purposes of promotion within the service". Infact, requirement of Confirmation is always "rule specific". Thus the aforesaid judgment is not applicable in this case. In contrast to the aforesaid judgment, the old Service Rules of 1936 applicable on the parties clearly required completion of probation before promotion. Rule 5(iv) of the old Rules of 1936 regulating the promotion of A.E. (Civil), specifically provide that recruitment by promotion shall be made of "members of United Provinces Subordinate Engineering Services, who have shown exceptional merit". The "members of Subordinate Engineering Services" have been defined in Rule 3(g) of U.P. Public Works Department Subordinate Engineering Services Rules, 1951, which provides that "member of service means a person appointed in substantive capacity under provisions of these Rules". Further, the definition of the "member of service" as mentioned in Rule 3(g) of Subordinate Engineering Services, i.e. J.E, Service Rules of 1951 is infact pari-materia with the definition of "member of service" mentioned in Rule 3(b) of United Provinces Service of Engineers (Building and Road Branch) Class-II i.e AE Service Rules of 1936 (i.e. A.E. Service Rules of 1936), which provides the same definition of member of service i.e. "Member of Service means Government Servant appointed in the substantive capacity under the provisions of these Rules".

(174) Since the phrase "substantive capacity" has been used in the definition clause of Rule 3(g) of J.E. Service Rules, 1951, which defines "members of united provinces subordinate engineering services", it is clear that a person would become a member of subordinate services only after he is appointed in "substantive capacity" under the said Rules, which in turn means that he becomes members of subordinate services, only after successfully completing the period of probation and after passing the departmental tests prescribed thereof.

(175) In view of the aforesaid facts, it is abundantly clear that only those persons, who have successfully completed the period of probation after completing the requisite formalities/ *examination* etc., become the members of subordinate engineering service under the J.E, Service Rules 1951 and it is only such J.Es., who can only be considered eligible for promotion to the next higher post of A.E. (Civil), under Rule 5(4) of A.E. Service Rules i.e. old Service Rules of 1936.

(176) In order to further emphasize that confirmation is a must for a candidate to be eligible for promotion as A.E. (Civil), the State Government took a policy decision contained in the G.O. no. 680/EAP/27EA/ 69 of 1969, Clause-2 of the said G.O. clearly provided that passing of qualifying *examination*, confirmation in service and 07 years of minimum service experience is the minimum eligibility requirement for promotion of a J.E. (Civil) to A.E. (Civil). Though Clause-8 of the said G.O. exempted the Degree Holder J.Es. from the requirement of minimum 07 years of service experience and though amendment of 1943 of old Service Rules of 1936 already granted exemption to Degree Holder J.Es from appearing in qualifying *examination* but there has never been any provision of law, which gave automatic exemption to Degree Holder J.Es from being 'confirmed in service of J.E, (Civil)', before being placed in the feeder post or getting eligible for promotion as A.E. (Civil). Even the new guidelines dt 08.08.2007 of the rescheduled exam clearly required confirmation in service as one of the eligibility. Therefore the contention regarding non-requirement of confirmation before promotion is wholly unfounded.

(177) Further, this court finds and as is also available from records that the state, after making 27 promotions on 03.07.2009 and declaring 97 more vacancies for promotion vide order dated 05.02.2010, wherein clause 1 to 4 of the same provided that the direct recruits appointed in the meantime shall be adjusted against future vacancies, material prejudice was caused to the direct recruits as well. Since only 10 vacancies were there for promotion under 25% promotion quota of rule 6(1) of the old rules of 1936, against which the respondents had made/ proposed 191 excess promotions during 2008 to 2010, and since the direct recruits do not want these 191 excess promotees to sit over and above them who were appointed through UPPSC of 2007 batch, therefore they had sought impleadment/ interventions in the present bunch of cases as well as filed separate writ petition, as they also have a valid cause of action against private respondents. Apparently, the direct recruits of 2009 batch are actually supporting the cause of the Diploma Engineers Sangh in joining the request for setting aside the aforesaid 03 appointment orders dated 02.08.2008, 03.07.2009 and 05.02.2010 by adding one more ground that the vacancies which are needed to support the aforesaid promotion orders are actually occupied already by the direct recruits of 2009 batch.

(178) It has been argued by Shri Dixit, Ld. Senior Counsel that the exercise being taken by this court in adjudicating these bunch of matters is meaningless as apparently only 84 out of 711 candidates who participated in the qualifying *examination* are presently working and the rest have superannuated and even this 84 diploma holder JEs have been promoted to Asst. Engineers and as such nothing survives in these petitions. However this court, as has been also rightly argued by Shri Misra, Ld. Senior Counsel that all these 84 working Diploma Holder J.Es, who were denied the benefits of promotion due to the illegal promotions of their juniors having degrees, still have a right to seek promotion as AE w.e.f. the date their juniors/private respondents were promoted and therefore the instant bunch of cases & the cause of present Litigation survives for all the petitioners. Secondly, even if all the 711 Diploma Holder J.Es would have

retired, it cannot be presumed that the cause of action does not survive because all the senior Diploma Holder JEs/Members of the Sangh, who have been made to retire while illegally denying promotion as A.E. (Civil), have a legal right of notional promotion from the date their juniors were promoted as A.E, and therefore the present litigation survives. Thirdly, the respondents themselves have admitted that one direction which can possibly be given, is for the respondents to hold fresh qualifying *examination*. If accepted by the Hon'ble Court, this itself would prove that the impugned promotion orders dated 02.08.2008, 03.07.2009 and 05.02.2010 were held without previously holding a valid qualifying *examination* under Rule 9(2) of the old Rules and this would suffice for quashing the 03 impugned promotion orders. Therefore the present litigation survives qua the petitioners. Lastly, as against only 10 promotion quota vacancies existing prior to 2004, which were covered under old Rules of 1936, 181 excess promotions (191-10) were made by the respondent authorities, from J.E to A.E. (Civil) but only from Degree Holder JE's, while presuming all the senior Diploma Holder JEs/ Members of the Sangh as ineligible for promotion. Thus junior Degree Holder J.E's were arbitrarily picked up and promoted, while presuming all senior Diploma Holder J.E's, which requires indulgence of this Hon'ble Court.

(179) As far as the argument of Shri Asit Chaturvedi, Ld. Senior counsel relating to applicability of the principles of res judicata, which requires that anything which has been settled between the parties in the earlier rounds of litigations through the judgments of P.D. Agarwal's case, Aruvendra Kumar Garg's case, Vijay Kumar's case, Diploma Engineer Sangh's case and the latest judgment dated 21.08.2019, cannot be reopened. This court finds that there is merely an over emphasis on the 'obiters' of the 5 judgments earlier decided by this court and the Hon'ble Apex court with respect to same old 1936 service rules, however as per law, it is the *ratio decidendi*, which is binding on the parties. As to the distinction between obiter and *ratio decidendi*, recently the Hon'ble Apex Court vide order dated 24.04.2023 passed in SLP (Civil) No. 7455-74562023 comprising of the bench of Sanjiv Khanna and M.M. Sundresh J.J., has held as herein under:

"....The distinction between obiter dicta and ratio decidendi in a judgment, as a proposition of law, has been examined by several judgments of this Court, but we would like to refer to two, namely, State of Gujarat & Ors. v/s. Utility Users' Welfare Association & Ors. (2018 6 SCC 21 and Jayant Verma & Ors. vs. Union of India & Ors. (2018) 4 SCC 743. The first judgment in State of Gujarat (supra) applies, what is called, "the inversion test" to identify what is ratio decidendi in a judgment. To test whether a particular proposition of law is to be treated as the ratio decidendi of the case, the proposition is to be inversed, i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the ratio decidendi of the case.

In Jayant Verma (supra), this Court has referred to an earlier decision of this Court in Dalbir Singh & Ors. vs. State of Punjab, (1979) 3 SCC 745 to state that it is not the findings of material facts, direct

and inferential, but the statements of the principles of law applicable to the legal problems disclosed by the facts, which is the vital element in the decision and operates as a precedent. Even the conclusion does not operate as a precedent, albeit operates as res judicata. Thus, it is not everything said by a Judge when giving judgment that constitutes a precedent. The only thing in a Judge's decision binding as a legal precedent is the principle upon which the case is decided and, for this reason, it is important to analyse a decision and isolate from it the obiter dicta…"

(180) Putting the aforesaid "inversion test" into service, it is apparently available that in P.D. Agarwal's case, the Apex Court while setting aside the 1969 and 1971 amendments (both brought by substitution), had simultaneously directed preparation of fresh seniority list as per the un-amended provisions of the old Service Rules of 1936. Thus pre-1969 Rule position (i.e. upto 1959 amendment rules) was kept intact while interpreting the same rules. Further, in Aruvendra Kumar Garg's case, this Court categorically declared 1969 and 1971 amendments to be "still born laws" and hit by the vice of prohibitive legislation under Article 13(2) of the Constitution. Since all the four amendments of 1969, 1971, 1987 and 1997 amendments were voilative of Article 14 and 16 and hence in contravention of Article 13(2), therefore they were also declared to be void ab initio. Thus only the aforesaid *ratio decidendi* passed in Aruvendra Garg's case were the binding precedent and nothing beyond it.

(181) Similarly, in Vijay Kumar's case of 16.07.2004, the State Govt., while relaxing provisions of Rule 9(2) and 5(4) of the old 1936 Rules as they stood prior to 1969, had introduced 'interview', instead of 'written *examination*', vide office order dated 11.02.2003, as the mode of qualifying *examination*. This Court, after considering the validity of the office order dated 11.02.2003, passed the judgment dated 16.07.2007, in which it was categorically noted the fact that the State Government had issued the office order dated 11.02.2003, while reviving the provisions of rule 5(4) and while relaxing the provisions of Rule 9(2) of the old Rules of 1936, as they stood prior to 1969. This Court had set aside the Office order dated 11.02.2003 on the ground that a G.O. cannot supersede the provisions of the statutory rules.

(182) Following the Vijay Kumar's case, when in Diploma Engineer Sangh's case, the validity of the judgment dated 16.07.2004 passed in Vjay Kumar's case was considered by the Hon'ble Apex Court. In that case, the Diploma Holder J.Es while relying ATB Mehtab Mazid's case, contended that pre-1969 Rule position would not revive after setting aside of the four amendments. The Degree Holder J.Es argued on the contrary. The Hon'ble Apex Court in para 5 and 7 of the said judgment gave a categorical finding that after setting aside of four amendments from 1969 to 1997 which were void-ab-initio, the Rules of 1936, as they stood before such amendments (including Rule 5(4) and 9(2)) had revived and therefore direction was given for holding of written qualifying *examination* as per Rule 5(4) and 9(2) of the old Rules.

(183) In Sri Atibal Singh's case, when the correctness of the Division Bench

judgment dated 20.03.2007 passed in *Diploma Engineers Sangh's case* was referred to the larger/three judges bench vide order dated 24.10.2013, the same was upheld by the larger bench vide its remand order dated 21.08.2019, which had set aside Anjani Kumar's judgment dated 03.11.2006, which had laid down that nothing would revive from pre-1969 rule position after setting aside of four amendments and therefore only the G.O. dated 20.02.2003, providing 41.66% promotion quota shall apply. Simultaneously it had reiterated and upheld the Division bench judgment dated 20.03.2007 of Diploma Engineer Sangh's case, which had provided for revival of old 1936 Rules upto 1959 amendment, after setting aside of four amendments.

(184) The aforesaid two judgments dated 20.03.2007 of the Hon'ble Division Bench and 21.08.2019 of larger Bench were passed actually between the parties and therefore the ratio of the judgment actually constitute res-judicata in true sense. Therefore, by application of principle of res-judicata, all the parties of the said litigation are bound by the law settled by the Hon'ble Apex Court while interpreting the same rules, that after quashing/ setting aside of four amendments of 1969, 1971, 1987 and 1997, the pre-1969 Rule position of the old Rules of 1936 i.e. upto 1959 amendment would revive.

(185) Since the old Rule, 1936 cannot be revived in piece meal but rules in its entirety would be revived, as it existed upto 1959 amendment, therefore, along with Rule 5(4) and 9(2), Rule 6(a) providing for 25% promotion quota would also get revived, which would be legally applied while making any promotion on the post of A.E. (Civil), for any vacancy upto the year 2003-2004, i.e. those existed prior to promulgation of new Service Rules of 2004. Apart from the aforesaid issues, which stand decided by this Hon'ble Court and affirmed by the Hon'ble Apex Court, nothing else can be allowed to be included in these settled issues, while misinterpreting the aforesaid judgments, under the garb of application of principles of res-judicata.

(186) Further, after quashing of the Anjani Kumar's Judgment dated 03.11.2006 *(except the portion of the judgment upholding the validity of new Service Rules of 2004, which stands approved in Dilip Kumar Garg's case)*, by Hon'ble Apex Court's vide remand order dated 21.08.2019, the direction of Anjani Kumar's Judgment regarding application of letter dated 20.02.2003 is no longer applicable. Therefore, the application of promotion quota of 41.66% of the said letter dt 20.02.2003, which is merely a communication between Secretary and E-in-C, is no longer applicable and enforceable, over and above 25% promotion quota prescribed under rule 6(1) of the old rules of 1936, which is now applicable in the matter of promotion of Junior Engineers to the post of Asst. Engineers.

(187) As explained earlier, by application of 25% promotion quota under Rule 6(1)(a) of the old 1936 Rules, there were only 10 promotion quota vacancies which could have been filled up as per old 1936 Rules but against these 10 vacancies, 191 promotions (181 excess promotions) have been made by applying 41.66%

promotion quota as per letter dated 20.02.2003. Since only Anjani's judgment directed for application of letter dated 20.02.2003 and quota of 41.66%, and it is already set aside by Hon'ble apex court on 25.08.2019, while reiterating the ratio of Diploma Engineers Sangh's judgment dated 20.03.2007, then the request of private respondents regarding application of 41.66% promotion quota as laid down in letter dated 20.03.2003 (i.e post-Anjani position) cannot be accepted now, otherwise it would amount to upholding the approach of Anjani kumars' case, which stands set aside by Hon'ble apex court and therefore it is impermissible in law.

(188) Thus the effect of setting aside of Anjani Kumar's Judgment dated 03.11.2006 by Hon'ble Apex Court on 21.08.2019 on the rehearing being held by this Hon'ble Court, under the directions contained in the said judgment is that the petitioner's prayer regarding correct determination of promotion quota vacancies under old Rules of 1936 and declaration of the excess vacancies to be filled under new Rules of 2004 has to be considered afresh. Thereafter, if it is found that there were only 10 vacancies existing in promotion quota upto the recruitment year 2003-2004, the same may be adjusted out of 96 private respondents promoted on 02.08.2008 and the impugned promotion order dated 02.08.2008 regarding remaining 86 excess promotees deserve to be quashed.

(189) Thereafter all the remaining excess 105 vacancies illegally determined in promotion quota (27+78) by 2 impugned orders dated 03.07.2009 & 05.02.2010, made by wrongly applying letter dated 20.02.2003 and an incorrect promotion quota of 41.66%, also deserve to be quashed. Thereafter all these excess 181 vacancies deserve to be declared as the New promotion quota vacancies to be filled up under the New Service Rules of 2004.

(190) Before concluding, this court finds that *"A stitch in time saves nine",* although not a legal maxim but an old adage, fits on all four corners to the dispute engaging the attention of this court in the present bunch of matters. Apparently, promotion for the year 1998-1999 to 2002-2003 to the post of Assistant Engineers (AE) in the Uttar Pradesh Public Works Department, is the centrifugal issue in these petitions, which had been unsettled by the letter dated 20.02.2003. The issuance of the said letter and other cognate letters/Government orders had a rippling effect leading to a swarm of petitions filed on the self-same issue which is under consideration in this bunch of matters. This court finds that this situation could had been avoided by a little care & caution by the state and these Junior Engineers be the Diploma Holders or the Degree Holders, would had been given their fair, rightful & equal opportunities of promotions as envisaged under the provisions of United Provinces Service of Engineers (Buildings and Roads Branch) Class-II Rules 1936.

J. <u>Conclusion</u>

(191) As a sequel to the aforesaid discussions and legal position, this Court arrives at the following conclusion:

(a) The State Authorities are directed to re-determine/re-calculate the

number of vacancies accrued for the post of Asst. Engineer in the promotion quota by applying the promotional quota of 25% as is to be found in the old rules, 1936 & in the light of observation made by this court, for the period of 1997-1998 to 2003-2004 by constituting a High level committee as mentioned in the present Judgment;

(b) After the said determination, the state Authorities are directed to hold the qualifying *examination* as provided under rule 9(ii) of the old rule, 1936 and other ancillary rules and provide equal opportunity to the diploma holder Junior Engineers forthwith, so as to enable them to come within the consideration zone for promotion to Asst. Engineers;

(c) Impugned promotion orders dated 02.08.2008, 3.7.2009 and 5.2.2010 and the consequential orders for promotion and posting as Assistant Engineers are not sustainable, which are hereby quashed.

(d) Any promotion made to the Junior Engineers, otherwise than the aforesaid promotion order 02.08.2008, 3.7.2009 and 5.2.2010 shall remain undisturbed, as this court was only examining the validity of these impugned orders;

(e) The 105 new vacancies (27+78), withheld by the State Govt, in the requisition for promotion sent to the UPPSC for the recruitment year 2013-14, in support of the impugned orders dated 03.07.2009 and 05.02.2010 be released, subject to the re-calculation/re-determination of the promotional quota seats by the High level Committee;

(f) Except for the vacancy seats re-determined/re-calculated by the High level committee for the promotion of Asst. Engineers for vacancies arising during the period of 1997-98 to 2003-04, all the withheld seats may be filled as per the provisions of new Service rules, 2004;

(g) Since, promotions have already been made as per the promotion order dated 02.08.2008, it is hereby directed that until and unless the aforesaid exercise of re-determination and/or re-calculation of the number of promotion quota is not determined by the state government and the list of promotion is not prepared strictly as per the service rules of 1936, these promotees shall continue to work & be posted in their respective position;

(h) The State authorities are directed to undertake aforementioned exercise and complete it within a period of two months from the date of production of certified copy of order passed by this court.

(192) With the aforesaid observations and directions, all the writ petitions stands ***disposed of finally.***

(193) There shall be no order as to cost.

(2023) 6 ILRA 265
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ A No. 4029 of 2011

Kamlesh Kumar ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:

S.C. Yadav, G.M. Kamil, Suresh Chandra Yadava

Counsel for the Respondent:
C.S.C.

A. Service Law – Appointment – Forged document was used in obtaining the appointment – Dispensing the service – Violation of principle of natural justice – Relevance – Held, person appointed erroneously on a post must not reap the benefits of wrongful appointment jeopardizing the interests of the meritorious and worthy candidates – If initial action is not in consonance with Law, the subsequent conduct of a party cannot sanctify the same – High Court refused to interfere in the impugned action of the respondents dispensing the services of the petitioner. (Para 12, 13, 14 and 18)

B. Maxim – *Subia Fundamento cofit opus* – Meaning – A foundation being removed, the superstructure falls. (Para 13)

C. Maxim – *Fraus et jus nunquam cohabitant* – Meaning – Fraud and justice never dwell together. (Para 16)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Vinodan T. Vs University of Calicut; (2002) 4 SCC 726: AIR 2002 SC 1885: 2002 AIR SCW 2025

2. St. of U. P. Vs Neeraj Awasthi; (2006) 1 SCC667: 2006 AIR SCW 875: (2005) 10 SCALE 286

3. U.O.I. Vs Major General Madan Lal Yadav (Retd.); AIR 1996 SC 1340: 1996 AIR SCW 1500 : (1996) 3 SCR 785

4. Lily Thomas Vs U.O.I.; AIR 2000 SC 1650: 2000 Cr LJ 2433; (2000) 6 SCC 224

5. S.P. Chengalvaraya Naidu Vs Jagannath; (1994) 1 SCC 1: AIR 1994 SC 853

6. United India Insurance Co. Ltd. Vs Rajendra Singh; (2000) 3 SCC 581 : AIR 2000 SC 1165

7. Mohammed Ibrahim Vs St. of Bihar; (2009) 8 SCC 751

8. Vimla Delhi Administration; AIR 1963SC 1572: 1963 (2) SC) 559 (1963) 2 Cr LJ 44

9. Indian Bank Vs Satyam Fibres (India) Pvt. Ltd.; (1996) 5 SCC 550; AIR SCW3228: AIR 1996 SC 2592

10. St. of Andhra Pradesh Vs T. Suryachandra Ran; AIR 2005 SC 3110: 2005 AIR SCW 3603: (2005)6 SCC 149

11. K.D. Sharma Vs Steel Authority of India Ltd.; (2008) 12 SCC 481: AIR 2009 SC (Supp) 1309 : 2008 AIR SCW 6654

12. Regional Manager, Central Bank of India Vs Madhalika Gor Prasad Dahir; (2008) 13 SCC 170: AIR 2008 SC 3266 : 2008 AIR SCW 5525

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

1. Heard Shri G.M.Kamil, learned Counsel for the petitioner and learned Standing Counsel for the State.

2. Through this petition the petitioner has prayed for issuance of a writ in the nature of Certiorari quashing the oral order of dispensing the services of the petitioner dated 16.12.2010 passed by opposite party no.5 and also a writ in the nature of Mandamus commanding the opposite parties to allow the petitioner to work on his post and pay him salary each and every month regularly.

3. Learned Counsel for the petitioner submits that the petitioner was engaged on muster roll as daily wager in Work Charge Establishment as Work Supervisor vide Office Memorandum 369/W-1/Sin.Kha.Ta

dated 12.3.2003 by the order of Executive Engineer, Irrigation Division, Tanda-Ambedkar Nagar and he was posted at IInd Sub Division, Baskhari, in compliance of the Office Memorandum dated 20.2.2003 passed by Engineer-In-Chief (Work Charge Establishment Prakoshtha), Irrigation Department, U.P., Lucknow. In compliance of letter dated 20.02.2003, the petitioner has joined on 5.7.2003.

4. Learned Counsel for the petitioner further submits that the service book of the petitioner was also prepared on 05.07.2003. Thereafter vide order dated 07.07.2003 the Superintending Engineer, 12th circle, Irrigation Work, Ganga Sinchai Bhawan, Telibagh, Lucknow, appointed the petitioner to the post of Junior Clerk in pay scale of Rs.3050-4590 in regular establishment, from work charge establishment in backlog quota of Schedule Caste, in Group "C" and posted at Irrigation Department, Sharda Nagar, Lakhimpur Kheri, in compliance of D.O. letter dated 13.06.2003 of Chief Engineer (Sharda Sahayak), Irrigation Department, U.P., Lucknow.

5. Learned Counsel for the petitioner further submits that the Executive Engineer, Irrigation Division, Ambedkar Nagar relieved the petitioner and thereafter, the petitioner has submitted his joining on 27.7.2003 before Executive Engineer, Irrigation Division, Sharda Nagar, Lakhimpur Kheri. Vide Office Memorandum dated 10.9.2007 the services of the petitioner was confirmed to the post of Junior Clerk with effect from the date of issuance of order in order to promote the petitioner to the post of Senior Clerk (pay scale of Rupees 4000-6000) from the post of Junior Clerk. Thereafter, a Committee was constituted by Executive Engineer, Irrigation Division, Sharda Nagar, Lakhimpur Kheri to examine the original documents of the petitioner, however, name of the petitioner was not released for promotion for the post of Senior Clerk although the original documents of the petitioner were verified and no suspicion was found. Subsequently, vide Office Memorandum dated 04.12.2010, charge of the petitioner was given to Naim Ahamad, Senior Clerk by opposite party no.5. In pursuance thereof, the petitioner has handed over his complete charge to Naim Ahmad on 16.12.2010. The petitioner has proceeded on casual leave and has returned on 20.02.2011 with a request to make payment of salary for the month of December, 2010 onwards.

6. It is submitted that since 16.12.2010 the petitioner has not been authorized to do work nor paid his salary nor any inquiry has been contemplated against the petitioner as provided under Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 nor the petitioner has been permitted to resume duty.

7. Per contra, learned Standing Counsel has submitted that the petitioner has started working in the Work Charge Establishment in the Irrigation Division Tanda Ambedkar Nagar in furtherance of the order dated 20.2.2003 allegedly passed by the Engineer-in-Chief (Work Charge Establishment) Irrigation Department, U.P., Lucknow. The Executive Engineer, Irrigation Division, Tanda, Ambedkar Nagar vide letter dated 24.3.2003 has requested for information regarding the joining on which it was informed vide letter dated 24.4.2010 by the Executive Engineer Office of the Engineer in Chief (Work Charge Establishment) Irrigation Department, U.P. that neither any such

letter dated 20.2.2023 was issued from the his office nor the letter dated 24.3.2003 written by Executive Engineer, Irrigation Division Tanda, Ambedkar Nagar has been received in his office. Copy of the letter dated 24.4.2003 has been annexed as Annexure CA-3 to the Counter Affidavit. Thus, an inquiry was ordered by the Chief Engineer (Sharda Sahayak) and Superintending Engineer, 14th Division, Irrigation Work Azamgarh was appointed as Enquiry Officer. The Enquiry Officer has submitted his report vide order dated 16.9.2010, a copy of which has been annexed as Annexure CA-5 to the Counter Affidavit wherein it was found that the petitioner has obtained the appointment on the basis of forged documents and, accordingly, vide order dated 7.12.2010 passed by the Superintending Engineer 12th Division Irrigation Work, Lucknow, it was directed that the charge of the petitioner be handed over to some other officer and his salary be stopped. An First Information Report was also directed to be lodged vide letter dated 17.1.2011 addressed to Superintendent of Police, Lakhimpur Kheri requesting him to lodge an FIR against the petitioner.

8. Learned Standing Counsel has further submitted that the letter dated 24.3.2003 was sent and the petitioner was given all the benefits because there was no information that the letter dated 20.2.2003 is a forged document and the appointment of the petitioner is illegal and has been obtained by committing fraud.

9. Learned Standing Counsel has also produced the written instruction received from the department dated 27.3.2023, the same is taken on record.

10. Learned Standing Counsel further submitted that since the initial appointment of the petitioner as a work charge employee was on the basis of the fake and forged documents, the consequential benefits given to the petitioner will not confer any right as fraud vitiates everything.

11. I have considered the arguments advanced by learned counsel for the parties and perused the materials available on record as well as documents (F.I.R. copy, copy of letter by which inquiry officer was appointed and Inquiry Report) produced by learned Standing Counsel.

12. It is settled law that a person appointed erroneously on a post must not reap the benefits of wrongful appointment jeopardizing the interests of the meritorious and worthy candidates. However, in cases where a wrongful or irregular appointment is made without any mistake on the part of the appointee and upon discovery of such error or irregularity the appointee is terminated, Supreme Court has taken a sympathetic view in the light of various factors including bonafide of the candidate in such appointment and length of service of the candidate after such appointment (See: Vinodan T. v. University of Calicut, (2002) 4 SCC 726: AIR 2002 SC 1885: 2002 AIR SCW 2025; State of Uttar Pradesh v. Neeraj Awasthi, (2006) 1 SCC 667: 2006 AIR SCW 875: (2005) 10 SCALE 286)

13. It is also settled law that if initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same "Subia Fundamento cofit opus a foundation being removed, the superstructure falls. A person having done witing cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent Court. Nullus Commodium capere Potest De Iuria Sua Propria.

(Vide. Union of India v. Major General Madan Lal Yadav (Retd.), AIR 1996 SC 1340: 1996 AIR SCW 1500 (1996) 3 SCR 785). The violators law cannot be permitted to urge that their offence cannot be subject matter of Inquiry, trial or investigation. (Vide: Lily Thomas v. Union of India, AIR 2000 SC 1650: 2000 Cr LJ 2433; (2000) 6 SCC 224)

14. So far as the arguments of learned counsel for the petitioner that no opportunity has been provided by the department before taking charge from him and the action of the department suffers from non-compliance of principle of natural justice is concerned, law in this regard is settled.

15. In **S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1: AIR 1994 SC 853**, the Apex Court held that it is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eyes of law. "Fraud avoids all judicial acts ecclesiastical or temporal.

16. In **United India Insurance Co. Ltd. v. Rajendra Singh, (2000) 3 SCC 581 : AIR 2000 SC 1165**, the Apex Court observed that *"fraud and justice never dwell together" (fraus et jus nunquam* cohabitant) and it is a pristine maxim which has never lost its temper over all these centuries.

17. In **Mohammed Ibrahim v. State of Bihar, (2009) 8 SCC 751**, the Apex Court held that the ratio laid down by Supreme Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud as a deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage (Vide Vimla Delhi Administration, AIR 1963 SC 1572: 1963 (2) SC) 559 (1963) 2 Cr LJ 44 Indian Bank v. Satyam Fibres (India) Pvt. Ltd., (1996) 5 SCC 550; AIR SCW 3228: AIR 1996 SC 2592; State of Andhra Pradesh v. T. Suryachandra Ran AIR 2005 SC 3110: 2005 AIR SCW 3603: (2005) 6 SCC 149; K.D. Sharma v. Steel Authority of India Ltd., (2008) 12 SCC 481: AIR 2009 SC (Supp) 1309, 2008 AIR SCW 6654; and Regional Manager, Central Bank of India v. Madhalika Gor Prasad Dahir, (2008) 13 SCC 170: AIR 2008 SC 3266: 2008 AIR SCW 5525.

18. Keeping in mind the aforesaid legal proposition of law and the fact that the petitioner got appointment on the post in question on the basis of forged and frivolous documents, this Court is of the view that the impugned action of the respondents dispensing the services of the petitioner w.e.f. 16.12.2010, does not require any interference under Article 226 of the Constitution of India.

19. The writ petition is, accordingly, ***dismissed.***

(2023) 6 ILRA 269
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ A No. 9491 of 2011

Ram Gopal Lodhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Deepak Srivastava, Akash Dhar Dubey, K.K. Singh, Nirmal Singh Yadav, Shiv Pravesh Dhar Dubey

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Government Servant's Conduct Rules, 1956 – Departmental enquiry – Punishment – Unauthorized absent from duty – Concealment of facts relating to detention in civil prison – No oral enquiry has been conducted by the enquiry officer and no date, time and place for oral enquiry was provided, charges and the documents relied on the enquiry officer have not been proved by examining or cross-examining the witnesses – Effect – Held, basing the entire enquiry proceedings on the basis of charge sheet and reply submitted by the employee without fixing date, time and place for holding such oral enquiry and without examining the witnesses in support of his charges, is was not in accordance with the settled Law – *Abdul Salam's case* relied upon – High Court set aside the impugned order. (Para 17 and 23)

Writ petition disposed of. (E-1)

List of Cases cited:

1. Moti Ram Vs St.; 2013 LCD 1319

2. Vinod Kumar Vs Bank of Baroda; 2013 (31) LCD 2116

3. Rajender Prasad Srivastava Vs St.; 2011 (29) LCD 2417

4. Dr. Abha Gupta Vs St.; 2013 (31) LCD 2568

5. Arun Kumar Pandey Vs U.P. Vikas Ayukt; 2004 (22) LCD 964

6. Abdul Salam Vs St. of U.P. & ors.; 2011 (29) LCD 832

7. St. of U.P. v. Saroj Kumar Sinha; (2010) 2 SCC 772

8. Vijay S. Sathaye Vs Indian Airlines & ors.; 2013 (31) LCD 1938

9. North Eastern Karnataka R.T. Corporation Vs Ashappa; MANU/SC/8174/2006

10. Haryana Financial Corporation & ors. Vs Kailash Chandra Ahuja; MANU/SC/7804/2008

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

1. Heard learned counsel for the applicant, Shri Shiv Pravesh Dhar Dubey as well as Sanjeev Singh, learned CSC for the State.

2. By this petition, the petitioner has prayed for the following relief:-

(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 25.11.2011, contained in Annexure No. 1 with this writ petition.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the respondents to accept joining of the petitioner and pay all his consequential benefits immediately.

(iii) Issue any other writ, order or direction in the nature which this Hon'ble Court may deem just and proper in the circumstances of the case."

3. Brief facts of the case are that the petitioner was appointed in the year 1987 under the opposite party No.2. On 16.03.1988, the petitioner was posted as Tractor Driver at Ruramallu. The petitioner became absent without any intimation to the authorities since November, 1991 hence an explanation was called from him as the

petitioner neither reported duty nor any explanation was submitted by him with regard to registered letter dated 31.08.1992 by which the petitioner was intimated that if he does not come to his duty within a week, the action will be taken against him under the provisions of U.P. Government Servant's Conduct Rules, 1956. In spite of that letter, he has not reported on duty. The letter was ultimately served to the petitioner on 01.07.1993 to which the petitioner replied that he is ill since November, 1991 and still has not recovered. He submitted his joining report on 15.03.1996. The matter of the petitioner was referred to the opposite party No.2 for further course of action who sought direction from the Additional Director of Agriculture (Administration) U.P. Lucknow. In the meantime, the petitioner filed Writ Petition No.4154 (S/S) of 1998 for acceptance of his joining. The writ petition was disposed of vide judgment and order dated 23.07.2008 with a direction to the opposite party No.3 to take a decision in the matter. In compliance of the order dated 23.07.2008 passed by this Court, the petitioner's case was considered by the Additional Director of Agriculture (Administration) U.P. Lucknow who vide order dated 21.01.2009 directed the Joint Director of Agriculture Jhansi Mandal Jhansi (Appointing Authority) to decide the matter of the petitioner on merits after making enquiry and affording the opportunity of hearing. Pursuant to the order dated 21.01.2009 passed by the Additional Director of Agriculture, the Enquiry Officer was appointed, charge-sheet was issued to the petitioner on 17.02.2009 containing charge that he was absent from duty since November, 1991 to 14.03.1996 and also he was in jail in Case Crime No.130A/91 under Sections 147, 148, 149, 307 & 504 I.P.C. Reply to the charge-sheet was submitted by the petitioner and after that Enquiry Officer submitted his report after conducting the enquiry and recommended for punishment and disciplinary authority ultimately has passed the order of punishment.

4. Learned counsel for the petitioner submits that after suplly of the copy of the charge sheet, the petitioner though has submitted reply, however, during course of the entire enquiry, no oral hearing was done. No documents on which the charges were pasted were supplied to the petitioner. Documents relied by the enquiry officer has not been proved by the witnesses. No evidence has been recorded in presence of the petitioner, neither any opportunity to cross examine was given to the petitioner. No date, time and place of enquiry was fixed. enquiry report was submitted only on the basis of reply to the charge sheet.

5. In support of his contention, learned counsel for the petitioner has relied on the following judgments:

(i) Moti Ram Vs. State {2013 L.C.D. Page 1319}

(ii) Vinod Kumar Vs. Bank of Baroda {2013 (31) L.C.D. page 2116}

(iii) Rajender Prasad Srivastava Vs. State {2011 (29) L.C.D. page 2417}

(iv) Dr. Abha Gupta Vs. State {2013 (31) L.C.D. page 2568}

(v) Arun Kumar Pandey Vs. U.P. Vikas Ayukt {2004 (22) L.C.D. page 964)

(vi) Abdul Salam Vs. State of U.P. and others {2011 (29) L.C.D. page 832)

6. Per contra, Shri Sanjeev Singh, learned Additional CSC opposed the contention submitting that the petitioner was unauthorizedly absent w.e.f. 01.11.1991 to 14.03.1996 without

information. He also submits that the petitioner remained in jail for 17 days i.e. from 25.01.1991 to 09.12.1991. The petitioner concealed this fact from the department. Vide letter dated 10.12.1991, 29.02.1992 and 12.08.1992 he was directed to show cause and to remained present on duty, however, the petitioner ignored this letter and did not report on duty. The Additional Director (Agriculture) vide order dated 01.07.1993 directed the petitioner to join the duty, to which the petitioner replied that he is not well and as early as he is declared fit, he will report for duty along with medical certificate.

7. In compliance of the order dated 23.07.2008 passed in writ petition No. 4154/SS/1998, the Additional Director (Agriculture) directed the appointing authority to initiate the departmental proceedings against the petitioner for his unauthorized absence and concealment of fact that he was confined in civil prison. The Deputy Director, Jalaun was appointed as enquiry officer vide letter dated 24.01.2009. Charge sheet dated 17.02.2009 was issued and charges were framed first for absence of the applicant from November, 1991 to 14.03.1996. Second charge was regarding concealment of fact regarding detention in civil prison in crime No. 130M/1991, under Section 147/148/149/307/506 I.P.C. from the department which is against The U.P. Government Servant's Conduct Rules, 1956.

8. The applicant has replied to the charge sheet admitting his detention from 25.11.1991 to 09.12.1991 and submitted that thereafter he became ill and after that he submitted joining on 15.03.1996 with medical certificates. Enquiry report dated 04.06.2011 was submitted by the Deputy Director, Jalaun holding the petitioner guilty of unauthorized absence from 01.11.1991 to 14.03.1996 and concealment of fact from the department regarding his confinement to jail. On 25.11.2011 the impugned punishment order passed by Joint Director, Jhansi Division by concluding with enquiry report that the petitioner concealed the fact regarding his detention from the department and therefore, accepting report is not in the interest of the State and consequently the joining report of the petitioner after four years and four month and thirteen days was rejected.

9. The petitioner filed a claim petition No. 721/2005 "Ram Gopal Lodhi Vs. State of U.P. and others", before the Services Tribunal, UP, Lucknow which was dismissed and opposite parties were directed to complete the enquiry and pass consequential order within a period of three months.

10. Heard learned counsel for the parties.

11. It is not disputed at bar that during course of enquiry, no opportunity of hearing was provided to the petitioner. The enquiry officer did not conduct any oral hearing. The documents relied on by the enquiry officer were not proved by examining any witness and no opportunity to examine or cross-examine the witnesses of the enquiry was given to the petitioner. Even after submission of the enquiry report, copy of the report was not given to the petitioner. The Division Bench of this Court in the case of Moti Ram (supra) has held that a proper opportunity must be afforded to the government servant at the stage of enquiry after the charge sheet is supplied to the delinquent employee as well

as at the stage when punishment is about to be imposed on him. It has also been held that an oral enquiry is must whether employee demands it or not. Relevant para 8, 9 and 17 are extracted below:-

"In State of Madhya Pradesh vs. Chintaman Sadashiva Waishampayan; AIR 1961 SC 1623; State of U.P. vs. Shatrughan Lal and another; (1998) 6 SCC 651 and State of Uttaranchal and others vs. Kharak Singh (2008) 8 SCC 236, the Apex Court has emphasized that a proper opportunity must be afforded to a government servant at the stage of enquiry, after the charge sheet is supplied to the delinquent as well as at the second stage when punishment is about to be imposed on him. In State of Uttaranchal & ors. V. Kharak Singh (supra), the Apex Court has enumerated some of the basic principles regarding conducting the departmental inquiries and consequences in the event, if these basic principles are not adhered to, the order is to be quashed. The principles enunciated are reproduced herein:-

(a) The enquries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(b) If an officer is a witness to any of the incident which is the subject matter of the enquiry or if the enquiry was initiated on the 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.

(C) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged, 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.

A Division Bench of this Court in Radhey Kant Khare vs. U.P. Cooperative Sugar Factories Federation ltd. [2003](21) LCD 610] held that 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 so fixed the oral and documentary evidence against the employee should first be led in his presence. Thereafter the employer must adduce his evidence first. 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. The person who is required to answer the charge 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."

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Even, if we assume that most of the charges have been admitted by the petitioner in his reply, but still there are some charges which are to be proved against him. For this purpose also, petitioner has to be afforded an opportunity of hearing before submission of enquiry report. In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged, 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, as has been observed by the Apex Court in the case of State of Uttaranchal & ors. V. Kharak Singh (supra). Further, the person who is required to answer the charge 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, as has been held by this Court in the case of Radhey Kant Khare (supra). While entertaining the writ petition, this Court stayed the impugned order, by means of order dated 29.10.1999.

12. In the case of Vinod Kumar (supra), the Division Bench of this Court has enumerated the basic principles or conducting departmental enquiries. Relevant para No. 19 is extracted below:-

In State of Madhya Pradesh vs. Chintaman Sadashiva Waishampayan; AIR 1961 SC 1623; State of U.P. vs. Shatrughan Lal and another; (1998) 6 SCC 651 and State of uttaranchal and others vs. V. Kharak Singh (2008) 8 SCC 236, the Apex Court has emphasized that a proper opportunity must be afforded to a government servant at the stage of the enquiry, after the charge sheet is supplied to the delinquent as well as at the second stage when punishment is about to be imposed on him. In State of Uttaranchal & ors. V. Kharak Singh (supra) the Apex Court has enumerated some of the basic principles regarding conducting the departmental inquiries and consequences in the event, if these basic principles are not adhered to, the order is to be quashed. The principles enunciated are reproduced herein:

(a) The enquries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(b) If an officer is a witness to any of the incident which is the subject matter of the enquiry or if the enquiry was initiated on the 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.

(C) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged, 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.

13. In the aforesaid judgment of Vinod Kumar it has further held that after charge sheet is given to the employee, an oral enquiry is must. Relevant para 24 is extracted below:-

A Division Bench of this Court in Radhey Kant Khare vs. U.P. Cooperative Sugar Factories Federation ltd. [2003](21) LCD 610] held that 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 so fixed the oral and documentary evidence against the employee should first be led in his presence. Thereafter the employer must adduce his evidence first. 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. The person who is required to answer the charge 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.

14. In the case of Rajendra Prasad Srivastava (supra), it was held that before any major punishment is awarded, the charges should be proved. The relevant para No. 14 is extracted below:-

We also take notice of the fact that the earlier dismissal order dated 1.9.2001 was set aside by this Court in earlier writ petition with the specific direction to the respondents to pass a fresh order after affording adequate opportunity to the appellant but the department though was concious, that the opportunity as required under Article 311(2) of the Constitution need be afforded, actually did not afford the said opportunity. There cannot be a presumption of guilt where the law requires that the charges should stand proved before any major punishment is awarded, unless there is an unqualified admission of the delinquent to the charges levelled against him.

15. In the case of Dr. Smt. Abha Gupta (supra) again it was held that not holding oral enquiry is a serious flaw which can vitiate the order of disciplinary authority. Relevant para 32 and 35 are extracted below:-

32. The Division Bench of this Court, in the case of Salahuddin Ansari v. State of U.P. and others, reported in 2008 (3) ESC 1776, has held that not holding of oral enquiry is a serious flaw which can vitiate the order of the Disciplinary authority, including the order of the punishment. It has been observed that "Non-holding of oral enquiry in such a case is a serious matter and goes to the root of the case."

35. The Division Bench of this Court, in the case of Vijay Kumar Sinha v. State of U.P. and others, reported in 2011 (4) ESC, 2949, has held that "in cases where no oral evidence in the presence of charged government servant has been recorded, there is no question of opportunity to cross-examine to him and in respect to providing opportunity to award major punishment like dismissal, holding of full-fledged enquiry must be there." The Division Bench in the said case has observed as under:

16. In the case of Arun Kumar Pandey (supra) it was held that not intimating the petitioner about date and time of oral enquiry and not recording any evidence in presence of the petitioner and no opportunity of cross examination to the petitioner vitiates the enquiry. The relevant para 7 is extracted below:-

"There was a denial of charges. Oral enquiry into the charges was required. There is an avermes) in the respective paras of writ petition that the petitioner was never intimated about date and time of such oral enquiry and no evidence was recorded in his presence or no opportunity of cross-examination was afforded. It is also said that he was never asked to adduce evidence in detence (see paras 19, 19-8, 19-D, 19-E, 20, 21, of the writ petition). A perusal of counter-affidavit would reveal that though there are averments to the

effect that the petitioner was given ample opportunity to have his say in the matter but it was not specified as to whether he was intimated about the date or dates of oral enquiry if so in what manner. General denial was not sufficient. The department ought to have disclosed that such and dales were fixed for oral enquiry, and the petitioner was informed by such and such mode, about such dates etc. Even if the petitioner was not cooperating as alleged in para- (sic) of the counter-affidavit, oral enquiry after intimation of the date or dates was the legal requirement. The Court is of the view that the order of punishment is vitiated for the said reasons and for denial of reasonable opportunity of hearing."

17. In the case of Abdul Salam (supra), it was held that basing the entire enquiry proceedings on the basis of charge sheet and reply submitted by the employee without fixing date, time and place for holding such oral enquiry and without examining the witnesses in support of his charges, it was held that departmental enquiry was not in accordance with the settled law and orders were set aside. Relevant para No. 16, 17, 24, 25, 26, 27 and 29 are extracted below:-

16. Before coming to any conclusion, it would be relevant to mention the legal position with regard to the conduction of the departmental enquiry and award of punishment to a delinquent employee. Time and again, the Hon'ble Apex Court as well as this Court has pronounced that in the matter of enquiry for awarding major punishment, no short-cut is permissible. The charge-sheet has to be furnished to the delinquent to apprise him of the charges, which should be specific along with the evidence, both oral and documentary, which the department intends to rely for upholding the charges. In case after service of charge-sheet, the delinquent needs any documents or copy thereof, such prayer has to be considered by the enquiry officer and the documents which are found relevant for enquiry are to be supplied to the delinquent. In case copies of any such document can not be supplied for any valid reason, free access has to be afforded to the delinquent for making inspection of such records. After this stage, the reply is to be submitted by the delinquent within the given time schedule and the enquiry is to proceed, fixing the date, time and place calling the delinquent.

17. Normally, the evidence by the department is required to be led first to prove the charges wherein the delinquent is also allowed to participate, who can cross-examine the witnesses, with opportunity of adducing the evidence either in rebuttal or for disproving the charges. It is thereafter that the enquiry officer has to submit its report either saying that any of the charges stand proved or not. There has to be corroborating evidence to prove the charge and without any material being placed by the department to substantiate the documentary evidence, the charge can not be found to be proved. There has to be a corroboration of facts from the documents on record and if any report is also being relied upon, the said report is also required to be authenticated by the person who has submitted the report, therefore, for this purpose the oral enquiry is required to be held for proving the charges.

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24. In the present case it is evident from the records that the enquiry officer during the course of enquiry by order dated 03.07.2002 had come to the conclusion that it is necessary to provide opportunity of hearing to the delinquent

employee and for that purpose had fixed 15.07.2002. However, on 15.07.2002 enquiry could not be held, so another date was fixed. Thereafter certain dates were fixed by the enquiry officer and it was by an order dated 29.8.2002, the enquiry officer had observed that no other document is required to be given to the delinquent employee, therefore, 07.09.2002 was fixed for submitting reply by the delinquent. It is admitted fact as borne out from the enquiry report dated 17.10.2002 that the delinquent employee had submitted his written reply on 05.10.2002. However, from the perusal of record it appears that no date, time and place was fixed by the enquiry officer for holding oral enquiry after submission of the reply to the charge-sheet by the delinquent employee and the entire enquiry proceedings were completed on the basis of charge-sheet and the reply submitted by the delinquent employee, relying on the documentary evidence submitted in support of the alleged charges.

25. The learned Single Judge in the impugned judgment has come to the conclusion that the enquiry officer did not examine any witnesses as there was no need to summon any witness for the simple reason that in support of the charges, only the documents were relied upon and the documents were so categorical that they were not required to be proved by any witness. It has been further observed by the learned Single Judge that if we examine the report of the enquiry officer, indeed, the documentary evidence seems to be so whelming that it was not obligatory for the enquiry officer to have called any witness in support of the charges.

26. The learned Single Judge, however, did not take into consideration that if the witnesses were not required to be examined in support of the charges, even then it was incumbent upon the enquiry officer to have fixed the date, time and place after submission of the reply to the charge-sheet by the delinquent for holding oral enquiry in order to appreciate the evidences filed in support of the charges in presence of the delinquent employee and call upon the department to prove the alleged charges. There is no denial about the fact that such exercise was not done by the enquiry officer in the present case.

27. In this view of the matter, we are of the considered opinion that the departmental enquiry conducted against the appellant-petitioner on the basis of which the punishment of dismissal from service was awarded, was not held in accordance with law as propounded by the Apex Court as well as this Court, as discussed above.

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29. In view of the above, the impugned judgment and order dated 31.01.2007 passed by the learned Single Judge in writ petition no.151(SS) of 2003 is not sustainable and it is hereby set aside. The punishment order dated 27.12.2002 passed by the opposite party no.3, is also liable to be quashed, which is hereby quashed.

18. In the case of State of U.P. v. Saroj Kumar Sinha, (2010) 2 SCC 772, the Apex Court has held that the employee should be treated fairly in any proceedings which may culminate in punishment being imposed on him.

19. Learned Standing Counsel has relied on the following judgments in support of his contention:-

(i) Vijay S. Sathaye Vs. Indian Airlines and others {2013 (31) LCD 1938}.

(ii) North Eastern Karnataka R.T. Corporation Vs. Ashappa (MANU/SC/8174/2006).

(iii) Haryana Financial Corporation and others Vs. Kailash Chandra Ahuja {MANU/SC/7804/2008}.

20. So far as the judgment relied on by the learned Standing Counsel in the case of Vijay S. Sathaye (supra) is concerned, in that case, the petitioner has voluntarily abandoned the services of the respondent. Here is not such case. Here the petitioner has requested for joining in the year 1996, hence, on facts, the judgment is distinguished.

21. So far as the judgment of North Eastern Karnataka R.T. Corporation (supra) is concerned, the Supreme Court was dealing with whether the punishment of dismissal from service is disproportionate or not. Here is not such case.

22. So far as the judgment in a case of Haryana Financial Corporation (supra) is concerned, the oral enquiry during course of enquiry was not in question before the Supreme Court, only non-supply of enquiry report by the enquiry officer to the delinquent employee was under consideration where employee had to show prejudice. Here is not such case. Here is the case where no oral enquiry at all has been conducted by the enquiry officer, hence, this judgment is also distinguishable.

23. In view of the settled position of law and undisputed facts that no oral enquiry has been conducted by the enquiry officer and no date, time and place for oral enquiry was provided, charges and the documents relied on the enquiry officer have not been proved by examining or cross-examining the witnesses, hence, in view of the settled preposition of law, the impugned order contained in Annexure No. 1 is set aside.

24. The matter is remanded to the Disciplinary Authority directing him to conduct a de novo enquiry from the stage of supplying of charge sheet within a period of three months from the date of receiving of certified copy of this order. No order as to cost.

(2023) 6 ILRA 278
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ B No. 388 of 2023
&
Writ B No. 419 of 2023

Daya Shankar & Ors. ...Petitioners
Versus
Deputy Director of Consolidation, Kheri, District Kheri & Ors. ...Respondents

Counsel for the Petitioners:
Pradeep Kumar Tiwari, Parmatma Prasad Singh

Counsel for the Respondents:
C.S.C., Dilip Kumar Pandey

A. Civil Law - U.P. Imposition of Ceiling on Land Holdings Act, 1961-Section 27(3) - Forest Act, 1927 - Sections 4 & 20 - U.P. Consolidation of Holdings Act, 1954-Section 9-A(2)-Lease-Land declared as suplus under the Act of 1960 was allotted by execution of lease deed by S.D.O.-After issuance of notification u/s 4 of the Act, 1927 the land in question vests in the Forest Department and no one can claim any right or title on the basis of any subsequent patta-Further, as per Section 27(3) of the Act, 1960 lease may be granted only by Collector, and S.D.O. was not competent authority to grant lease-Claim of petitioners to the land on the

basis of lease, not sustainable-The law is settled on the point that if any order is passed by the incompetent authority, de horse the statutory prescriptions, that order would be nullity in the eyes of law and would be void ab initio-Therefore, on the strength of illegal and void order no claim of petitioners in respect of the land in question may be considered.(Para 2 to 40)

The writ petitions are dismissed. (E-6)

List of Cases cited:

1. St. of U.P. Vs DDC & ors. (1996) 5 SCC 194

2. Prabhagiya Van Adhikari Awadh Van Prabhag Vs Arun Kumar Bhardwaj (Dead) thru Lrs & ors. (2021) AIR SC 4739

3. St. of U.P. Vs Kamal Jeet Singh (2017) 9 ADJ 768

4. St. of U.P. Vs DDC & ors. (1996) 5 SSC 194

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

1. Heard Sri P.K. Tiwari, learned counsel for the petitioner, Sri Shailendra Kumar Singh, learned C.S.C.-II and Sri Upendra Singh, learned Standing Counsel for the State respondents and Sri Dilip Kumar Pandey, learned counsel for the opposite party no. 6 / Gaon Sabha.

2. Since the issue in both the writ petitions is identical, therefore, with the consent of parties both the writ petitions are being decided by a common judgment.

3. Learned counsel for the State has provided the detailed instructions enclosing therewith the orders of this Court passed in the issue in question as well as copy of approval dated 2.7.1980 of Sub-Divisional Officer, Nighasan whereby the lease has been granted in favour of 58 persons and other relevant correspondences / orders, same are taken on record.

4. Learned State counsel has also produced the original records to show that the instructions so provided to the Court have been taken from those original records.

5. In the first writ petition, the petitioners have prayed following relief :

"(i) A writ, order or direction in the nature of Certiorari for quashing the impugned orders dated 14.02.2023, 27.09.2017, 16.07.2016 modified order 21.07.2016 and 31.12.1985 are being annexed as Annexure No.01, 02, 03 & 04, to this writ petition.

(ii) A writ, order or direction in the nature of Mandamus thereby commanding /directing the opposite party No.04 and 05 not interfering in peaceful possession of the petitioner over the land in question."

6. In the second writ petition, the petitioners have prayed following relief :

"(1) A writ, order or direction in the nature of Certiorari for quashing the impugned orders dated 14.02.2023, 27.09.2017. 16.07.2016 modified order 21.07.2016 and 31.12.1985 are being annexed as Annexure No.01, 02, 03 & 04, to this writ petition.

(ii) A writ, order or direction in the nature of Mandamus thereby commanding /directing the opposite party No.04 and 05 not interfering in peaceful possession of the petitioner over the land in question.

7. It has been submitted that disputed gatas were recorded before the Abolition of Zamindari by the U.P. Z.A. & L.R. Act in the name of the Rani Bhuwan Kumari w/o Raja Pratap Vikram Shah, resident of Singhai who was the Zamindar of Plot No. 1Sa and 23Sa along with another several other plots situated in Village Khairatia, Pargana- Khairigarh, Tehsil- Nighasan, District Kheri. After the Abolition of Zamindari the aforesaid plots comprised the holdings of Rani Bhuwan Kumari and she became the Bhumidhar of the plots referred to above.

8. On the enforcement of U.P. Imposition of Ceiling on Land Holding Act, 1960 proceedings were initiated against Rani Bhuwan Kumari. The Prescribed Authority under the U.P. Imposition of Ceiling on Land Holding Act, 1960 declared 423.39 acres of land as surplus which included 379.10 acres of land of land of plot No. 1- Sa and 23Sa along with other Gata on 05.12.1968.

9. After the land was declared surplus an endorsement to that effect was made in the Khetauni for the year 1376-F to 1378-F, thereafter plots were taken into possession by the state of U.P.

10. A proposed notification no. 1734/14-43-54 total area 2555 acre under Section 4 of the Indian Forest Act was published 29.03.1954 along with the disputed Gatas.

11. Thereafter the District authority of Lakhimpur executed the lease of plot No. 1- Sa and 23Sa along with the another plots area 3 acres to each in favor of the petitioners of the aforesaid under the Government Grant Act on 2.07.1980.

12. After execution of the lease deed of the respective plots the petitioners were put in possession. The leases were executed on 2 July, 1980, petitioners and others are the permanent leases by the authority concerned in exercise of the powers under section 27(3) of the U.P. Imposition of Ceiling on Land Holding Act, 1960. And on the basis of the leases the name of the petitioners was entered in the respective Khetauni of the village Khairatia.

13. The Forest authorities / respondents allege that the Section 20 of the Forest Act was published on 11.04.1984 by the no. 1655/14-2-20(39)-81 in pursuance of notification no. 1737/14-B-53-54, dated 29.03.1954 the land in question with another land declared the forest reserve land from date of 15.06.1984 with the approvals of Hon'ble Governor.

14. Forest authorities filed an objection before the Consolidation Officer Lakhimpur Kheri on 02.12.1985 claiming that Plot No. 1- Sa area 3 acres and 23Sa which is in possession of the petitioners is proposed to be declare Forest and a notification with respect to the aforesaid land is send for publication in the Gazette. This objection was registered as case no. 184 to 276 under section 9-A (2) of the Consolidation of Holdings Act.

15. Consolidation officer has allegedly illegally expunged the name of the lease holders and his possessions were declared illegal in case no. 184 to 276 under section 9A(2) of the U.P. C. H Act on order dated 31.12.1985. In aforesaid case fact is admitted that the lease holders are in possession and his names are recorded as Bhumidhar with non transferable rights.

16. The notification issued under section 20 of the Forest Act 1927, dated 11.04.1984 was challenged by the Babu Lal and 51 others lease holders of the state of U.P., titled as writ petition no. 1771 of 1987 Babu Lal and others versus State of U.P. and another, the aforesaid writ petition was dismissed by this Hon'ble Court on order dated 17.05.2005, writ petition no. 5690 of 2000 filed by the Dayashankar and 9 another's by which they were challenged the notification dated 11.04.1984 under section 20 of the Forrest Act for its quashing same was dismissed by this Hon'ble court on order dated 21.11.2000, writ petition no. 63 of 2001 M/B Ramnageena and 9 others versus State of U.P. and another, by which they were challenged the notification dated 11.04.1984 under section 20 of the Forrest Act for its quashing same was dismissed by this Hon'ble court on order dated 19.09.2007.

17. Against the order dated 31.12.1985 appeal nos 1576 to 1581 of 1992 1993 under section 11(1) of UP. CH. Act filed by the Lease holders, all appeals allowed except in respect of Gata no. 23 and matter was remanded to the trial court on order dated 24.06.1993 by the S.O.C. Kheri

18. In pursuance of remand order matter was again heard by the Consolidation Officer, written arguments were filed by the petitioners in matter before the trial court, Consolidation Officer had again confirmed the ex parte order dated 31.12.1985 which was already set aside in appeal and directed the land in question will be recorded as forest Land without considering the case of the petitioners. Further, the order dated 16.07.2016 was amended vide order dated 21.7.2016.

19. Against the order dated 16.07.2016 passed by the opposite party no. 3, total 71 appeals preferred, all appeals consolidated, appeal no. 558/2016 was made leading file, all appeals was dismissed by arbitrary manner without considering the case of the petitioners and evidence available on the face of records filed by the petitioners his vide illegal order dated 27.09.2017.

20. Being aggrieved of the orders dated 27.09.2017 and 16.07.2016 revision was preferred by the petitioners before the opposite party no. 1 on different dates.

21. Aforesaid all revisions was illegally dismissed by the opposite party no. 1 by arbitrary manner without considering the case of the petitioners and evidence available on the face of records filed by the petitioners his vide illegal order dated 14.02.2023.

22. Per contra, at the very outset, learned counsel for the State has stated that in the issue in question there is a concurrent finding of fact, on a subject matter, of Consolidation Officer, Settlement Officer, Consolidation and Deputy Director of Consolidation, Lakhimpur Kheri, therefore in view of the settled proposition of law of the Apex Curt in catena of cases, the interference in the aforesaid concurrent findings may not be required under Article 226 of the Constitution of India.

23. In the present case the notification u/s 4 of the Indian Forest Act, 1927 (herein after referred to as Act, 1927) bearing Gazette Notification No. 1737/14 dated 29.3.1954 for the proposed reserving of 2555 Acre land for the Forest area. Section 4 of the Act, 1927 is being reproduced herein below :

"4. Notification by [State Government). (1) Whenever it has been decided to constitute any land a reserved forest, the [State Government] shall issue a notification in the [Official Gazette]- (a) declaring that it has been decided to constitute such land a reserved forest;

(b) specifying, as nearly as possible, the situation and limits of such land; and

(c) appointing an officer (hereinafter called "the Forest Settlement-officer") to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits or in or over any forest- produce, and to deal with the same as provided in this Chapter.

Explanation. For the purpose of clause (b), it shall be sufficient to describe the limits of the forest by roads, rivers, ridges or other well-known or readily intelligible boundaries.

(2) The officer appointed under clause (c) of sub-section (1) shall ordinarily be a person not holding any forest-office except that of Forest Settlement-officer.

(3) Nothing in this section shall prevent the [State Government] from appointing any number of officers not exceeding three, not more than one of whom shall be a person holding any forest-office except as aforesaid, to perform the duties of a Forest Settlement-officer under this Act.

24. For the disposal of the present issue it would be necessary to reproduce section 5,20 and 23 of the Forest Act, 1927:

"5. Bar of accrual of forest-rights.-After the issue of a notification tinder section 4, no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or contract in writing made or entered into by or on behalf of the [Government] or some person in whom such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the 2[State Government] in this behalf.

20. 20. Notification declaring forest reserved. (1) When the following events have occurred, namely:-

(a) the period fixed under section 6 for preferring claims have elapsed and all claims (if any) made under that section or section 9 have been disposed of by the Forest Settlement-officer; (b) if any such claims have been made, the period limited by section 17 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and

(c) all lands (if any) to be included in the proposed forest, which the Forest Settlement-officer has, under section 11, elected to acquire under the Land Acquisition Act, 1894 (1 of 1894), have become vested in the Government under section 16 of that Act, the [State Government) shall publish a notification in the [Official Gazette), specifying definitely, according to boundary-marks erected or otherwise, the limits of the forest which is to be reserved, and declaring the same to be reserved from a date fixed by the notification.

(2) From the date so fixed such forest shall be deemed to be a reserved forest.

23. No right acquired over reserved forest, except as here provided.- No right of any description shall be acquired in or over a reserved forest except by succession or under a grant or contract in writing made by or on behalf of the [Government] or some person in whom such right was vested when the notification under section 20 was issued."

25. As per instructions so provided by the State respondents it is clear that the claim in respect of the similar and identical parties has been rejected by the Forest Settlement Officer, Nighasan and those orders were challenged before the Appellate Authority and those appeals were rejected by the Appellate Authority. Not only the above some similarly and identically placed persons have filed writ petition before this Court which has been rejected. Thereafter, the special appeal was filed which has also been rejected. One writ petition bearing Writ Petition No. 192 of 1959 was filed under the title of Dr. Gurdeep Singh and another vs. The Divisional Forest Officer, North Kheri Division, Kheri and others which was rejected vide order dated 18.5.1964. Against the order dated 18.5.1964 the Special Appeal No. 118/1964 : Dr. Gurdeep Singh vs. The Divisional Forest Officer, North Kheri Division, Kheri and others was filed and dismissed by this Court vide order dated 19.10.1966. Not only the above the declaratory suit u/s 229 B of U.P.Z.A. & L.R. Act has been filed by Dr. Gurdeep Singh and his wife which was finally decided on 30.11.1966 whereby the aforesaid suit was dismissed with costs. The aforesaid Gurdeep Singh again filed Writ Petition No. 931/1975 which was rejected by this Court vide order dated 8.3.1979. One more person has filed Writ Petition No. 2380 of 1998(M/B) (Surjeet Singh and others vs. State of U.P. & others) which has also been dismissed vide judgment and order dated 6.8.1998.

26. For the issue in question relating to the land in question one Writ Petition No. 1771 of 1987 has been filed under the title Babulal and others vs. State of U.P. & others which came to be dismissed by this Court vide order dated 17.5.2005. For the convenience the order dated 17.5.2005 is being reproduced herein below :

"By way of this petition the petitioners seek a direction in the nature of certiorari quashing the Notification dated 11 April, 1984 issued in exercise of power under Section 20 of the Indian Forest Act and further direction in the nature of mandamus directing the respondents not to Interfere in the possession of the petitioners over the land and the area allotted to them with respect to the plot nos 1-Sa and 23-Sa of village Khairatia as shown in Annexure 2 to the petition.

The case of the petitioners is that the land in question belonged to Rani Bhuwan Kumari W/o Raja Pratap Vikram Shah and the same was declared surplus by the Collector in exercise of power under Section 27() of U.P, Imposition of Coiling on Land Holdings Act, 1960. Subsequently the land in question was allotted to the petitioners and since then they ar in possession over the land in dispute. It has further boon submitted that the aforesaid land is entered into the revenue records in the name of the petitioners and thus the aforesaid land does not belong to the forest department. It is, therefore, prayed that the possession of the petitioners so as the land in dispute be not disturbed.

The petition has been contested amongst others on the ground that Rani Bhuwan Kumari W/o Raja Pratap Vikram

Shah has no rights in the disputed plots because after issuing notification under Section 4 of the Indian Forest Act on 29.3.1954, she filed an objection under Section 6/9 of Indian Forest Act before the Forest Settlement Officer, Nighasan Kheri which was rejected on 30.9.1958, a copy of which has been annexed as Annexure CA-1 to the counter affidavit. Against that order Rani Bhuwan Kumari filed an appeal before the Deputy Commissioner, Kheri, which was also dismissed on 30.4.1959, a certified copy of the order is annexed as Annexure CA-2 to the counter affidavit. Thus all the rights of Rani Bhuwan Kumari extinguished and the judgment of the Forest Settlement Officer became final. It has further been pleaded that no surplus land was declared and the prescribed authority, Nighasan passed the order on 30.5.1964 in case No.243 under Section 14(3) of CH Act. The disputed plots are not held by Rani Bhuwan Kumari Devi as such those plots are excluded from the surplus area. Certified copy of the said order is being annexed as Annexure No.CA-3 to the counter affidavit. It has further been pleaded that the plots in dispute are excluded from the surplus area and no question of more plots being declared as surplus of Smt. Rajrani and the land in dispute belongs to reserved forest and disputed plots are excluded from ceiling proceedings and the consolidation courts also decided the case against the petitioners by orders dated 26.3.1984 and 17.1.1985 passed by Consolidation Officer, Nighasan and certified copy of the order dated 18.7.1986 passed by the Settlement Officer, Consolidation being annexed as Annexures CA-S and CA-6 to the counter affidavit. has further been pleaded that the petitioners have filed objections and contested the case before the Consolidation Courts. It has been pleaded that Dr. Gurdeep Singh filed objection under Section 14(3) of U.P Imposition of Ceiling on Land Holdings Act and Gurdeep Singh aforesaid also filed a writ petition bearing No.931 of 1976, which was dismissed by this Court vide order dated 8.3.1979, a copy of which has been annexed as Annexure No.CA-7 to the counter affidavit.

We have heard the learned counsel for the parties at length and have gone through the record and find that the land in dispute has already been declared as forest land after issuing notification under section 4 of the Indian Forest Act on 29.3.1954. After the issue of said notification in the year 1954 the petitioners and other persons contested the matter before the Forest Settlement Officer and all the objections of the petitioners and other persons were dismissed and the land in question was declared as reserved forest. Therefore, subsequent proceedings taken and drawn under the U.P. Imposition of Ceiling on Land Holdings and other proceedings have no meaning and such proceedings are not binding and have no legal effect. -

The petition has no force and is dismissed."

27. In the aforesaid judgment the Division Bench of this Court has not only upheld the orders being passed by the competent consolidation authorities but also clarified the effect under the Act, 1960. The Division Bench has categorically observed that the subsequent proceedings taken and drawn under the U.P. Imposition of Ceiling of Land Holdings Act, 1960 (herein after referred to as Act, 1960) and other proceedings have no meaning and such proceedings are not binding and have no legal effect. As per learned counsel for the State the aforesaid order has not been challenged and that order has attained

finality, therefore, so far as the claim of the petitioners that they are the lessee of the State Government being patta holder of surplus land in the light of Act, 1960 would not make them entitled to have possession on such land.

28. Learned counsel for the State has submitted that the patta in question was approved by the Sub-Divisional Officer, Nighasan on 2.7.1980 as list of 58 patta holders have been enclosed with the enclosures which clearly shows that the approval was grated by the S.D.O. concerned on 2.7.1980. Learned State Counsel has referred section 27 of the Act, 1960, which reads as under :

"27. Settlement of surplus land. - (1) The State Government shall settle out of the surplus land in a village in which no land is available for community purposes or in which the land as available is less than 15 acres with the [Gaon Sabha] of that village so however that the total land in the village available for community purposes after such settlement does not exceed 15 acres. The land so settled with the [Gaon Sabha] shall be used for planting trees, growing fodder or for such other community purposes, as may be prescribed.

[(2) The State Government may either settle any surplus land in accordance with sub-section (1) sub-section (3) or use or permit its use in accordance with Section 25 or manage or otherwise deal with it in such manner as it thinks fit.]

[(3) Any remaining surplus land shall be settled by the Collector in accordance with the order of preference and subject to the limits, specified respectively in[sub-sections (1) and (3)]of Section 198 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950.

[(4) The Commissioner may of his own motion and shall, on the application of any aggrieved person, enquire into such settlement and if he is satisfied that the settlement is irregular he may after notice to the person in whose favour such settlement is made to show cause -Pradesh Zamindari Abolition and Land Reforms Act, 1950 shall mutatis mutandis apply in relation to the such vesting.

(i) cancel the settlement and the lease, if any and thereupon, notwithstanding anything contained in any other law or in any instrument, the rights, title and interest of the person in whose favour such settlement was made or lease executed or any person claiming through him in such land shall cease, and such land shall revert to the State Government; and

(ii) direct that every person holding or retaining possession thereof may be evicted, and may for that purpose use or cause to be used such force as may be necessary.]

(5) Every order passed by the Commissioner under sub-section (4) shall be final.

(6) The Commissioner acting of his own motion under sub-section (4) may issue notice, and an application under that sub-section may be made, -

[(a) in the case of any settlement made or lease granted before November 10, 1980, before the expiry of a period of [seven years]

[(b) in the case of any settlement made or lease granted on from the said date, and or after the said date, before the expiry of a period of five years from the date of such settlement or lease] or up to November 10, 1987, whichever be later].

[(6A) Where any surplus land has been settled by the Collector under sub-section (3), and any person other than the person in whose favour such settlement was made is in occupation of such land in contravention of the provisions of this Act, the Collector may, of his own motion and shall on the application of the person in whose favour such settlement was made, put him in possession of such land and may for that purpose use or cause to be used such force as he considers necessary.

(6B) Where any person, after being evicted under this section, reoccupies the land or any part thereof without lawful authority, he shall be punishable with imprisonment for a term which may extend to two years but which shall not be less than three months and also with fine which may extend to three thousand rupees :

Provided that the Court convicting the accused may, while passing the sentence, direct that the whole or such portion of the fine that may be recovered as the Court considers proper, be paid to the person in whose favour such settlement was made as damages for use and occupation.

(6C) Where in any proceeding under sub-section (6-B), the Court, at any stage after cognizance of the case has been taken, is satisfied by affidavit or otherwise -

(a) that the accused is in occupation of the land to which such proceeding relates, in contravention of the provisions of the Act; and

(b) that the person in whose favour such settlement was made is entitled to the possession of such land;

the Court may summarily evict the accused from such land pending the final determination of the case and may put the person in whose favour such settlement was made in possession of such land.

(6D) Where in any such proceeding, the accused is convicted the interim order passed under sub-section (6-C) shall be confirmed by the Court.

(6E) Where in any such proceeding, the accused is acquitted or discharged and the Court is satisfied that the person so acquitted or discharged is entitled to be put back in possession over such land, the Court shall, on the application of such person, direct that delivery of possession be made to him.

(6F) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under sub-section (6-B) shall be cognizable and non-bailable and may be tried summarily.

(6G) For the purpose of speedy trial of offences under this section, the State Government may, in consultation with the High Court, by notification, constitute, special Courts consisting of an officer not below the rank of Sub-Divisional Magistrate, which shall, subject to the provisions of the Code of Criminal Procedure, 1973, exercise in relation to such offences the powers of a Judicial Magistrate of the first class.]

(7) The State Government may, [by a general or special order to be published in the manner prescribed], declare that as from a date to be specified in this behalf, all surplus land situate in a circle which could not be settled under the provisions of this Act, shall vest in the Gaon Sabha concerned, and the provisions of Section 117 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 shall mutatis mutandis apply in relation to the such vesting."

29. In the light of aforesaid provision of law, more particularly, under section 27 (3) of the Act, 1960 the approval of patta may be granted only by the Collector, therefore, the S.D.O., Nighasan was not the

competent authority to grant approval of patta. Hence, the order dated 2.7.1980 granting approval to the patta to the petitioner is without jurisdiction, so non-est in the eyes of law.

30. Learned State Counsel has referred a decision of Apex Court in re: ***(State of U.P. vs. Dy. Director of Consolidation and others) (1996) 5 Supreme Court Cases 194*** referring para 9 and 10 which reads as under :

"9. The crucial question for consideration, however, is whether the consolidation authorities have the jurisdiction to go behind the notification under Section 20 of the Act and deal with the land which has been declared and notified as a reserve forest under the Act. It is necessary, therefore, to examine the scheme of Chapter II of the Act. Section 3 provides that the State Government may constitute any forest land or wasteland which is the property of the Government or over which the Government has proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled, a reserved forest. Section 4 provides for the issue of a notification declaring the intention of the Government to constitute a reserved forest. Section 5 bars accrual of forest rights in the area covered by the notification under Section 4 after the issue of the notification. Section 6, inter alia, gives power to the Forest Settlement Officer to issue a proclamation fixing a period of not less than three months from the date of such proclamation and requiring every person claiming any right mentioned in Section 4 or Section 5 within such period, either to present to the Forest Scelement Officer a written notice specifying or to appear before him, and a state the nature of such right and the amount and particulars of the compensation (if any) claimed in respect thereof. Section 7 gives power to the Forest Settlement Officer to investigate the objections. Section 8 prescribes that the Forest Settlement Officer shall have the same powers as a civil court has in the trial of a suit. Section 9, inter alia, provides for the extinction of rights where no claim is made under Section 6. Section 11(1) b lays down that in the case of a claim to a right in or over any land, other than a right of way or right of pasture, or a right to forest produce or water course, the Forest Settlement Officer, shall pass an order admitting or rejecting the same in whole or in part. In the event of admitting the right of any person to the land, the Forest Settlement Officer, under Section 11(2), can either exclude such land from the limits of the proposed forest or come to an agreement with the owner thereof for the surrender of his rights or proceed to acquire such land in the manner provided by the Land Acquisition Act, 1894, Section 17 provides for appeal from various orders under the Act and Section 18(4) for revision before the State Government. When all the proceedings provided under Sections 3 to 19 are over the State Government has to publish a notification under Section 30 specifying definitely the limits of the forest which is to be reserved and declaring the same to be reserved from the date fixed by the notification.

10. It is thus obvious that the Forest Settlement Officer has the powers of a civil court and his order is subject to appeal and finally revision before the State Government. The Act is a complete code in itself and contains elaborate procedure for declaring and notifying a reserve forest. Once a notification under Section 20 of the Act declaring a land as reserve forest is published, then all the rights in the said

land claimed by any person come to an end and are no longer available. The notification is binding on the consolidation authorities in the same way as a decree of a civil court. The respondents could very well file objections and claims including objection regarding the nature of the land before the Forest Settlement Officer. They did not file any objection or claim before the authorities in the proceedings under the Act. After the notification under Section 20 of the Act, the respondents could not have raised any objections qua the said notification before the consolidation authorities. The consolidation authorities were bound by the notification which had achieved finality."

31. Further attention has been drawn towards the decision of Apex Court in re: ***Prabhagiya Van Adhikari Awadh Van Prabhag vs. Arun Kumar Bhardwaj (Dead) through Lrs. and Ors. AIR 2021 Supreme Court 4739*** referring para 22 and 24, which reads as under :

"22. We do not find any merit in the argument raised by Mr. Khan and Mr. Hooda. In the notification published on 23.11.1955, there was a declaration that land measuring 162 acres shall constitute forest land. Explanation (1) to Section 4 of the Forest Act clarifies that it would be sufficient to describe the limits of the forest by roads, rivers, ridges or other well-known or readily intelligible boundaries. The notification dated 23.11.1995 has the boundaries on all four sides mentioned therein. There is no other requirement under section 4 of the Forest Act. It is only Section 6 of the Forest Act which needs to specify the situation and limits of the proposed forest. In terms of such clause (a) of Section 6 of the Forest Act, the details of Khasra numbers which were part of 162 acres find mention in the proclamation so published. Therefore, the statutory procedural requirements stand satisfied.

24. Mr. Khan further raised an argument that the final notification under Section 20 of the Forest Act has not been published. A reading of Section 20 of the Forest Act does not show that for a reserved forest, there is a requirement of publication of notification but no time limit is prescribed for publication of such notification under Section 20. Therefore, even if notification under Section 20 of the Forest Act has not been issued, by virtue of Section 5 of the Forest Act, there is a prohibition against acquisition of any right over the land comprised in such notification except by way of a contract executed in writing by or on behalf of the Government. Since no such written contract was executed by or on behalf of the State or on behalf of the person in whom such right was vested, therefore, the Gaon Sabha was not competent to grant lease in favour of the appellant."

32. Learned State Counsel has also drawn attention of this Court towards the decision of Division Bench of this Court in re: ***State of U.P. vs. Kamal Jeet Singh, 2017 (9) ADJ 768*** which has been passed in the same matter referring para 2 & 45, which reads as under :

"[2] The main controversy in the present writ petition relates to the title over plot Nos.15 and 21 on which the forest department of the State of U.P. agitates the matter on the ground that after Zamindari Abolition and Land Reforms Act the plots in question situated in village Baghauwa. Pargana Palia, Tehsil Nighasan, District Lakhimpur Kheri, which were earlier recorded as Jungle and Jhari on the date of vesting, were vested in the State and after

that again declared as forest land, while opposite parties contends right over the plots on the ground that right of sirdari accrues in favour of Jagat Ram son of Chaudhary Ishwar Das (Jat) resident of Neara, Post Office and District Hoshiyarpur (East Punjab) and later on transferred the land in favour of respondents with all title and interest which were vested in him.

45) On the basis of above legal propositions, we conclude the present petition as follows:

I. From the date of notification under Section 4 of the U.P. Zamindari Abolition Act all the estate situate in U.P. vested in the State and stand transferred and vested in the State free from all encumbrances.

II. The land in question was previously in 1356F or before that was recorded as junglat/ghas/waste land

III. Under the provisions of Section 3 of the Forest Act. the State may constitute any forest land or waste land which is the property of the Government or over which the Government has proprietary right and declare it as reserved forest. The land in question was recorded as junglat being under the proprietary right of the State and State has every authority to declare the land as forest land.

IV. After notification of Section 4 of the Forest Act no right shall be acquired in or over the land comprised in such notification except by succession or under a grant or contract in writing made or entered into by or on behalf of the Government. It is not a case where grant was made by the Government.

V. No right shall be alienated by a grant sale or otherwise without the sanction of the State Government. Jagat Ram had no authority to transfer the land. Thus the respondents have no better title than Jagat Ram.

VI. As reported by the revenue authorities the land was recorded as bushes or woody vegetation and it is included in forest in light of Section 38(a) & (b) of UP. Act No. XXIII of 1965

VII. After the issuance of notification under Section 4 of the Forest Act late Jagat Ram through whom respondents claim their right on the basis of a transfer deed had filed an objection under Section 6 of the Forest Act and it was decided in the year 1958 and the land was declared as forest land. Thus the dispute reached to its finality, as indicated above, and except revision before the State no authority has jurisdiction to determine the rights as contained in Section 27-A of the Forest Act

VIII. By way of measurement and by way of notification the petitioners have proved that the land in question is included in the notification under Section 4 of the Forest Act."

33. Therefore, learned State Counsel has stated that both the writ petitions may be dismissed.

34. Having heard learned counsel for the parties and having perused the material on record as well as the relevant documents so produced through instruction letter, I am of the considered opinion that the order being passed by the Consolidation Officer, Settlement Officer, Consolidation and Deputy Director of Consolidation, Lakhimpur Kheri are valid and justifiable orders passed strictly in accordance with law. In all the aforesaid orders the relevant provision of Act, 1927, more particularly section 4,5,20 and 23 have been considered.

35. Since the findings of consolidation authorities are justifiable and those findings are not perverse in any manner whatsoever, therefore, those findings may not be interfered under Article 226 of the Constitution of India. Besides, the issue in question is no more res integra as the Apex Court in re: ***State of U.P. vs. Dy. Director of Consolidation and others (1996) 5 Supreme Court Cases 194 and Prabhagiya Van Adhikari Awadh Van Prabhag vs. Arun Kumar Bhardwaj (Dead) through Lrs. and Ors. AIR 2021 Supreme Court 4739*** has already held that after issuance of notification under section 4 of the Act, 1927 the land in question shall vest in the Forest Department and no one can claim any right or title on the basis of any subsequent patta. Further, this Court in re: ***Babulal (supra)*** has settled the controversy vide judgment and order dated 17.5.2005 and that order has not been assailed till date. Besides, the similar controversy has been adjudicated by this Court in re: ***Kamal Jeet Singh (supra)*** on 4.8.2017 and that order has also not been assailed till date. So far as the claim of the petitioners in the light of the Act, 1960 is concerned, that has also been settled that after the issuance of notification u/s 4 of the Act, 1927 in the year 1954, any subsequent patta if given under the provisions of Act, 1960 it would have no meaning and such provisions would not be binding and would have no legal effect.

36. There is one more relevant aspect in the present issue that the approval of patta which was granted on 2.7.1980 had not been granted by the competent authority inasmuch as the competent authority under section 27(3) of the Act, 1960 is Collector whereas the approval of patta in question has been granted by the Sub-Divisional Officer of the Tehsil, therefore, this is more the reason not to accept the prayer of the petitioner as the order dated 2.7.1980 granting approval of patta by the S.D.O. concerned is without jurisdictional order. Hence, the very foundation regarding the claim of the petitioner on the basis of patta has been removed, therefore, the super-structure on the basis of fact that the petitioners were having possession over the land in question on the basis of that patta would not be able to be raised, rather the same would fall on the basis of maxim '*sublato fundamento cadit opus'* which means that on foundation being removed the super-structure falls.

37. The law is settled on the point that if any order is passed by the incompetent authority, de horse the statutory prescriptions, that order would be nullity in the eyes of law and would be void ab initio. Therefore, on the strength of illegal and void order no claim of the petitioners in respect of the land in question may be considered.

38. At last, it would be apt to mention that the identical persons have approached this Court time and again for seeking same relief and their writ petitions have been rejected by this Court and those orders have not been assailed before the Apex Court, therefore, those orders have attained finality.

39. Having considered the submissions of learned counsel for the parties and having regard the dictums of Apex Court in re: ***State of U.P. vs. Dy. Director of Consolidation and others (1996) 5 Supreme Court Cases 194 and Prabhagiya Van Adhikari Awadh Van Prabhag vs. Arun Kumar Bhardwaj (Dead) through Lrs. and Ors. AIR 2021 Supreme Court 4739*** as well as the

decision of Division Bench of this Court in re: ***Babulal (supra) and Kamaljeet Singh (supra)***, I am of the considered opinion that the impugned orders being passed by the competent consolidation authorities do not suffer from any illegality or perversity, therefore, those orders may not call for any interference.

40. Accordingly, the writ petitions are dismissed being devoid of merit.

41. No order as to costs.

(2023) 6 ILRA 291
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2023

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Matters Under Article 227 No. 4800 of 2023

Sanjay Kumar Garg & Anr. ...Petitioners
Versus
Akhilesh Pratap Singh & Ors. ...Respondents

Counsel for the Petitioners:
Sri Tanzeel Ahmad, Sri Rakesh Kumar (Sr. Advocate)

Counsel for the Respondents:
Sri Devendra Kumar Yadav, Sri Ashish Mishra, Sri A.K. Gaur (Sr. Advocate)

(A) Constitution of India - Article 227 - The Code of Civil Procedure, 1908 - Order 22 Rule 10 r.w. 151 & 153 , section 24 - General power of transfer and withdrawal - order of transfer must reflect application of mind by the Court and the circumstances which weighed in taking the action - If the transfer application under Section 24 of Code of Civil Procedure has been moved on the allegations of bias of Presiding Officer, the Court must be satisfied that the apprehension of bias or prejudice is bonafide and reasonable - expression of apprehension must be proved/substantiated by circumstances and material placed by such applicant before the Court - Justice delivery system knows no caste, religion, creed, colour etc. - It is a system following principle of black and white, i.e., truth and false - Whatever is unfair, that is identified and given its due treatment and whatever is good is retained. (Para -20,21)

Transfer application filed by respondent no. 2 & 3 - rejected - Presiding Officer relative of appellant - both are same caste - no faith in Court - applicant not a party to civil appeal - application filed by respondent no. 1 for impleadment - rejected - Rejection of first transfer application brought on record - objection filed by appellant in transfer application - transfer application not maintainable - as moved by a person not party to proceedings - order does not consider petitioners' objections - no finding recorded on petitioner's objection - application accepted based on facts and circumstances - indicating application is worthy to be accepted - no application of mind - order passed mechanically.**(Para - 6,15,16, 18,23)**

HELD:-Court finds no reason for the District Judge to disagree with his earlier order dated 28.3.2023, as no fresh material was brought on record, which may justify the passing of the order dated 11.4.2023. Order dated 11.4.2023 passed by District Judge in transfer application contrary to law, set aside. Transfer Application filed by respondent no.1, rejected.**(Para -23)**

Petition allowed. (E-7)

List of Cases cited:

1. Kulvinder Kaur Vs Kandi Friends Education Trust & ors., 2008(1) AWC 523 :: (2008) 3 SCC 659

2. Amit Agarwal Vs Atul Gupta, 2015(2) AWC 1145

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Shri Rakesh Kumar, learned Senior Counsel assisted by Shri Tanzeel Ahmad, learned counsel for the plaintiffs-petitioners, Shri A.K. Gaur, learned Senior Counsel assisted by Shri Devendra Kumar Yadav, learned counsel appearing on behalf of contesting-respondents and Shri Ashish Mishra, learned counsel who was requested to appear on behalf of District Judge, Aligarh.

2. The present petition under Article 227 has been filed by the petitioners, challenging the order dated 11.4.2023 passed by the District Judge, Aligarh in Transfer Application No. 116 of 2023 (Akhilesh Pratap Singh Vs. Sanjay Kumar Garg & others).

3. It is stated in the petition that the petitioners have instituted a Civil Suit No. 50 of 1998 for specific performance of contract. The aforesaid suit was dismissed by Additional Civil Judge (Senior Division), Court No. 1, Aligarh by judgment and decree dated 23.9.2022.

4. The petitioners being aggrieved with the aforesaid judgment and decree dated 23.9.2022 have preferred a civil appeal no. 63 of 2022, in the court of District Judge, Aligarh. After admitting the appeal, the same was transferred to the Court of Additional District Judge, Court No. 1, Aligarh.

5. The petitioners also approached this Court by filing a petition under Article 227 No. 2161 of 2023 (Sanjay Kumar Garg & another Vs. Atar Singh & others) for a direction to the Court concern for early disposal of civil appeal. The said petition was finally decided by an order dated 14.3.2023, directing the Court concern to decide the appeal strictly in accordance with law, without granting any unnecessarily adjournment.

6. When appeal was at final argument stage, then Devendra Pal Singh & Suraj Pal Singh who are defendant-respondent in appeal, moved transfer application no. 83 of 2023 before the District Judge, Aligarh, stating therein that on 2.3.2023, the pairokar of the appellant informed the respondent that in lower Court, the suit was dismissed, but in the appeal, the respondent cannot succeed, as the Presiding Officer is relative of the appellant and both are same caste. With the said averment, it was stated in the transfer application that the defendants/respondents have no faith in the Court concern, as such, the matter be transferred to some other Court.

7. The plaintiffs/petitioners have filed their reply to the said transfer application, stating therein that the argument in the said appeal was concluded on 23.2.2023. The transfer application has been filed with an intention to delay the proceedings and false allegations have been made in the transfer application. The District Judge, Aligarh, after considering the comments submitted by the Presiding Officer, i.e, Additional District Judge, Court No. 1, Aligarh, dismissed the transfer application by an order dated 28.3.2023 with the findings that the transfer application has been moved only just to delay the disposal of the appeal.

8. It is further stated in the petition that thereafter application Nos. 15Ga & 17Ga for adjournment of the appeal were filed on the ground that a new counsel has been appointed, but the said adjournment application was rejected by the Additional District Judge, Court No. 1, Aligarh by a detailed order, mentioning therein that the hearing of the appeal has been concluded

and the date was fixed for filing case-law. The Court below, after rejecting the aforesaid application, fixed 11.4.2023 for delivery of the judgment.

9. Thereafter when the matter was fixed for delivery of the judgment, an application under Order 22 Rule 10 read with 151 & 153 of Code of Civil Procedure was filed by one Akhilesh Pratap Singh for impleadment in the appeal as respondent, on the ground that he has purchased the said property by registered sale deed dated 27.9.2022. The aforesaid application was rejected by the Additional District Judge, Court No. 1, Aligarh, by an order dated 6.4.2023.

10. Thereafter an application under section 24 of Code of Civil Procedure was filed by Akhilesh Pratap Singh. In paragraph 3 of the aforesaid application, it was mentioned that Akhilesh Pratap Sigh has moved above mentioned application under Order 22 Rule 10 CPC, which was not accepted by the Presiding Officer, and as such, the same was filed in Computer Section, which was to be taken up at 3.00 PM, the Presiding Officer was not available in the Court and it was informed that the application will be heard on next day. In paragraph 4 of the application it was mentioned that on 7.4.2023, the applicant and his counsel has seen the appellant no. 1 coming out from the Chamber of Presiding Officer and has informed that his application will be rejected without hearing him and the case will be decided in favour of the appellant, as the Presiding Officer is of caste of the appellant and he is relative of the appellant.

11. In the said application, comments were called for by the District Judge, Aligarh. The Presiding Officer has submitted his comments on 10.04.2023, denying allegations of application and specifically mentioning therein that the application, filed on 6.4.2023 has already been rejected on 6.4.2023 itself. It was further stated in the comments that the allegations in paragraph nos. 4 & 5 of the transfer application are false. The Presiding Officer has further mentioned that in case his appeal is transferred to some other Court, he has no objection for the same.

12. The appellant petitioner has filed his objection, stating therein that:

(i) Akhilesh Pratap Singh is not party to the appeal;

(ii) Application filed by Akhilesh Pratap Singh for his impleadment has already been rejected;

(iii) Application under section 24 of Code of Civil Procedure can be moved by a person, who is party to the proceedings of the Court below;

(iv) Appeal has been expedited by order of this Court;

(v) The earlier transfer application No. 83 of 2023 filed on the same ground has been rejected by the District Judge, Aligarh by an order dated 28.3.2023.

(vi) Final argument in the appeal had been concluded and 11.4.2023 is the date fixed for delivery of the judgment;

13. The District Judge, Aligarh, by order dated 11.4.2023 without considering any of the grounds mentioned by the petitioners in his objection, allowed the transfer application only stating therein that considering the facts and circumstances of the case, the transfer application is worthy to be accepted. With this finding, the appeal has been transferred from the Court of Additional District Judge, Court No. 1,

Aligarh to the Court of Additional District Judge, Court No. 9, Aligarh. The said order dated 11.4.2023 has been challenged in the present petition.

14. On behalf of the respondent no. 1/Akhilesh Pratap Singh, a counter affidavit has been filed by Yogendra Pal, alleging himself to be the pairokar of contesting respondent no. 1. In the counter affidavit, it is stated that the order passed by the District Judge, Aligarh in transfer application no. 83 of 2023 had been challenged by Devendra Pal Singh by filing transfer application. It is further stated that the said transfer application was dismissed as infructuous, as the case has already been transferred from the court of Additional District Judge, Court No. 1, Aligarh to the court of Additional District Judge, Court No. 9, Aligarh. The said order has been passed on 1.5.2023. It is further stated in the counter affidavit that the order dated 6.4.2023 come to the knowledge of the respondent only when he received the copy of the present petition. In paragraph 16 of the counter affidavit, the ground mentioned in paragraph 4 of the transfer application has been reproduced.

15. Heard learned counsel for the parties. It is not disputed that the transfer application No. 83 of 2023 filed by Devender Pal Singh & Suraj Pal Singh had been rejected by the District Judge, Aligarh, by an order dated 28.3.2023. It is also not disputed that the applicant of transfer application No. 116 of 2023, namely, Akhilesh Pratap Singh is not a party to the civil appeal No. 63 of 2022. The application filed by Akhilesh Pratap Singh for his impleadment had been rejected by the Court concern.

16. The fact of rejection of first transfer application was clearly brought on record by the objection filed by the appellant in transfer application No. 116 of 2023. The said objection was numbered as Paper No. 10Ga and has also been referred in the impugned order. It is also not disputed that in the objection, i.e.. paper No. 10Ga, the appellant has clearly mentioned that Akhilesh Pratap Singh is not party to the proceedings before the Court below and his application for impleadment has already been rejected. With these averments it was specifically mentioned that the transfer application is not maintainable, as it has been moved by a person, who is not party to the proceedings sought to be transferred from one court to other Court. The ground of transfer mentioned in the earlier transfer application No. 83 of 2023 was also mentioned in the order dated 28.3.2023. The said order was also part of the record.

17. Presiding Officer has also clearly stated in his comments that the hearing of the appeal had been concluded and the date 11.4.2023 is fixed for delivery of the judgment. The fact of dismissal of application for impleadment was also mentioned in comments of Presiding Officer.

18. A perusal of the impugned order dated 11.4.2023 also make it clear that none of the objection raised by the petitioners has been considered by the District Judge, Aligarh. No finding on the objection of the petitioner has been recorded by the District Judge, Aligarh, while allowing the transfer application and only this much is stated that in facts and circumstances of the case, the transfer application is worthy to be accepted.

19. Shri Ashish Mishra, learned counsel for the High Court has also

submitted the instruction provided by the District Judge, Aligarh. The instruction submitted by the District Judge, Aligarh states that keeping in view the allegation made by the applicant against the officer, for the purpose of maintaining transparency and in the interest of justice, the case was transferred so that there is no possibility of any adverse effect or serious damage to the interest of any parties.

20. The learned counsel for the petitioner has relied upon a judgment, reported in **2008(1) AWC 523 :: (2008) 3 Supreme Court Cases 659, Kulvinder Kaur Vs. Kandi Friends Education Trust & others** especially paragraph 26 for the proposition that an order of transfer must reflect application of mind by the Court and the circumstances which weighed in taking the action. Paragraph 26 of the aforesaid judgment cited in (2008) 3 SCC 659 is reads as follows:-

"26. In the case on hand, the High Court without stating anything whatsoever as to allegations and counter-allegations, without considering the reply submitted by the appellant herein and without recording any reason/ground passed the impugned order transferring the case. The learned counsel for the contesting respondent no doubt submitted that the Court has not observed anything since observations by a High Court one way or the other might prejudice one of the parties to the suit. It is true that normally while making an order of transfer, the Court may not enter into merits of the matter as it may affect the final outcome of the proceedings or cause prejudice to one or the other side. At the same time, however, an order of transfer must reflect application of mind by the Court and the circumstances which weighed in taking the action."

21. The learned counsel for the petitioner has also relied upon a judgment, reported in **2015(2) AWC 1145 Amit Agarwal Vs. Atul Gupta** for the proposition that if the transfer application under Section 24 of Code of Civil Procedure has been moved on the allegations of bias of Presiding Officer, the Court must be satisfied that the apprehension of bias or prejudice is bonafide and reasonable. The expression of apprehension must be proved/substantiated by circumstances and material placed by such applicant before the Court. The relevant paragraphs 23 to 27 of the aforesaid judgment are reproduced herein below:-

"23. The allegations of bias of Presiding Officer, if made the basis for transfer of case, before exercising power under Section 24 C.P.C., the Court must be satisfied that the apprehension of bias or prejudice is bona fide and reasonable. The expression of apprehension, must be proved proved/ substantiated by circumstances and material placed by such applicant before the Court. It cannot be taken as granted that mere allegation would be sufficient to justify transfer. In Smt. Sudha Sharma (supra) the Court observed that it is the duty of learned counsel to draft the application and made allegations with utmost care and caution. Hon'ble B.M. Lal, J. (as His Lordship then was), said:

"9. .....a foremost duty casts upon the counsel concerned while drafting and making allegations in the transfer petition against the Judge concerned with utmost

care and caution, particularly in making wild allegations against the Presiding Judge. But, it appears that now-a-days it has become common feature to make allegations against the Court Presiding Judge. The counsel should realise that they are also officers of the Court. Introducing fanciful and imaginary allegations as grounds for transfer and harbouring apprehension such grounds that fair and impartial justice would not be done should always be deprecated.

10. Nonetheless, it is also important for all those who are engaged in the task of administering justice to remember that it is incumbent on them to create and maintain such confidence and atmosphere by giving every litigant an assurance by their judicial conduct that fair and impartial justice will be imparted. It is necessary to create such a confidence in the mind of the litigants so that their faith may not be shaken in Courts of law."

24. Mere suspicion by the party that he will not get justice would not justify transfer. There must be a reasonable apprehension to that effect. A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case. Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another. It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise. (Rajkot Cancer Society vs. Municipal Corporation, Rajkot, AIR 1988 Gujarat 63; Pasupala Fakruddin and Anr. vs. Jamia Masque and Anr., AIR 2003 AP 448; and, Nandini Chatterjee vs. Arup Hari Chatterjee, AIR 2001 Calcutta 26)

25. Where a transfer is sought making allegations regarding integrity or influence etc. in respect of the Presiding Officer of the Court, this Court has to be very careful before passing any order of transfer.

26. In the matters where reckless false allegations are attempted to be made to seek some favourable order, either in a transfer application, or otherwise, the approach of Court must be strict and cautious to find out whether the allegations are bona fide, and, if treated to be true on their face, in the entirety of circumstances, can be believed to be correct, by any person of ordinary prudence in those circumstances. If the allegations are apparently false, strict approach is the call of the day so as to maintain not only discipline in the courts of law but also to protect judicial officers and maintain their self esteem, confidence and above all the majesty of institution of justice.

27. The justice delivery system knows no caste, religion, creed, colour etc. It is a system following principle of black and white, i.e., truth and false. Whatever is unfair, that is identified and given its due treatment and whatever is good is retained. Whoever suffers injustice is attempted to be given justice and that is called dispensation of justice. The prevailing system of dispensation of justice in Country, presently, has different tiers. At the ground level, the Courts are commonly known as "Subordinate Judiciary" and they form basis of administration of justice. Sometimes it is said that subordinate judiciary forms very backbone of administration of justice. Though there are various other kinds of adjudicatory forums, like, Nyaya Panchayats, Village Courts and then various kinds of Tribunals etc. but firstly they are not considered to be the regular Courts for adjudication of disputes,

and, secondly the kind and degree of faith, people have, in regular established Courts, is yet to be developed in other forums. In common parlance, the regular Courts, known for appropriate adjudication of disputes basically constitute subordinate judiciary, namely, the District Court; the High Courts and the Apex Court."

22. Section 24 of Code of Civil Procedure reads as under:-

"Section 24. General power of transfer and withdrawal.

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section,

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it. "

23. Perusing the records it is clear that the District Judge, Aligarh, while passing the order dated 11.4.2023 has not at all applied his mind and has not recorded any finding on the objection made by the petitioners regarding maintainability of the application under section 24 of the Code of Civil Procedure. Section 24 of C.P.C. provides that the application for transfer may be filed by a party to the proceedings. The applicant of transfer application no. 116 of 2023 was not party to the proceedings, i.e. civil appeal no. 63 of 2022, as such his application was not maintainable. The District Judge, Aligarh has recorded only a conclusion that in facts and circumstances, the application is worthy to be accepted. This clearly shows that while passing the order dated 11.4.2023, the District Judge has not at all applied his mind, and in a mechanical way, the order dated 11.4.2023 has been passed. When the same District Judge on the same allegation has rejected the earlier transfer application no. 83 of 2023, this Court finds that there was no reason with the District Judge to disagree with his own earlier order dated 28.3.2023 especially when no fresh

material was brought on record before the District Judge, Aligarh which may justify the passing of the order dated 11.4.2023. Thus, the order dated 11.4.2023 passed by the District Judge, Aligarh in transfer application being contrary to law, is set aside. Transfer Application No. 116 of 2023 filed by the respondent no.1, namely Akhilesh Pratap Singh is rejected. The present petition is **allowed**.

24. No order as to cost.

(2023) 6 ILRA 298
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 4925 of 2023

Heera Lal Chhabra ...Petitioner
Versus
Nawal Kishore Agarwal ...Respondent

Counsel for the Petitioner:
Sri Ashish Agrawal

Counsel for the Respondent:
Sri Shikhar Tripathi, Sri Shrey Sharma

(A) Constitution of India - Article 227 - The Code of Civil Procedure, 1908 - Order XVII Rule 1 - Court may grant time and adjourn hearing , Order XVII Rule 2 - engagement of pleader of party in another Court would not be ground for adjournment - No litigant has a right to abuse the procedure provided in the CPC. (Para - 6,7,12)

(B) Words and Phrases - The Code of Civil Procedure, 1908 - proviso to Order XVII Rule 1 CPC - *`justifiable cause'* - a cause which is not only *`sufficient cause'* as contemplated in sub-rule (1) of Order XVII CPC - but a cause which makes the request for adjournment by a party during the hearing of the suit - beyond three adjournments unavoidable and sort of a compelling necessity - like sudden illness of the litigant or the witness or the lawyer - death in the family of any one of them - natural calamity like floods, earthquake, etc. in the area where any of these persons reside - an accident involving the litigant or the witness or the lawyer on way to the court and such like cause. (Para -12)

Plaintiff-respondent filed SCC Suit – date fixed – defendant counsel was busy in some other court , unable to appear - Court passed ex-parte order -- filed recall application - rejected - Petitioner-defendant preferred SCC Revision – dismissed - approximately 22 adjournments sought by defendant-petitioner . **(Para - 1,9,11)**

HELD:-Adjournment to be granted on bonafide reasons and unavoidable circumstances for limited occasion not for many occasion . Absence of counsel or his engagement in other Court cannot be ground for adjournment coupled with fact that several adjournments were earlier sought. No interference in impugned orders. **(Para - 15,16)**

Petition dismissed. (E-7)

List of Cases cited:

1. The Secy., Dept. of Horticulture, Chandigarh & Anr. Vs Raghu Raj , JT 2008 (11) SC 397

2. Gayathri Vs M. Girish , 2016 0 SC 587

3. Shiv Cotex Vs Tirgum Autoplast Ltd. , 2011 (9) SCC 678

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Ashish Agrawal, learned counsel for the petitioner and Sri Shrey Sharma, learned counsel for the respondent.

2. Learned counsel for the petitioner submitted that earlier plaintiff-respondent

has filed SCC Suit No. 48 of 2014 in which date of 5.3.2022 has been fixed, but learned counsel for the defendant was busy in some other Court, therefore, he could not appear before the Court. On the very same day, Court has passed order to proceed ex-parte. Against that he has filed recall application on 22.3.2022, which was rejected vide order dated 28.7.2022. Against the said order, petitioner-defendant has preferred SCC Revision No. 101 of 2022, which was also dismissed vide order dated 12.4.2022.

3. Learned counsel for the petitioner further submitted that cause of non appearance of leaned counsel for the defendant is genuine as he is arguing before the another Court. Further, in paragraph 39 of the petition, he undertakes that he would appear each and every date before the concerned Court without taking adjournment, therefore, order may be quashed and opportunity may also be given to accept the evidence of defence. He lastly submitted that Hon'ble Apex Court has discussed this aspect in the case of The ***Secretary, Department of Horticulture, Chandigarh and Anr. Vs. Raghu Raj reported in JT 2008 (11) SC 397*** and held that even if there is default on the part of advocate in not appearing at the time of hearing, defendant-petitioner shall not suffer injustice.

4. Sri Shrey Sharma, learned counsel for the plaintiff-respondent has vehemently opposed the submission and submitted that now the hearing is concluded and tomorrow is the date fixed for pronouncement of judgment. He further submitted that defendant-petitioner is habitual to abstain from hearing of the matter. First time Court vide order dated 28.4.2015 has proceeded to decide ex-parte against the defendant. The said order was recalled vide order dated 19.5.2015. He further submitted that again case was listed on 8.1.2018, but defendant had filed adjournment application, which was accepted by the trial Court with costs of Rs. 250/-. Thereafter, case was listed on 18.1.2018 and witnesses of both the parties are present, but counsel for the defendant is not present for cross examination and accordingly, opportunity of cross examination of P.W.-1 has been closed. The said order was recalled vide order dated 21.2.2019. Case was again listed on 16.9.2019, Court has fixed the date 1.10.2019 for cross examination of P.W.-1. On the next date date i.e. 19.10.2019, P.W.-1 alongwith counsel for the plaintiff was present, but no one has appeared on behalf of the defendant and again cross examination of P.W.-1 has been closed. Further, on 14.11.2019, 10.1.2022 & 5.3.2022, learned counsel for the defendant was not present. He lastly submitted that suit was filed in the year 2014 and till 2022, approximately 22 adjournments have been sought by the defendant-petitioner. In support of his contention, he has placed reliance upon the judgement of Apex Court in the cases of ***Gayathri vs. M. Girish reported in 2016 0 SC 587 & Shiv Cotex vs. Tirgum Autoplast Ltd. reported in 2011 (9) SCC 678.***

5. I have considered the rival submission of learned counsel for the parties and perused the record, order sheets, impugned order and Order XVII Rule 1 of CPC. From perusal of the order sheet, facts so argued by the learned counsel for the respondent is absolutely correct. Undisputedly, defendant-petitioner sought adjournment after adjournment in so many occasions and trial Court has granted several opportunity, but even after defendant has misused the process of law

either by seeking adjournment or being absent from the hearing of the matter.

6. Order XVII Rule 1 of CPC deals with adjournment, which is quoted hereinbelow:-

*"**Court may grant time and adjourn hearing.-** (1) The court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the Suit for reasons to be recorded in writing:*

Provided that no such adjournment shall be granted more than three times to a party during hearing of the suit.

*(2) **Costs of adjournment** - in every such case the court shall fix a day for the further hearing of the suit, and shall make such orders as to costs occasioned by the adjournment or such higher costs as the court deems fits:*

Provided that,?

(a) when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary,

(b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party,

(C) the fact that the pleader of a party is engaged in another court, shall not be a ground for adjournment,

(d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another court, is put forward as a ground for adjournment, the court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time,

(e) where a witness is present in court but a party or his pleader is not present or the party or his pleader, though present in court, is not ready to examine or cross-examine the witness, the court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination in chief or cross-examination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid.

HIGH COURT AMENDMENTS

Allahabad.- Add the following further proviso:

'Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to Order -XVI, Rule 1." (24.7.1926)."

7. From perusal of the same, it is very much clear that only three adjournments shall be granted to a party during the hearing of the suit and Order XVII Rule 2 further provides that engagement of pleader of party in another Court would not be ground for adjournment and here the case is entirely different it is case of 22 adjournments have been sought and even present petition has been filed for quashing of the order on the ground that counsel for petitioner-defendant was busy in other Court due to which, he could not appear, which is in teeth of provision of Order XVII of Rule 1 & 2 CPC.

8. I have perused the judgment of ***The Secretary, Department of Horticulture, Chandigarh (Supra)*** relied by the learned

counsel for the petitioner. Relevant paragraph of the said judgment is quoted hereinbelow:-

"34. From the case law referred to above, it is clear that this Court has always insisted advocates to appear and argue the case as and when it is called out for hearing. Failure to do so would be unfair to the client and discourteous to the Court and must be severely discountenanced. At the same time, the Court has also emphasized doing justice to the cause wherein it is appropriate that both the parties are present before the Court and they are heard. It has been noted by the Court that once a party engages a counsel, he thinks that his advocate will appear when the case will be taken up for hearing and the Court calls upon the counsel to make submissions. It is keeping in view these principles that the Court does not proceed to hear the matter in absence of the counsel.

40. On the facts and in the circumstances in their totality, in our opinion, even though the learned counsel for the appellant was not present, it would have been appropriate, had the High Court granted an opportunity to the learned counsel for the appellant to make his submissions by adjourning the matter."

9. From perusal of the judgment of above paragraph, it is clear that even in case of default on the part of lawyer, opportunity has to be granted to the parties, but here the case is different. Not only one, but 22 adjournments had been sought either by defendant or his counsel. Therefore, as per spirit of the judgment, in case counsel of any party is absent on any occasion and opportunity has to be provided, but here this judgment would not rescue the case of petitioner-defendant considering his habitual default on different dates.

10. I have also perused the judgment of Apex Court in the case of ***Gayathri (supra)*** relied by the learned counsel for the respondent. Relevant paragraph of the said judgment is herebelow:-

"10. In the case at hand, as we have stated hereinbefore, the examination-in-chief continued for long and the matter was adjourned seven times. The defendant sought adjournment after adjournment for cross-examination on some pretext or the other which are really not entertainable in law. But the trial court eventually granted permission subject to payment of costs. Regardless of the allowance extended, the defendant stood embedded on his adamantine platform and prayed for adjournment as if it was his right to seek adjournment on any ground whatsoever and on any circumstance. The non-concern of the petitioner-defendant shown towards the proceedings of the court is absolutely manifest. The disregard shown to the plaintiff's age is also visible from the marathon of interlocutory applications filed. A counsel appearing for a litigant has to have institutional responsibility. The Code of Civil Procedure so command. Applications are not to be filed on the grounds which we have referred to hereinabove and that too in such a brazen and obtrusive manner. It is wholly reprehensible. The law does not countenance it and, if we permit ourselves to say so, the professional ethics decries such practice. It is because such acts are against the majesty of law."

11. In the judgment referred in above, in case of adjournment on seven times,

Court has depreciated the conduct of counsel and not inclined to grant any relief. In the present case, approximately 22 adjournments have been sought by the defendant-petitioner, therefore, such acts are wholly reprehensible and against the majesty of law. Petitioner is not entitled for any sympathy from the Court.

12. This issue was again before the Apex Court in the case of ***Shiv Cotex (Supra)*** and while considering the issue of adjournment, Court has also considered the absence of counsel. Relevant paragraph of the said judgment is quoted hereinbelow:-

"It is sad, but true, that the litigants seek - and the courts grant - adjournments at the drop of the hat. In the cases where the judges are little pro-active and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realize that adjournments do dent the efficacy of judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit."

16. No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained. When we say `justifiable cause' what we mean to say is, a cause which is not only `sufficient cause' as contemplated in sub-rule (1) of Order XVII CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause.

The list is only illustrative and not exhaustive. However, the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit - whether plaintiff or defendant - must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been

fixed. If they don't, they do so at their own peril. Insofar as present case is concerned, if the stakes were high, the plaintiff ought to have been more serious and vigilant in prosecuting the suit and producing its evidence. If despite three opportunities, no evidence was let in by the plaintiff, in our view, it deserved no sympathy in second appeal in exercise of power under Section 100 CPC. We find no justification at all for the High Court in upsetting the concurrent judgment of the courts below. The High Court was clearly in error in giving the plaintiff an opportunity to produce evidence when no justification for that course existed."

13. In this matter, Apex Court has highly depreciated the tendency of grant of adjounrment and also taken firm view that change of lawyer, continuance of illness of lawyer or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. In the present case, number of adjournments are 22, therefore, present dispute is squarely covered with the ratio of law laid down by the Apex Court and petitioner is not entitled for any relief.

14. From perusal of the judgments cited hereinavove as well as Order XVII Rule 1 & 2 of CPC, it is apparently clear that intention of legislation is to complete the hearing of the suit at the earliest for which number of adjournments have been confined to three times only and further rigorous conditions have been imposed for grant of adjournment, which also negates engagement of counsel in another Court.

15. In light of interpretation made by the Apex Court, this Court is also of the view that adjournment has to be granted on bonafide reasons and unavoidable circumstances for limited occasion not for many occasion as the case is hear and further absence of counsel or his engagement in other Court cannot be ground for adjournment coupled with this fact that several adjournments were earlier sought.

16. In view of facts and circumstances of the case as well as law discussed hereinabove, no case is made out for interference in the impugned orders. The petition lacks merit and is, accordingly, **dismissed**. No order as to costs.

(2023) 6 ILRA 303
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 5213 of 2023

Sri Firoz Uddin & Ors. ...Petitioners
Versus
Sri Anwar Uddin ...Respondent

Counsel for the Petitioners:
Sri Jata Shanker Pandey

Counsel for the Respondent:
Sri Ravi Shanker Pathak

(A) Constitution of India - Article 227 - The Code of Civil Procedure, 1908 - Order VI Rule 17 - Amendment of pleadings - courts should be liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side or on the ground that the prayer for amendment was not a bonafide one - Change of counsel cannot be a ground for filing amendment.(Para - 12, 20)

(B) Word of phrases - "due diligence" - determines the scope of a party's

constructive knowledge, claim and is very critical to the outcome of the suit - due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested - a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial - 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. (Para - 14 to 19)

Amendment application filed after commencement of trial - received affidavits of plaintiff and defendants - petitioners filed application under Order VI Rule 17 CPC - to bring new facts on record - due to a change of counsel - amendment application filed for adding additional facts – as later pointed out by new counsel engaged - due diligence made in bringing facts on record not disputed.**(Para - 11)**

HELD:-Amendment application lacks information, except for the engagement of new counsel, and due diligence conditions cannot be satisfied. Despite sincere efforts, they couldn't find the fact to be amended in a written statement. No interference required in impugned order.**(Para - 20)**

Petition dismissed. (E-7)

List of Cases cited:

1. Usha Balashaheb Swami & ors. Vs Kiran Appaso Swami & ors. , 2007 (3) Supreme (SC) 582

2. Hari Shanker & ors. Vs Bhagwati Prasad Mishra , 2014 0 Supreme (All) 3127

3. Sagwa Singh Tyagi Vs The A.D.J. & ors. , 2014 0 Supreme (All) 3433

4. Hari Narayan Vs Shanti Devi , 2019 SCC OnLine All 2380

5. Ramesh Duggal @ Pappu Vs Pt. Ram Shanker Mishra Trust Chief Office, Article 227 No. 2658 of 2023

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the petitioners and Sri Ravi Shanker Pathak, learned counsel for the respondent.

2. Present petition has been filed with following prayer;

"It is, therefore, Most Respectfully prayed that this Hon'ble Court may kindly be pleased to stay the effect and operation of the impugned order dated 11.04.2023 passed by Prescribed Authority/ JSCC Agra in P.A. Case No. 42 of 2015, Anwar Uddin and Firoz Uddin (since deceased) and others."

3. 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.

4. Learned counsel for the petitioners submitted that P.A. Case No. 42 of 2015 was filed by plaintiff- respondent. As petitioners- defendants had not appeared and trial Court vide order dated 04.01.2017 proceeded ex parte, upon which recall a application was filed, which was rejected vide order dated 03.07.2018. Both orders were challenged before this Court by filing Matters Under Article 227 No. 5779 of 2018, which was disposed of vide order dated 19.12.2022 with direction to the petitioner to deposit the cost of Rs. 1500/- on or before the 10th of January, 2023 and further held that his written statement, which is already on record, will be taken into consideration and he would also file his affidavit of evidence by 10th of January, 2023. He next submitted that in compliance of order dated 19.12.2022, petitioners have deposited Rs. 1500/- on

06.01.2023 and the written statement was also taken on record.

5. He further submitted that after receiving the affidavit of applicant, petitioners have filed application under Order VI Rule 17 CPC for amendment of written statement, which was rejected on the ground that said amendment is already part of written statement and secondly, petitioners- defendants have not given any proper reason as to why the said facts are not incorporated in written statement filed earlier. Petitioners have taken specific ground in their application under Order VI Rule 17 CPC that earlier written statement was filed by Sri R.P. Singh Dhakare, Advocate and after engaging new Advocate, Sri Rajat Kumar Saraswat, petitioners have properly gone through the paper book and suggested for amendment. Therefore, under such facts of the case, it is required on the part of trial Court to allow the amendment.

6. He next submitted that while dealing with amendment in written statement, Court should have been more liberal. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matter of ***Usha Balashaheb Swami & others Vs. Kiran Appaso Swami & others; 2007 (3) Supreme (SC) 582.***

7. Per contra, Sri Ravi Shanker Pathak, learned counsel for the respondent has vehemently opposed the submissions raised by learned counsel for the petitioners and submitted that there is no dispute on the point that while dealing with amendment application in written statement, Court should have been more liberal, but he firmly submitted that while filing application after commencement of trial, it is mandatory requirement to show the efforts so made by the petitioners-defendants and prove that even after due diligence, they were not having knowledge of those facts. Mere change of counsel cannot be a ground to allow the amendment application at a very belated stage and in the present case, even after submission of affidavit of witness by the opposite party filing of amendment application is nothing but dilatory tactics adopted by the petitioners-defendants. In support of his contention, he has placed reliance upon the judgments of this Court in ***Hari Shanker and 5 others Vs. Bhagwati Prasad Mishra; 2014 0 Supreme (All) 3127***, decided on 31.10.2014, ***Sagwa Singh Tyagi Vs. The Additional District Judge and 6 others; 2014 0 Supreme (All) 3433,*** decided on 11.11.2014, ***Hari Narayan v. Shanti Devi; 2019 SCC OnLine All 2380,*** decided on 28.05.2019, and ***Matter Under Article 227 No. 2658 of 2023 (Ramesh Duggal Alias Pappu Vs. Pt. Ram Shanker Mishra Trust Chief Office),*** decided on 05.05.2023.

8. I have considered the rival submissions raised by learned counsel for the parties and perused the records, provision of Order VI Rule 17 CPC as well as judgments relied upon.

9. Issue before this Court is as to whether while deciding the amendment application for **written statement**, issue of due diligence has to be taken care of or not ?

10. Present issue is arising out of order VI Rule 17 CPC, therefore, the same is being quoted below;

"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."

11. Facts of the case are not disputed that amendment application was filed after commencement of trial, receiving the affidavits of plaintiff and submission of affidavits of defendants also. In the amendment application, the only ground taken is that due to change of counsel, petitioners want to bring new facts on record and for that reason, they have filed application under Order VI Rule 17 CPC for amendment. Except this, there is no reason about the due diligence so made by them for bringing the facts on record. The amendment application was filed for adding additional facts as later on pointed out by the new counsel so engaged.

12. I have perused the judgment of Apex Court in the matter of ***Usha Balashaheb Swami (supra)***. Relevant paragraphs of the said judgment are quoted below;

"19. It is now well-settled by various decisions of this Court as well as those by High Courts that the courts should be liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side or on the ground that the prayer for amendment was not a bonafide one. In this connection, the observation of the Privy Council in the case of Ma Shwe Mya v. Maung Mo Hnaung [AIR 1922 P.C. 249] may be taken note of. The Privy Council observed:

"All rules of courts are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject-matter of the suit. (Underlining is ours)"

20. It is equally well settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

21. Such being the settled law, we must hold that in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case [see B.K. Nrayana Pillai v. Parameswaran Pillai (2000(1) SCC 712) and Baldev Singh & Ors v. Manohar Singh (2006 (6) SCC 498)]. Even the decision relied on by the plaintiff in Modi Spinning

(supra) clearly recognises that inconsistent pleas can be taken in the pleadings. In this context, we may also refer to the decision of this Court in Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudhary (Dead) [1995 Supp (3) SCC 179]. In that case, the defendant had initially taken up the stand that he was a joint tenant along with others. Subsequently, he submitted that he was a licensee for monetary consideration who was deemed to be a tenant as per the provisions of Section 15A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. This Court held that the defendant could have validly taken such an inconsistent defence. While allowing the amendment of the written statement, this Court observed in Basavan Jaggu Dhobi's case (supra) as follows :-

"As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his statement under Order 6 Rule 17 CPC by taking a contrary stand than was stated originally in the written statement. This is opposed to the settled law open to a defendant to take even contrary stands or contradictory stands, the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action."

22. As we have already noted herein earlier that in allowing the amendment of the written statement a liberal approach is a general view when admittedly in the event of allowing the amendment the other party can be compensated in money. Technicality of law should not be permitted to hamper the Courts in the administration of justice between the parties. In the case of L.J. Leach and Co. Ltd. v. Jardine Skinner and Co. [AIR 1957 SC 357], this Court observed "that the Courts are more generous in allowing amendment of the written statement as the question of prejudice is less likely to operate in that event". In that case this Court also held "that the defendant has right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to serious injustice."

23. Keeping these principles in mind, namely, that in a case of amendment of a written statement the Courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed, we may now proceed to consider whether the High Court was justified in rejecting the application for amendment of the written statement.

.....

32. For the reasons aforesaid, the appeal is allowed and the order of the High Court rejecting the prayer for amendment of the written statement is set aside. The application for amendment of the written statement thus stands allowed. The trial court is now directed to dispose of the suit at the earliest possible time preferably within six months from the date of communication of this order without granting any unnecessary adjournment to either of the parties."

13. From the perusal of aforesaid judgment, there is no doubt that Court is of the firm view that while deciding the amendment application for amendment in written statement, Court must take some liberal view. Even in case of inconsistent view or alternative plea, the same should have been allowed, but in the said judgment, at no point of time, there is any

opinion of the Court that proviso of due diligence shall not be taken into consideration while deciding the application under Order VI Rule 17 CPC for amendment in written statement. In present case, there is no explanation about the due diligence except the change of counsel.

14. I have also perused the judgment passed in ***Hari Shanker (Supra),*** in which, Court has considered about the concept of 'due diligence'. Relevant paragraphs of the said judgment are quoted below:-

"9. Supreme Court in Modi Spinning & Weaving Mills Company Ltd. Vs. Ladha Ram, AIR 1977 SC 680, held that the defendants cannot be allowed to change completely the case made in paras 25 and 26 of the written statement and substitute an entirely different and new case. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. Same view has been taken in Heera Lal Vs. Kalyan Mal, (1998) 1 SCC 278, Gautam Swarup Vs. Leela Jetly, (2008) 7 SCC 85, Sumesh Singh Vs. Phoolan Devi, (2009) 12 SCC 689 and Vishwanath Agrawal Vs. Savitri Bera, (2009) 15 SCC 693.

In B.K. Narayana Pillai v. Parameswaran Pillai, (2000) 1 SCC 712, Supreme Court held that the principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as the question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates (sic results) in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.

Thus in view of the authoritative pronouncements of Supreme Court, the case law relied upon by the counsel for the petitioners cannot be followed.

11. Now the next question arises as to whether the proposed amendment can be allowed in view of Proviso to Order VI Rule 17 C.P.C. The defendant alleged that the fact relating to the proposed

amendment was noticed at the time of preparation of the appeal for final arguments on 03.08.2014.

12. Supreme Court in Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344, held that Order VI Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being 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. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.

13. The phrase "due diligence" came for consideration before Supreme Court in Chander Kanta Bansal v. Rajinder Singh Anand, AIR 2008 SC 2234, in which it has been held that the words "due diligence" have not been defined in the Code. According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

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" 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 castes a rider on the power of the Court in allowing amendment application. "

15. This issue was again considered by this Court in ***Sagwa Singh Tyagi (Supra).*** Relevant paragraphs of the said judgment are quoted below:-

"13. In J. Samuel and others v. Gattu Mahesh and others: (2012) 2 SCC 300, the Court observed that, on a proper interpretation of proviso to Rule 17, Order 6 CPC, the party has to satisfy the Court that he could not discover that ground which was pleaded by proposed amendment of the plaint, despite due diligence. No doubt, Rule 17 confers power on the Court to amend pleading at any stage of the proceedings. However, the proviso restricts that power, once the trial has commenced. Unless the Court is satisfied that there is a reasonable cause for allowing amendment, normally the Court has to reject such requests. Due diligence is the idea behind such restriction, that is, a reasonable investigation is necessary before certain kinds of relief are requested. Undoubtedly, diligent efforts are a requirement for a party seeking to use adjudicatory mechanism to attain an undisputed relief. An advocate representing someone has to engage himself in due diligence to determine that the representations made by him are factually correct and sufficient. The term due diligence is specifically used in the Court so as to provide a test for determining whether to exercise a distinction in a situation of requested amendment after the commencement of trial. A party requesting a relief stemming out of a claim is required to exercise due diligence. It is a requirement which cannot be dispensed with. The term 'due diligence' determines the scope of parties' constructive knowledge, and is critical to the outcome of the suit. The Court also observed that decisions given before insertion of proviso to Order 6, Rule 17 CPC may not help the parties to decide cases after such amendment has been inserted in CPC. The entire object of amendment to Order 6, Rule 17 , as introduced in the year 2002, is to stifle filing of application for amendment of a pleading, subsequent to the commencement of trial court, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking delays in filing applications. The Court in making the aforesaid observation relied on its earlier decisions in Aniglase Yohannan v. Ramlatha and others: (2005) 7 SCC 534; Chander Kanta Bansal v. Rajinder Singh Anand: (2008) 5 SCC 117; Rajkumar Gurawara (Dead) through LRs v. S.K. Sarwagi and Company Private Limited and another: (2008) 14 SCC 364; Vidyabai and others v. Padmalatha and another: (2009) 2 SCC 409; and Man Kaur (Dead) by LRs v. Hartar Singh Sangha, (2010) 10 SCC 512.

14. The view, I have taken above, has also been reiterated by this Court in Suraj Prakash v. Waqf Khudaband Tala Mausooma, 2012(11) ADJ 524 and Civil Misc. Writ Petition No. 61790 of 2012 (Shanti Swaroop v. Smt. Rama Sharma) decided on 29.11.2012.

15. In the present case, the amendment has been sought after the trial has commenced, without satisfying the Court as to why assertion of such facts could not be made with due diligence before commencement of trial when initial pleadings were filed before trial court. On this aspect virtually there is no averment. It cannot be said that there is a proper justification stated to do away the rider imposed by proviso to Order 6, Rule 17 CPC. Therefore, I have no hesitation in holding that the courts below have rightly rejected amendment sought by the petitioner. No legal or otherwise error can be said to have been committed by Court below so as to justify interference by this Court under Article 226 of the Constitution."

16. This issue was also subject matter of this Court in **Hari Narayan (Supra).** Relevant paragraphs are quoted below:-

"3. Contention of the learned counsel for the revisionist is that under Order VI Rule 17 the court may at any stage of proceedings allow the amendment of pleadings so as to determine the real question in controversy between the parties, and the trial court has rejected the amendment application without recording any finding to arrive at a conclusion that in spite of due diligence the defendant could not have sought the amendment before the commencement of the trial.

7. The proviso to Rule 17 under Order VI, as inserted by the Code of Civil Procedure (Amendment) Act, 2002, however, restricts and curtails the power of the court to allow amendment of pleadings by enacting that no application for amendment is to 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 the trial.

8. The proviso to Rule 17, as per the Amendment Act, 2002, has introduced the "due diligence" test, which requires that the court must be satisfied that in spite of "due diligence" the party could not discover the ground pleaded in the amendment. The term "due diligence" has been specifically used so as to provide a test for determining whether to exercise the discretion in situations where amendment is being sought after commencement of the trial.

9. The provisions contained under Order VI Rule 17 proviso as introduced in the year 2002 came up for consideration in the case of J. Samuel Vs. Gattu Mahesh & Ors.2 wherein the principles relating to allowing amendments under Order VI Rule 17 were reiterated and the object of the proviso and the meaning and significance of "due diligence" of the parties seeking amendment has also been stated. The observations made in the judgment in this regard as follows:-

"18. The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to balance the interests of the parties in pursuit of doing

justice, the proviso has been added which clearly states 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."

19. 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.

20. 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.

x x x x x

23. ...The entire object of the amendment to Order VI Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. [Vide Aniglase Yohannan v. Ramlatha [(2005) 7 SCC 534], Ajendraprasadji N. Pandey v. Swami Keshavprakeshdasji N. [(2006) 12 SCC 1], Chander Kanta Bansal v. Rajinder Singh Anand [(2008) 5 SCC 117], Rajkumar Gurawara v. S.K. Sarwagi and Co. (P) Ltd. [(2008) 14 SCC 364], Vidyabai v. Padmalatha [(2009) 2 SCC 409 : (2009) 1 SCC (Civ) 563] and Man Kaur v. Hartar Singh Sangha [(2010) 10 SCC 512 : (2010) 4 SCC (Civ) 239]."

10. Reference may also be had to the judgment in the case of Revajeetu Builders and Developers Vs. Narayanaswami and Sons & Ors.1 wherein some of the important factors which may be kept in mind while dealing with an application filed under Order VI Rule 17 have been enumerated in the following terms:-

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order

6 Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments."

11. In a recent judgment in the case of M. Ravanna Vs. Anjanamma3, it has been held that after commencement of trial amendment of pleadings is not permissible except under conditions stated in the proviso and the burden is on the person seeking the amendment after commencement of trial to show "due diligence" on his part as contemplated under the proviso. The relevant observations in the judgment are as follows:-

"7. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order 6 Rule 17 CPC virtually prevents an application for amendment of pleadings from being 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 the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money."

12. In the case at hand, the court below upon due consideration of the facts of the case has come to the conclusion that the amendment which was being sought was not imperative for determining the real question in controversy between the parties, and also that the same was barred by the proviso to Order VI Rule 17 CPC which curtails the discretion to allow amendment of pleadings after the trial has commenced, and introduces the "due diligence" test in terms whereof the burden is on the person seeking the amendment after commencement of trial to show that in spite of "due diligence" such an amendment could not have been sought earlier, and as such the order passed by the trial court cannot be faulted with. ”

17. This matter was again considered by this Court in the case of ***Ramesh Duggal Alias Pappu (supra)***. Relevant paragraph is quoted below;

“16. From the perusal of Order VI Rule 17 of CPC, it is clear that amendment application may be allowed before commencement of trial, but in case, Court is of the view that in spite of due diligence, party could not have raised the matter before the commencement of trial, application may be allowed. In the present case, it is required on the part of Court to see about the due diligence made by petitioner-defendant to file amendment application based upon date of knowledge

of trust deed and also the effect of amendment upon the judgment and decree of suit, if allowed.

.....

.....

20. This case is not a case of delay as the trust deed was well in existence from the date of filing of written statement and as per admission of petitioner-defendant also, it is in his knowledge from 07.12.2017, but amendment application has not been filed. In fact, it is a case where the conditions of due diligence provided under Order VI Rule 17 of CPC has not been fulfilled and without any justification, amendment application has been filed at revisional stage after final judgment and order dated 08.07.2022 passed in suit. Therefore, judgments so relied upon by learned counsel for petitioner-defendant shall not come in the rescue of petitioner-defendant as it is case of negligence and not of bona fide delay."

.....

.....

"23. The controversy involved in the present case is squarely covered with judgements of Hari Shanker (Supra) and Hari Narayan (Supra). Therefore, considering all facts and circumstances of the case, this Court is of the view that due diligence is a very important factor while allowing amendment application under Order VI Rule 17 of CPC and applicant has to prove that he has made all possible efforts, but even after that, he could not know about the documents or facts which are most relevant to decide the controversy. In case documents or facts are available or within the knowledge of petitioner, at any stage, if any application is filed, same cannot be allowed as it would not fulfil the para meter of due diligence as provided in Order VI Rule 17 of CPC."

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.

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.

21. Accordingly, petition lacks merit and is **dismissed**. No order as to costs.

(2023) 6 ILRA 315
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2022

BEFORE

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

In Re. Civil Misc. Recall Application No. 2 of 2022
In
Matters Under Article 227 No. 7723 of 2021

Smt. Urmila Devi Varshney ...Petitioner
Versus
Garima Varshney & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rakesh Kumar Singh, Sri Krishnaji Khare

Counsel for the Respondent:
Sri Utkarsh Birla

(A) Constitution of India - Article 227 - The Code of Civil Procedure, 1908 - Order VII Rule II (b) & (c) ,The Court Fees Act, 1870 - Sections 6A (2), 7(iv-A) ,17(iii) of Schedule II , Section 6A(1) - Appeal against order to pay court fee - Any person called upon to make good a deficiency in court fee may appeal against such order as if it were an order appealable under Section 104 of the Code of Civil Procedure.(Para -10)

Recall of final order - issues of undervaluation and proper court fee payable - petition seeking to expedite hearing of temporary injunction matter - plea to postpone determination of the temporary injunction application - until issue of undervaluation and proper court fee payable are decided. **(Para -11, 13)**

HELD:- Remedy of appeal available against decisions on the issues of proper court fee payable under Section 6A of the Act of 1870.**(Para -13)**

Recall application rejected. (E-7)

List of Cases cited:

1. Arun Kumar Tiwari Vs Smt. Deepa Sharma & ors. , 2006 SCC Online All 1979

2. Ajay Tiwari Vs Hriday Ram Tiwari & ors. , 2006 SCC Online All 701

3. Pratap Narayan & anr. Vs Sudhir Kumar Sinha & ors., 2017 SCC Online All 3212

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

1. This recall application has been made on behalf of Smt. Garima Varshney, respondent no. 1 in Matters under Article 227 No. 7723 of 2021, seeking recall of my final order dated 21.01.2022. By the said order, I had directed the Civil Judge (Junior Division), Kasganj to decide the pending temporary injunction application in Original Suit No. 92 of 2021, Urmila Devi Varshney v. Garima Varshney and others, positively on the next date fixed, after hearing all parties to the suit. It was further ordered that in the event, for some reason, the temporary injunction application cannot be decided on the next date fixed, it shall be disposed of within fifteen days next.

2. Since the said order was passed without issuing notice to the private respondents, which was a course of action adopted because no rights by this Court inter partes were decided, it was thought

wise to leave it open to the private respondents, who might feel aggrieved by the said order, to make an application in the decided petition.

3. Now, taking benefit of the opportunity granted, the respondent no. 1 to the petition under Article 227 of the Constitution, has made this application, asking for recall of the order dated 21.01.2022. The applicant seeks recall of the order primarily on the ground that the petitioner, who is a defendant to the suit, has, amongst other pleas, raised an objection about the suit to be grossly undervalued and the court fee paid insufficient. The Trial Court, however, without noticing the said plea at the preliminary stage, has proceeded with the suit and not yet framed an issue with regard to undervaluation or deficient court fee. A copy of the written statement filed in the suit on behalf of the applicant has been annexed to the recall application as Annexure No. 3.

4. It is the applicant's case that she moved an application bearing Paper No. 60 C2, dated 23.02.2022, with a prayer that prior to hearing and orders on the temporary injunction application, the Court ought to afford the applicant an opportunity to address on the issues of undervaluation of the suit and deficient court fee. It is pointed out that this application made by the applicant has been rejected by learned Civil Judge (Senior Division) Kasganj before whom the suit is pending vide order dated 11.03.2022, because of the orders passed by the Court on 21.01.2022 expediting the hearing of the temporary injunction matter.

5. It is argued by Mr. Utkarsh Birla, learned Counsel in support of this application that the issues of valuation and sufficiency of court fee affect the jurisdiction of the Trial Court and the maintainability of the suit. The proper course of action is to decide these issues first and then hear the interim injunction application and other matters. In support of his submission, Mr. Birla has placed reliance upon a decision of the Division Bench of this Court in **Arun Kumar Tiwari v. Smt. Deepa Sharma and others** which has been followed by another Division Bench of this Court in **Ajay Tiwari v. Hriday Ram Tiwari and others.**

6. In **Arun Kumar Tiwari** (supra) it was held by the Division Bench :

11. Without expressing any final opinion on these points, we are of the view that whenever a serious challenge is made to the jurisdiction of the Court as well as to the valuation of the suit and sufficiency of the Court fee or to the maintainability of the suit, then if there appears prima facie some substance in those pleas, the proper procedure for the Court is to first decide these issues and then to decide the injunction application and other matters. It is also necessary in view of the spirit of provisions of section 6-A (2) of the Court Fees Act which provides that where it is found that the Court fee paid is insufficient, the injunction order shall be discharged if the deficiency is not made good in accordance with the order of the Court, even if an appeal has been filed against that order. The learned Addl. Civil Judge has observed in the impugned order that the preliminary issues could not be decided before hearing of the injunction because other defendants had not put in appearance so far. His above approach is not proper. Every defendant has got a right to get the

suit decided on the preliminary points at the initial stage without waiting for arrival of other defendants. In the present suit the injunction was sought against defendant No. 5 only and not against other defendants and so defendant No. 5 had a right to raise the above preliminary points and to pray the Court to record findings on those points before proceeding further in the suit. The approach adopted by the learned Addl. Civil Judge (Senior Division) was totally erroneous in this regard. The proper course for him was to decide the preliminary issues first and, then the injunction application. .....

7. In **Ajai Tiwari** (supra), another Division Bench of this Court, in the context of a suit where similar issues were involved, held :

12. The learned counsel for the plaintiff/appellant faintly argued that it is not open for the defendants/respondents to take any objection with regard to the inadequacy or deficiency in payment of Court fees. The above submission has no merits as the question of deficiency or payment of proper amount of Court fees can also be raised otherwise than by the officers of the State or the Revenue. Section 6(4) of the Act stipulates that whenever a question of proper amount of Court fees payable is raised otherwise than under sub-section (3) of Section 6 i.e. by person other than the officers mentioned in Section 24-A of the Act, the Court shall decide such question before proceedings with any other issue. Thus the Court is empowered to decide the question of payment of proper amount of Court fees even if it has not been raised by the officers of the State or Revenue. Therefore, the submission has no force and is not acceptable more particularly as the same was not even raised in the Court below.

8. It is argued further by Mr. Birla that the suit here is one seeking to declare a sale deed void, where Section 7(iv-A) of the Court Fees Act, 18703 is attracted, by virtue of which, ad valorem court fee would be payable. It is not a case to which Article 17(iii) of Schedule II of the Act of 1870 would apply. Thus, a fixed court fee of ₹700/- could not be paid. It is his submission that the court fee paid is ex-facie insufficient and therefore, before proceeding to hear the temporary injunction application, the issue of valuation and sufficiency of court fee ought to be decided.

9. For the legal position that it is a suit where ad valorem court fee would be payable under Section 7(iv-A) of Schedule II of the Act of 1870 and not Section 17(iii) of the Second Schedule of that Act, learned Counsel for the applicant has pressed in aid the principles adumbrated in the decision of the Division Bench in **Ajay Tiwari.**

10. Mr. Rakesh Kumar Singh, learned Counsel, on the other hand, has been at pains to submit that consideration of the temporary injunction matter is not the stage at which the Court ought to consider the issue of valuation of the suit or sufficiency of court fee. If that were to happen, the defendant may raise an objection about the suit being undervalued and the court fees paid insufficient and stall hearing of the temporary injunction application to the prejudice of the plaintiff. In support of the submission, Mr. Singh has placed reliance upon a later decision of a learned Single Judge of this Court in **Pratap Narayan and another v. Sudhir Kumar Sinha and**

others. In **Pratap Narayan** (*supra*) it has been held by the learned Judge :

*6. This Court is of the view that deciding an issue in suit is different from deciding an application seeking temporary relief such as interim injunction. Sub section (2) of section 6-A of the Court Fees Act, as applicable in the State of U.P., indicates that the legislature did contemplate grant of an interim order even before adjudication on the issue as regards sufficiency of Court fee, inasmuch as, sub-section (2) of section 6-A of the Court Fees Act, 1870 provides that in case an appeal is filed under subsection (1) of section 6-A, and the plaintiff does not make good the deficiency, all proceedings in the suit shall be stayed and all interim orders made, including an order granting an injunction or appointing receiver, shall be discharged. Sub section (1) of section 6-A provides that any person called upon to make good the deficiency in Court fee may appeal against such order as if it were an order appealable under section 104 of the Code of Civil Procedure. conspectus of the aforesaid provisions would go to show that in case where the plaintiff is directed to make good the deficiency in Court fee,' he may appeal against the said order and in the event he files an appeal against the said order, without depositing the Court fee directed to be deposited by the order under appeal, all proceedings in the suit would be, stayed and all interim orders made, including an order granting an injunction or appointing receiver, shall stand discharged. The legislature therefore envisaged situation where the Court granted an interim relief before deciding the issue pertaining to valuation and sufficiency of Court fee. Such view also subserves the interest of justice because otherwise it would be open to the defendant to thwart grant or an urgent interim relief by setting up bogus claim of insufficient valuation as well as Court fee paid. The above view would not harm the interest of Revenue because, if the Court comes to conclusion that the suit is under valued or that the Court fee paid is insufficient, it can direct the plaintiff to deposit such Court fee and in case Court fee, as directed by the Court, is not deposited, the plaint can be rejected under Order VII, Rule 11 (b) (c) of the Code. In the event the plaintiff challenges the order, without depositing the deficient Court fee, the interim injunction would stand discharged. Thus, there is sufficient safeguard to protect the interest of Revenue even by not stopping consideration of interim injunction prayer. This Court is therefore of the considered view that there is no bar on the power of the Court below to consider the interim prayer without first deciding the issue pertaining to valuation and sufficiency of Court fee. Although it is advisable for the Court to exercise its wisdom and ascertain whether the objection raised in Respect of valuation of the suit or in respect of payment of Court fee has, prima facie, substance or not and if it finds that there is substance in the objection, then keeping in mind the law laid down by the Division Bench of this Court in **Arun Kumar Tiwari case (supra),** it can defer consideration of interim injunction application till adjudication on the issues regarding valuation and payment of Court fee, particularly, in case, where, if the suit is properly valued, it would go beyond the pecuniary jurisdiction of the Court where it has been instituted. But such is not the case here inasmuch as the Court of Civil Judge (Sr. Div.) is a Court of unlimited pecuniary jurisdiction. The view taken above finds support from decision of this Court rendered in **Umesh Chandra and others v.***

Krishna Murari Lal, AIR 1980 Alld. 29, *which is not in conflict with Division Bench decision of this Court in* ***Arun Kumar Tiwari (supra).***

11. In the opinion of this Court, the remarks of my esteemed Brother Manoj Misra in **Pratap Narayan** are a complete answer to the point urged by Mr. Birla in aid of his plea to postpone determination of the temporary injunction application until the issue of undervaluation and proper court fee payable are decided. The provision of sub-Section (2) of Section 6A of the Act of 1870 as applicable in the State of U.P. read with Order VII Rule II (b) & (c) of the Code of Civil Procedure, 19085 take adequate care of the interests of the revenue, should the plaintiff indulge in undervaluation or avoidance of proper court fee payable. The legislative scheme of the Act of 1870 as applicable in the State of U.P. and the Code together are designed to advance the cause of substantial justice on the one hand, and protection of the interest of the revenue on the other. It would indeed lead to grave injustice if the defendant were permitted to raise objections about undervaluation or insufficient court fees and stall consideration of the temporary injunction application until time that irremediable mischief is done. The remarks of this Court in **Pratap Narayan** do not need reiteration, which, in the opinion of this Court, reconcile the principle in **Arun Kumar Tiwari** with the requirements of urgent consideration of the temporary injunction matter, particularly where the Trial Court is a Court of unlimited pecuniary jurisdiction.

12. In the present case also, the Trial Court is the Civil Judge (Senior Division) of the district and therefore, a Court of unlimited pecuniary jurisdiction. This is a case where the plaint has been registered on payment of court fee, without any objection by the officers empowered in this behalf. It is true that even if an objection about court fee payable is raised, otherwise than under sub-Section (3) of Section 6, that is to say, by an officer envisaged under Section 24A of the Act of 1870, the Court is obliged to decide such question before deciding any other issue. This is the opinion clearly expressed by the Division Bench in **Ajay Tiwari**. But, **Ajay Tiwari** does not hold that pending decision about the proper court fee payable, upon objection of the defendant, consideration of the temporary injunction matter must be adjourned. That is not the principle in **Ajay Tiwari**, as the learned Counsel for the applicant suggests.

13. To the submission of the learned Counsel for the applicant that the suit here is one where the court fee paid is clearly insufficient, in view of holding of the Division Bench in Ajay Tiwari, once reliefs claimed are considered, it must be said that this Court is not minded to succumb to the temptation, which the learned Counsel for the applicant presents. It is for the reason that the issues of undervaluation and the proper court fee payable are engaging the attention of the Trial Court and from the decision of the Trial Court on the issues of proper court fee payable, there is an appeal envisaged under Section 6A of the Act of 1870, as amended in its application to the State of U.P. Any determination made in the present petition under Article 227 of the Constitution, which is no more than a petition seeking to expedite the hearing of the temporary injunction matter, would be the most anomalous exercise of jurisdiction; one that is completely beyond the scope and office of the petition before this Court.

14. This Court must place on record our appreciation for the very able

assistance on the subtle point of law involved, by Mr. Utkarsh Birla and Mr. Rakesh Kumar Singh, learned Counsel for the parties.

15. In the circumstances, this Court does not find any merit in the application. It, accordingly, stands **rejected**.

(2023) 6 ILRA 320
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.05.2023

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. Bail Application No. 52553 of 2022

Jaiveer ...Applicant (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Yashpal Yadav, Sri Lalji Yadav, Sri Manish Tiwary (Sr. Advocate)

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 161,164 & 439 - Bail - Indian Penal Code, 1860 - Sections 376 - Rape, The Protection of Children from Sexual Offences Act, 2012 - Sections 2(1)d , 3/4 & 29 - every person has a different way of expressing their words and feelings in their local language - statement of victim under Section 164 Cr.P.C. will certainly prevail over her statement recorded by doctor or police officer under Section 161 Cr.P.C. - In order to constitute an offence of rape, it is not necessary that there should be complete penetration of penis in the vagina or mouth with emission of semen. (Para - 6)

Victim is minor girl - applicant aged about 24 years - Case of penetration by penis in mouth of victim - statement of victim under Section 161 Cr.P.C. - recorded by audio and video means - committed wrong by mouth or in her mouth - what victim says is same in all three statements - statement of victim under Section 164 Cr.P.C. - applicant put his penis in her mouth - cannot said to be material improvement - rather it reinforces her initial version - word used by victim " Galat kaam kiya" denotes the sexual act in common parlance. **(Para – 5, 6)**

HELD:-Offence of rape made out. Act of accused-applicant comes under the preview of Section 375 (a) of I.P.C.. No material on record to presume the false implication of the applicant and to disbelieve the statement of minor victim, which is primary for considering the bail application of accused in rape cases. **(Para - 6)**

Bail application rejected. (E-7)

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

1. By means of this application under Section 439 of Cr.P.C., applicant, who is involved in Case Crime No. 587 of 2022, under Sections 376 of I.P.C. & Section 3/4 of the Protection of Children from Sexual Offences Act, 2012, Police Station- Tilahar District- Shahjahanpur, seeks enlargement on bail during the pendency of trial.

2. Heard Shri Manish Tiwary, learned Senior Counsel for the applicant and Shri Rabindra Kumar Singh, learned Additional Government Advocate representing the State.

3. As per the prosecution case in brief, informant who is father of the victim lodged First Information Report on 07.8.2022 against the applicant-Jaiveer alleging inter alia that on 07.08.2022 at about 1:00 pm, his daughter aged about 14-15 years had gone to attend the call of nature in the sugarcane field of Rajesh, where the accused-applicant with intention

to commit rape forcible dragged her to the field of sugarcane and committed rape on her. His daughter came home crying and told the whole incident to her mother.

3.1. Victim was medically examined on 07.08.2022 at about 09:48 PM and at that time she told the doctor that when I had gone to attend the call of nature in the field, accused caught me and forcibly committed wrong by mouth. The statement of victim in Hindi is reproduced herein under:-

पीडिता के अनुसार वह शौच के लिये खेत में गयी थी तभी आरोपी वहां पर पकड़ लिया और जबरदस्ती मुंह के द्वारा गलत काम किया।

3.2. Victim in her statement under Section 161 Cr.P.C. dated 07.08.2022 has stated inter alia that the applicant caught hold of me and took me to the field with bad intention. When I screamed, he shut my mouth and tore my cloth (salwar). He tried to do misdeed with me and he did wrong in my mouth. The statement of victim in Hindi is reproduced herein under:-

"मेरा नाम "X" D/o "Y" R/O की रहने वाली हूं मैं कक्षा 8 तक गांव के ही प्राइमरी स्कूल में पढ़ी हूं। मेरी उम्र लगभग 14 वर्ष है आज दिनांक 07.08.22 को दोपहर 1.00 बजे मैं खेत पर शौच के लिए गयी थी। जब मैं धान के खेत में लेट्रिन कर रही थी तभी मेरे गांव के जयवीर S/O शेरबहादुर आ गया। जिसे देखकर मैं खड़ी हो गयी और थानों के खेत से बाहर निकल आयी। जयवीर अपने धानो मे स्प्रे करने आया था। जब मैं धानों के खेत से निकल आयी तभी जयवीर मुझे पकड़ लिया और बुरी नियत से गन्ने के खेत में ले गया। मैं चिल्लाई तो मेरा मुह बन्द कर लिया। इसके बाद उसने मेरे कपड़े (सलवार) फाड़ दिये। मेरे साथ गलत काम करने की कोशिश की तथा उसने मेरे मुंह मे गलत काम किया। इसके बाद मैं किसी तरह छूटकर भागती हुयी अपने घर आयी और अपनी मां को पूरी घटना बतायी।" दिनांक 7.8.22।

3.3. Victim in her statement under Section 164 Cr.P.C. has stated inter alia that the applicant grabbed me from behind and removed my salwar. When I screamed, he covered my mouth from his hand and he did wrong thing in my mouth. He put his penis in my mouth. With great difficulty I could let go of myself. The statement of victim in Hindi is reproduced herein under:-

"मेरा नाम "X" उम्र 15 वर्ष पिता का नाम "Y" निवासी जनपद शाहजहांपुर मैं खेतो में लेट्रिन के लिये गयी थी तभी पीछे से जयवीर ने मुझे दबोच लिया और मेरी सलवार निकाल दी फिर मै तेजी से चिल्लायी तब उसने मेरा मुंह हाथ से दबा लिया। मेरे मुंह मे उसने गलत काम किया अपना लिंग मेरे मुंह में डाल दिया फिर बड़ी मुश्किल से मैं अपने को छुड़ा पायी इसके अतिरिक्त मुझे कुछ नहीं कहना।

4. It is argued by the learned counsel for the applicant that as per medical examination report of the victim, there is no sign of use of force. As per supplementary report dated 08.08.2022 of the victim, she is aged about 17 years and there are no sign suggestive of penetration of oral cavity. There is inconsistency in the version given in the FIR and the statement of the victim before doctor as well as statement under Section 161 Cr.P.C. It is also submitted by the learned counsel for the applicant that considering the statement under Section 161 Cr.P.C. of the victim no offence of rape is made out, because several sexual act, which are done by mouth do not come under the definition of rape but considering her statement under Section 164 Cr.P.C., offence of rape is made out. In this regard, it is further submitted that the initial allegation of the victim against the applicant was gradually improved by the victim in her statement under Section 164 Cr.P.C., which was recorded after ten days of the occurrence and, therefore, the possibility of her being tutored cannot be ruled out. Lastly, it is submitted that there is no chance of the applicant fleeing away from the judicial process or tampering with the prosecution

evidence. The applicant does not have any criminal history and has been languishing in jail since 08.8.2022.

5. On the other hand learned A.G.A. for the state opposed the prayer for bail of the applicant by contending that at the time of medical examination of the victim, doctor has also noted in column no 15F of medical examination report that it is a case of penetration by penis in the mouth of the victim. The statement under Section 161 Cr.P.C. of the victim has been recorded by audio and video means by woman constable, which has been made part of the case diary. Site plan was prepared by the investigation officer on the direction of victim. Father and mother have also supported the prosecution case. As per scholar register of Upper Primary School Talvipur, district Shahjanpur and statement of headmaster, the date of birth of the victim is 01.01.2008, according to which victim was aged about 14 years 7 month 8 days on the day of incident. Charge sheet dated 30.08.2022 has been submitted against the applicant. In view of Section 29 of POCSO Act, the presumption shall also be drawn against the accused unless contrary is proved by him. The offence under Section 375 (a) of I.P.C. is clearly made out against the applicant. Lastly it is submitted that the offence is heinous in nature. Considering the gravity of offence, the bail application is liable to be rejected.

6. Having heard the learned counsel for the parties and perusing the record in its entirety, I find that in view of Section 2(1)(d) of the POCSO Act, the victim is minor girl. The applicant is aged about 24 years. So far as the submission of the learned counsel for the applicant regarding the discrepancies and improvement in the statements of victim as pointed out are concerned, this court is of the opinion that the same cannot said to be material contradictions and do not go into the root of the matter so as to demolish the entire prosecution case, because the allegation of victim that the applicant committed wrong by mouth or in her mouth is there in all her statements. The meaning of what victim says is same in all three statements. It is well known that the every person has a different way of expressing their words and feelings in their local language. Victim in her statement under Section 164 Cr.P.C. has stated inter alia that the applicant put his penis in her mouth, which under the facts of the case cannot said to be material improvement rather it reinforces her initial version. The word used by the victim " Galat kaam kiya" denotes the sexual act in common parlance. The statement of victim under Section 164 Cr.P.C. will certainly prevail over her statement recorded by doctor or police officer under Section 161 Cr.P.C. In order to constitute an offence of rape, it is not necessary that there should be complete penetration of penis in the vagina or mouth with emission of semen. Accordingly, Considering the cumulative effect of all the statements of the victim, I do not find force in the submission of learned senior counsel for the applicant that no offence of rape is made out. Considering the facts of the case, this Court is of the opinion that act of the accused-applicant comes under the preview of Section 375 (a) of I.P.C. As on date, I do not find any material on record to presume the false implication of the applicant and to disbelieve the statement of minor victim, which is primary for considering the bail application of accused in rape cases.

7. In the light of above discussion and having considered the facts that rape is the most hated, morally and physically

reprehensible crime in a society, as it is an assault on the body, mind and privacy of the minor victim. It shaken the spirit and very core of her life. Rape leaves a permanent scar on the life of the victim and further considering the provisions of Section 29 of POCSO Act as well as keeping in view the submissions advanced on behalf of parties as noted above, gravity of offence, role assigned to applicant and severity of punishment, I do not find any good ground to release the applicant on bail.

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

9. It is made clear that the observation contained in the instant order is confined to the issue of bail and shall not affect the merit of the trial.

10. Copy of this order be sent to the informant / complainant through Child Welfare Committee, Shahjahanpur and Trial Court for information.

(2023) 6 ILRA 323
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2023

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. Bail Application No. 57301 of 2022

Asharam ...Applicant (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Shyam Lal, Abhilasha Singh, Sri Ashutosh Yadav

Counsel for the Opposite Parties:
G.A., Sri Kanak Kumar Tripathi

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 161, 164, 439 - Bail, Section 53A – Examination of person accused of rape by medical practitioner, Indian Penal Code, 1860 - Sections 363, 366, 376, 506 , The Protection of Children From Sexual Offences Act, 2012 - Section 3/4 - In a case under section 376 IPC, the delay, if explained properly, is not fatal to the prosecution case - evidence of the prosecutrix is more reliable than that of an injured witness - Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. (Para - 11,36)

(B) Criminal Law - distinction between 'Preparation' and 'Attempt' to commit rape - stages of commission of a crime - first, Mens Rea (intention to commit), secondly, preparation to commit it, and thirdly, attempt to commit - Attempts are punishable because they are preceded by mens rea, moral guilt, and their impact on societal values is greater than the actual commission. (Para - 26)

(C) Criminal Law - Indian Penal Code, 1860 - Section 376/511- even slightest penetration of male organ into the female parts amounts to rape. (Para - 29)

Abduction, misdeed and threat to victim's life - Victim (minor) aged about 17 years - in confinement of applicant - for about one and a half day - specific allegations - committed misdeed with her - applicant first took off her Paijami - thereafter disrobed himself and lie down upon her - no penetration of male organ into the vagina - next day, in the night left victim outside the village - FIR lodged with inordinate delay. **(Para - 15,17,25)**

HELD:-Delay in lodging FIR properly explained by prosecution. Applicant's actions exceed stage beyond attempt, punishable under Section 376 IPC. No good ground to release the applicant on bail. **(Para -11,27,41)**

Bail application rejected. (E-7)

List of Cases cited:

1. Digamber Harinkhede & anr. Vs St. of M.P., Criminal Revision No. 1687 of 2013

2. Santosh Vs St. of Kerala, 2021 (3) KLJ 927 (Kerala High Court)

3. ChhefulsonSnaitang Vs St. of Meghalaya, Criminal Appeal No. 5 of 2020

4. Ram Naresh & ors. Vs St. of Chhatisgarh, AIR 2012, SC 1357

5. Tara Singh & ors. Vs St. of Punj., AIR 1991 SC 63

6. St. of Punj. Vs Gurmit Singh & ors., 1996 SCC (2) 384

7. St. of M.P. Vs Mahendra @ Golu, (2022)12 SCC 442

8. St. of Kerala Vs Kundumkara Govindan, 1969 Cr.L.J

9. Ranjit Hazarika Vs St. of Assam, (1988)8 SCC 635

10. Madan Gopal Kakkad Vs Naval Dubey, (1992) 3 SCC 204

11. Radha Krishna Nagesh Vs St. of A.P., (2013) 11 SCC 688

12. St. Of H. P. Vs Asha Ram, 2006 Cri.L.J. 139

13. BharwadaBhoginbhaiHirjibhai Vs St. of Guj., AIR 1983 SC 753

14. St. of A.P. Vs Bodem Sundara Rao, 1995 (6) SCC 230

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

1. Heard Shri Ashutosh Yadav. learned counsel for the applicant and Shri Rabindra Kumar Singh, learned Additional Government Advocate representing the State.

2. By means of this application under Section 439 of Cr.P.C., applicant Asharam, who is involved in Case Crime No.303 of 2022, under Sections 363, 366, 376, 506 IPC and ¾ of POCSO Act, police station Rajpura, district Sambhal, seeks enlargement on bail during the pendency of trial.

3. In short compass the facts of the case are that on 29.8.2022, the mother of the victim has given an application to the Superintendent of Police, (Public Grievance Cell), Sambhal to the effect that in respect of abduction, misdeed and threat to her daughter's life, she has given an application at the police station Rajpura, but neither her report has been lodged by the police nor victim was sent for medical examination. The report further alleges that on 24.8.2022, the minor daughter of informant aged about 17 years was enticed away by the applicant in respect whereof she made an application at the police station. Thereafter, applicant left her daughter outside her village. Her daughter told her that the applicant forcibly made physical relation with her and also threatened her of dire consequences in case she reports the matter to the police.

4. It is contended by learned counsel for the applicant that in respect of the incident dated 24.8.2022, the first information report has been lodged on 31.8.2022 and the victim was medically examined on 31.8.2022 for which no plausible explanation has been tendered by the prosecution.

5. Learned counsel for the applicant further submits that the informant in her

statement under Section 161 Cr.P.C. has stated inter alia that on 24.8.2022 when her minor daughter had gone to field, she was enticed away by the applicant and on the next day i.e., on 25.08.2022, he left her daughter outside the village. Her daughter told her that the applicant forcibly made physical relation with her. When second statement of the informant was recorded, she reiterated her earlier statement and has also stated that her daughter told her that the applicant disrobed her and committed misdeed/rape upon her. On being enquired, she stated that her daughter took bath and washed her clothes. On the basis of the aforesaid statement, it is argued that since victim took bath and washed her clothes, therefore, it could not be ascertained as to whether any sexual intercourse was done or not.

6. Referring the statement under Section 164 Cr.P.C. of the victim, much emphasis has been given by contending that the victim has stated that the applicant has committed misdeed with her. On putting query about the misdeed, she explained that the applicant took off her Paijami as well as his pant and lie down upon her. Much emphasis has been given by contending that disclosure made by the victim in her statement under Section 164 Cr.P.C. does not come with the purview of Section 375(c) IPC because the said provision will attract if the said manipulation was to cause penetration whereas in the present case as per statement under Section 164 Cr.P.C. of the victim, no penetration was done, therefore, said provision is not attracted.

7. Referring to the medical examination report of the victim, it is argued that there was no injury on the private part of the victim and in supplementary report, no spermatozoa was found and the doctor was of the opinion that no positive opinion can be given about sexual abuse. In support of his submission, learned counsel for the applicant has relied upon the following decisions:

1. **Criminal Revision No. 1687 of 2013, (Digamber Harinkhede and another Vs. State of Madhya Pradesh),** decided on 16.12.2018. (M.P. High Court).

2. **Santosh Vs. State of Kerala,** 2021 (3) KLJ 927 (Kerala High Court)

3. **Criminal Appeal No. 5 of 2020 (Chhefulson Snaitang Vs. State of Meghalaya),** decided on 14.3.2022)

8. Learned counsel for the applicant next submitted that medical examination of the applicant was also not conducted so as to rule out as to whether sexual offence was done or not which are mandatory as per Section 53A Cr.P.C. The medical examination of the victim was also done after seven days on 31.08.2022. Since the victim is an illiterate girl, therefore, her ossification test was conducted, according to which, she is aged about 17 years, therefore, there may be marginal error of two years on either side.

9. Lastly, it is submitted by the learned counsel for the applicant that there is no chance of the applicant of fleeing away from the judicial process or tampering with the prosecution evidence. The applicant is languishing in jail since 08.9.2022.

10. Opposing the prayer for bail of the applicant Shri Rabindra Kumar Singh, learned Additional Government Advocate submits that considering the allegations made by the victim in her statement under Section 164 Cr.P.C., offence under Section

376 is made out against the applicant and considering the gravity of the offence, the bail application of the applicant is liable to be rejected.

11. So far as the first contention of the learned counsel for the applicant that the FIR has been lodged with inordinate delay for which no plausible explanation has been given, is concerned, I find that the first information report itself speaks that the same has been lodged on the basis of an application made to the Superintendent of Police, Public Grievance Cell on 29.8.2022 wherein it has been stated that in respect of coaxing her minor daughter, she has given an application at the police station Rajpura, but her FIR has not been lodged. From the perusal of the FIR itself it is clear that the first information report has been lodged after the intervention of the Superintendent of Police. Therefore, I am of the opinion that delay in lodging the first information report has properly been explained by the prosecution. Further in a case under section 376 IPC, the delay, if explained properly, is not fatal to the prosecution case.

12. Hon'ble Supreme Court in the case of **Ram Naresh and others Vs. State of Chhatisgarh, AIR 2012, SC 1357,** has held that the delay, if any, in lodging the FIR, if explained properly, is in no way fatal to the case of the prosecution.

13. In **Tara Singh and others Vs. State of Punjab, AIR 1991 SC 63,** Hon'ble Supreme Court held that mere delay in lodging the FIR by itself cannot give scope for an adverse inference leading to rejection of the prosecution case outright.

14. Hon'ble Supreme Court in **State of Punjab Vs. Gurmit Singh and others,** 1996 SCC (2) 384 Hon'ble Supreme Court held as under:

In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.

15. Second contention of learned counsel for the applicant is that since there was no penetration of male organ into the vagina, no offence under Section 376 IPC is made out against the applicant. This contention of the learned counsel for the applicant is totally misconceived inasmuch as the victim in her statement under Section 161 Cr.P.C has stated that when she had gone to Forest to fetch grass, accused-applicant forcibly took her and committed mis-deed with her and also threatened her of dire consequences. Further in her statement under Section 164 Cr.P.C. the victim has stated that on 24.8.2022 at about 3.00 PM when she had gone to cut grass, the accused came there and forcibly took her to a deserted place in a room through Kachha road where he committed misdeed with her. On a specific query by the Court about misdeed, the victim has stated that the accused took off her Paijami and thereafter he also has taken down his Pant and lie down upon her. On the next day, i.e.

25.8.2022, at about 12.00 in the night, he left her outside the village.

16. For better appreciation, the statements of the victim under Section 161 and 164 Cr.P.C. are reproduced herein below:

"बयान किया कि मेरा नाम "X" पुत्री "Y" …..... जनपद सम्भल की रहने वाली हूं। मेरी उम्र लगभग 17 वर्ष है। मै पढ़ी लिखी नही हूं। दिनांक 24.08.2022 को लगभग समय 3 बजे के करीब मै जंगल में अकेली घास लेने के लिये गयी थी तभा अचानक पीछे से मेरे ही गांव का रहने वाला आशाराम s/o महेन्द्र ने मेरी पीछे से कौलिया भर ली और मुझे डराधमकाकर अपने साथ मेरी बिना मर्जी के जबरदस्ती मुझे अपने साथ ले गया। जहा पर उसने मेरे साथ गलत काम मेरी बेइज्जती भी की और मुझसे कहा कि अगर तूने किसी को इस बात के बारे में बताया तो तुझे और तेरे घरवालो को जान से मार दूंगा। दिनांक 25.08.2022 को वह मुझे गांव के बाहर छोडकर भाग गया। फिर जैसेतैसे मैने अपने घर आकर यह सारी बात अपनी मां से बतायी। यही मेरा बयान है।

बयान पीडिता "X" अन्तर्गत धारा 164 सीआरपीसी.....पीडिता "X" उम्र लगभग 17 वर्ष पुत्री "Y" निवासी ..... जिला सम्भल ने सशपथ बयान किया कि दिनांक 24.08.2022 को दिन 03 बजे मै घास काटने गयी थी आशाराम वहां आ गया वह मेरे गावं का ही है मै बचपन से उसे जानती हूँ उस वक्त घटना के दौरान वहां और कोई नही था आशाराम ने मुझे पीछे से पकड़ लिया और बाईक पर बैठा लिया और कच्चे रास्ते बहुत दूर ले गया था हमे पहुचते हुये वहाँ अन्धेरा हो गया था मैं अपनी मर्जी से नही गयी थी वहां एक कमरे मे आशाराम लेकर गया था कमरे में कोई और नहीं था वहां आशाराम ने मेरे साथ गन्दा काम किया गन्दा काम के मतलब पूछने पर पीडिता ने बताया कि मेरी पजामी उतारी और उसने अपनी पेन्ट उतारी और मेरे ऊपर लेट गया था इसके आगे क्या किया मुझे नही पता फिरदिनांक 25.08.2022 की शाम को लगभग 12 बजे मुझे गांव के बाहर छोड गया था पुलिस ने बयान लिया था मेडिकल भी हुआ है मुझे और कुछ नही कहना है "

17. From the perusal of the statement of the victim under Section 164 Cr.P.C it is clear that the applicant forcibly took her to a deserted place, kept her in a room throughout the night and committed rape on her and thereafter next day, in the night he left the victim outside the village.

18. As per report of the Medical Board comprises Chief Medical Officer, Orthopedic Surgeon and Radiologist, Sambhal, the age of the victim is 17 years. Although, as per medical report of the victim , no injury was found either on the body or private part of the victim, but hymen of the victim was found torn and healed.

19. **Criminal Revision No. 1687 of 2013, (Digamber Harinkhede and another Vs. State of Madhya Pradesh), Santosh Vs. State of Kerala, and (Chhefulson Snaitang Vs. State of Meghalaya)(Supra)** relied upon by the learned counsel for the applicant are not at all applicable to the facts of the present case and therefore, are no help to the applicant.

20. **Digamber Harinkhede and another Vs. State of Madhya Pradesh)** (supra) was a case in which as per admitted case of the prosecution, the accused therein pressed the breast of the prosecutrix, but the learned trial court framed the charge under Section 376 (1) IPC, which was set aside by the High Court of Madhya Pradesh.

21. In **Santosh Vs. State of Kerala,** (Supra) the Kerala High Court while setting aside the conviction of the appellant therein under Section 11(i)read with section 12, 9(I)(m) read with Section 10, 3(C) read with section 5(m) and 6 of Protection of Children from Sexual Offences Act, 2012; Section 376(2)(i) and Section 377 IPC, he was sentenced under Section 376(1) read with Section 375(c), 354 and 354A(1)(i) IPC.

22. In **Chhefulson Snaitang Vs. State of Meghalaya** (Supra) the victim in her cross-examination stated that "it is a fact that the accused person did not penetrate his male organ inside my vagina but he just rubbed from the top of my under wear". The Division Bench of High Court of Meghalaya at Shillong while upholding the conviction of the appellant therein, held as under:

" Even if the victim's evidence in her cross-examination is taken at face value, it would not imply that there was no penetrative sex. If it be accepted that at the relevant time the victim was wearing her underpants and the appellant rubbed his organ from over her underpants, there was no difficulty in penetration. Penetration for the purpose of Section 375 of the Penal Code does not have to be complete. Any element of penetration would suffice for the purpose of the relevant provision. Further, Section 375(b) of the Penal Code recognises that insertion, to any extent , of any object into the vagina or urethra would amount to rape. Even if it be accepted that the appellant herein forced his organ into the vagina or urethra of the victim despite the victim wearing her underpants, it would still amount to penetration for the purpose of Section 375(b) of the Penal Code.

In any event, by virtue of Section 375(c) of the Penal Code, when a person manipulates any part of the body of a woman so as to cause penetration into, inter alia, the vagina or urethra, the act would amount to rape. There is sufficient evidence of such penetration in the present case.

23. The aforesaid decision in **Chhefulson Snaitang Vs. State of Meghalaya** is of no help to the applicant rather it is in favour of the prosecution.

24. As per FIR version, the incident in question took place on 24.8.2022 and medical examination of the victim was done on 31.8.2022, i.e. after one week of the incident. In the medical report, hymen of the victim was found torn and healed, which goes to suggest that victim was subjected to rape.

25. Admittedly, victim in the case in hand is minor aged about 17 years. A plain reading of offence of rape under Section 375 IPC shows that intercourse with a woman below eighteen years, with or without her consent, amounted to rape and mere penetration is sufficient to prove such offence. The expression 'penetration' denotes ingress of male organ into the female parts, however, slight it may be. Since, the victim was in confinement of the applicant for about one and a half day and there was specific allegations that he

committed misdeed with her and on query by the investigating officer, she has explained that the applicant first took off her Paijami and thereafter disrobed himself and lie down upon her. It is not the case of the applicant-accused that after he was trying to commit rape, someone has intervened or came to the place to save the victim as a result thereof he could not complete the act.

26. Hon'ble Supreme Court in the case of **State of Madhya Pradesh Vs. Mahendra alias Golu,** (2022)12 SCC 442 laid down the distinction between 'Preparation' and 'Attempt' to commit rape and explained the three stages of commission of a crime, which are as under:

"It is settled preposition of Criminal Jurisprudence that in every crim, there is first, Mens Rea (intention to commit), secondly, preparation to commit it, and thirdly, attempt to commit. If the third stage, that is 'attempt' is successfu, then the crime is complete. If the attempt fails, the crime is not complete, but law still punishes the person for attempting the said act. 'Attempt' is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on the societal values is no less than the actual commission."

27. In the instant case since the acts of the applicant exceeded the stage beyond attempt to commit it, he is guilty of the offence punishable under Section 376 IPC.

28. Even if, for the sake of argument, it is assumed that there was no penetration, even then the applicant is liable to be punished under Section 376/511 IPC.

29. Moeover, Hon'ble Supreme Court in a plethora of judgements held that even slightest penetration of male organ into the female parts amounts to rape.

30. High Court of Kerala while examining the ingredients of the offence of rape, in **State of Kerala Vs. Kundumkara Govindan,** 1969 Cr.L.J, held as under:

31. "The crux of the offence under Section 376 IPC is rape and it postulates a sexual intercourse. The word "intercourse" means sexual connection. It may be defined as mutual frequent action by members of independent organization. By a metaphor the word "intercourse" like the word "commerce" is applied to the relation of sexes. In intercourse there is temporary visitation of one organization by a member of the other organization for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. There is no intercourse unless the visiting member is enveloped at least partially by the visited organization, for intercourse connotes reciprocity. In intercourse between thighs the visiting male organ is enveloped at least partially by the organism visited, the thighs; the thighs are kept together and tight."

31. In **Ranjit Hazarika Vs. State of Assam** (1988)8 SCC 635, it has been held by the Hon'ble Supreme Court that non-rupture of hymen or absence of injury on victim's private parts does not belie the testimony of the prosecutrix. The evidence of a victim of sexual assault stands at par with the evidence of an injured witness. Just as a witness who has sustained an injury is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offender is entitled to great weight, absence of corroboration notwithstanding."

32. In **Madan Gopal Kakkad Vs. Naval Dubey** (1992) 3 SCC 204, it has been held as under:

"Thus to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pedenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

33. In **Radha Krishna Nagesh Vs. State of Andhra Pradesh** (2013) 11 SCC 688, Hon'ble Supreme Court held as under:

"The mere fact that the hymen was intact and there was no actual wound of her private parts is not conclusive of the fact that she was not subjected to rape. According to PW-9, there was a definite indication of attempt to rape the girl. Also, later semen of human origin was traceable in the private parts of the girl, as indicated by the FSL report. This would sufficiently indicate that she had been subjected to rape. Penetration itself proves the offence of rape, but contrary is not true, i.e. even if there is no penetration, it does not necessarily mean that there is no rape.

34. Modi in his book Modi Textbook of Medical Jurisprudence and Toxicology, 23rd Edition, at page 897, opined thus:

"To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with the emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without the emission of semen, or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the Medical Officer should mention the negative facts in his report, but should not given his opinion that no rape had been committed. "

***At page 928**: In small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum.*

35. In Parikh's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

"Sexual intercourse: In Law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

36. **State Of Himachal Pradesh vs Asha Ram, 2006 Cri.L.J. 139** was a case in which High Court of Himachal Prdesh has acquitted the accused Asha Ram on the ground that no spermatozoa were found on the Salwar and underwear of the prosecutrix though according to the prosecution, complete act of sexual intercourse was committed. Further no evidence has come on record to show that hymen was ruptured. The medical evidence coming on record, as discussed above, is highly unreliable and even otherwise it

does not establish that the victim was subjected to sexual intercourse. Hon'ble Supreme while setting aside the judgement of the High Court, has held as under:

"We record our displeasure and dismay, the way the High Court dealt casually with the offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on the minor girls. The High Court was swayed by sheer insensitivity totally oblivious of growing menace of sex violence against the minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. ***The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."***

37. In the case of **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753,** Hon'ble Supreme Court held thus:

In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opiniated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplate it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society and its profile."

38. Hon'ble Supreme Court in **State of A.P. Vs. Bodem Sundara Rao, 1995 (6) SCC 230** has cautioned the Courts while dealing with the cases of sexual crime against women in the following words:

"Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The Courts are, therefore, expected to deal with the cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely."

39. So far as the last contention of the learned counsel for the applicant that medical examination of the applicant was not conducted as per Section 53A Cr.P.C, is concerned, it is to be noted that since the accused was arrested on 08.9.2022, i.e. after fifteen days of the incident, therefore, the investigating officer did not think it necessary to get him examined under Section 53A Cr.P.C.

40. The Court must keep in mind while appreciating the evidence of the prosecutrix the values prevailing in the country, particularly in rural India. It would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. In our country, a woman, victim of sexual aggression, would rather suffer silently than to falsely implicate somebody. Any statement of a rape victim is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit.

41. Considering the overall facts and circumstances of the case as well as keeping in view the submissions advanced on behalf of parties, gravity of offence, role assigned to applicant and severity of punishment, I do not find any good ground to release the applicant on bail.

42. Accordingly, the bail application is rejected at this stage.

43. It is clarified observations made herein above are limited to the extent of determination of this bail application and will in no way be construed as an expression on the merits of the case. The trial court shall be absolutely free to arrive at its independent conclusions on the basis of evidence to be adduced by the parties.

(2023) 6 ILRA 332
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 2097 of 2019
AND
Criminal Appeal No. 1794 of 2019

Chintu @ Kuldeep ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Surya Pratap Singh Parmar, Sri Ajay Kumar Pandey, Sri Sheshadri Trivedi, Sri Shyam Bihari Tripathi, Sri Suresh Chandra Yadav, Sri Vipin Kumar, Sri Satish Trivedi (Sr. Advocate)

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 452, 376, 386, 506 & 302 - Punishment for murder - Appeal against conviction - Life imprisonment - Relevancy

of Dying declaration - Code of Criminal Procedure, 1973 - Section 161, 207 & 313 - Indian Evidence Act, 1872 - Section 32 - Appellants held guilty of offence of rape, attempt to rape, murder and set the victim on fire - During treatment she died - Contention by appellants , delay of 48 hours in registration of F.I.R., not explained by prosecution - no eye witness - Neither it was a case of prosecution nor of defence that victim got accidental fire - Two dying declarations recorded - she narrated incident and commissioning of offence to her husband, PW-1 and to S.I., PW-3 who recorded her St.ment in hospital - From testimony of PW-1 and DW-1, it showed that PW-1 was unreliable witness - PW-1 St.d that he had brought victim to hospital, whereas MLC reflects contrary to that - PW-1 was not made a witness to St.ment recorded by PW-3 in hospital - Presence of PW-1 and PW-3 in hospital was doubtful - St.ment of PW-3 has no relevancy, not proved by prosecution that he was asked by senior officer to record St.ment of victim in hospital - No animosity between appellants and victim except sole testimony of complainant - As per doctor, deceased received burn injuries to the extent of 83%, therefore she was not in position to give St.ment - Several loopholes in procedure adopted while recording dying declaration. (Para 4, 31, 34 to 71)

Criminal Appeals allowed. (E-13)

List of Cases cited:

1. Dalip Singh & ors. Vs St. of Pun., AIR (1979) SC 1173

2. Nallapati Sivaiah Vs SubDivisional Officer, Guntur, (2007) 15 SCC 465

3. Arvind Singh Vs St. of Bihar, (2001) 6 SCC 407

4. Arun Bhanudas Pawar Vs St. of Mah., (2008) 11 SCC 232

5. Poonam Bai Vs St. of Chhattisgarh, (2019) 6 SCC 145

6. Kundula Bala Subrahmanyam & anr. Vs St. of Andhra Pradesh, (1993) 2 SCC 684

7. Sudhakar Vs St. of M. P., (2012) 7 SCC 569

8. Paniben (Smt.) Vs St. of Guj., (1992) 2 SCC 474

9. Lakhan Vs St. of M. P., (2010) 8 SCC 514

10. Amol Singh Vs St. of M. P., (2008) 5 SCC 468

11. Sher Singh & anr. Vs St. of Pun., (2008) 4 SCC 265

12. Mahendra Singh & ors. Vs St. of M. P., (2022) 7 SCC 157

(Delivered by Hon'ble Vinod Diwakar, J.)

1. We have heard Shri Satish Trivedi, learned Senior Advocate assisted by Shri Ajay Kumar Pandey, learned counsel for the appellants, learned A.G.A. for the State and perused the record.

2. These appeals have been filed against the judgment and order dated 21.01.2019, passed by learned Additional District and Sessions Judge/Fast Track Court No.2, Hapur, in Sessions Trial No.313 of 2016 (State vs. Chintoo @ Kuldeep) and Sessions Trial No.314 of 2016 (State vs. Monti @ Ravindra), arising out of Case Crime No.566 of 2015, under Sections 452, 376, 386, 506, 302 I.P.C., registered at Police Station Pilakhua, District Hapur, in which the trial court has convicted the accused-appellant Chintoo @ Kuldeep under Sections 452, 376, 386, 506 and 302 I.P.C. and the accused-appellant Monti @ Ravindra under Sections 452, 386, 506, 302, 376/511 I.P.C. The appellants have been sentenced to life imprisonment, besides other sentences in respective offences, apart from fine.

3. The prosecution case, in brief, is as under:

4. The complainant is a proprietor of a grocery shop in his village and had gone to Pilakhua to purchase groceries. On 8.10.2015, after the complainant returned from Pilakhua, District Hapur, U.P., at around 07:15 in the evening, the complainant saw his wife on fire. She fell in front of him. The complainant tried to douse the fire and received burn injuries on his feet and hand while dousing. After hearing the rescue call, Pinku, the complainant's cousin, reached the place of the incident and covered the complainant's wife with the blanket and doused the fire. The complainant's wife revealed to the complainant that in his absence, Chintoo and Monti, who lived beside them, came to her house and demanded money by extending a threat to his life. Chintoo forcibly committed rape upon her, and Monti attempted to commit rape. After that, they poured kerosene oil on her, set her on fire and fled away. The complainant further revealed that Chintoo and Monti were jealous of their family, and they used to quarrel with her when she asked for the payments of groceries that they had purchased; Chintoo and his brother Praveen had assaulted her few days before the incident.

5. The complainant immediately took his wife to G.T.B. Hospital, Delhi, for her treatment; the wife succumbed to the injuries and died on 15.10.2015.

6. The victim was admitted to G.T.B. Hospital, Delhi, at 09:25 p.m. on 8.10.2015 by her husband, and after that, Dr. Sushil prepared the MLC of the victim and declared the victim "fit for the statement". During this time, after receiving oral instructions, S.I. Manish Bhati, posted at Police Station G.T.B. Enclave, Delhi, reached the hospital and recorded the victim's statement, in which she stated that her husband runs a grocery shop at his home. About a month back, Chintoo's family borrowed groceries from their shop. Chintoo, Monti and Chintoo's brother Praveen thrashed her husband when he asked for the payment. Monti is a friend/relative of Chintoo and stays at his house. On 8.10.2015, her father-in-law had gone out of the house, and her husband had gone to buy goods for the shop. At around 07:00 p.m., Chintoo and Monti entered her house and started demanding money from her and extending threats to kill her husband. They caught her and pushed her down when she refused to give the money. Chintoo committed rape upon her, and Monti attempted to commit rape but could not succeed. They again asked her for money, and when she refused, they poured kerosene oil on her, kept in the cupboard, and set her on fire. Chintoo poured oil on her, and Monti lit the fire with matchstick. Her husband took her to G.T.B. Hospital, Delhi, and her statement was recorded in the presence of the Doctor.

7. On 10.10.2015 at 05:15 p.m., Rakesh, the victim's husband, presented a written complaint at Police Station Pilakhua, District Hapur. Based on the written report, the F.I.R. was registered at 07:15 p.m., under Sections 452, 376, 307, 386, and 506 I.P.C. against the accused persons, almost two days after the incident. As there was an allegation of sexual exploitation in the F.I.R., a Medical Examination Report for Sexual Exploitation was secured on 11.10.2015 at 03:00 p.m. In the report, it is mentioned that the victim suffered homicidal flame burns at home on 8.10.2015. The patient was intubated, which means she was on a life-saving medical procedure, entirely covered with dressings, 85-90% T.B.S.A.,

the flame burns involving two degrees, and superficial to deep burns on the entire body was found except on the feet. After performing the external and internal examination, Dr. Shalini Razdan opined that *"survivor being unconscious and sexual violence can't be ruled out".*

8. On 15.10.2015, the victim succumbed to her injuries and was declared dead. The post-mortem was conducted on 15.10.2015 at 01:00 p.m. Dr. Shalini Razdan conducted the autopsy. The autopsy report mentioned; alleged history of burns on 8.10.2015, after which the patient expired on 15.10.2015 at 07:54 a.m. Ante-mortem flame burns were found all over the body except for a patch of skin over the front lower back, buttocks and back of legs sole. The Doctor noticed no injuries over the genitalia. The autopsy surgeon determined the cause of death as *'septicaemia shock due to infected ante-mortem flame burns involving about eighty-three percent of the total surface area.'*

9. The police conducted the investigation and recorded the statement under Section 161 Cr.P.C. of Rakesh, Pintu, Titu, Sanjiv, Dr. Shalini Razdan, S.I. Satpal Singh, S.I. Manish Bhati, Constable Sanjay Kumar, Constable Santosh, Inspector Avneesh Kumar and Inspector Deepak Tyagi and after collecting all materials including the site plan, spot inspection report and medical papers of the victim filed a charge-sheet on 15.12.2015, under Sections 376, 452, 386, 506 and 302 I.P.C. against the accused-appellants. The Chief Judicial Magistrate took cognizance of the charge - sheet against the accused-appellants, complied with the requirements of Section 207 Cr.P.C., and committed the case to the Court of Sessions for trial.

10. The trial court framed separate charges under Sections 452, 376, 386, 506 and 302 I.P.C. against the accused-appellants. The orders of charge dated 5.11.2015 were read out to the accused persons, and the accused-appellants denied the charges and claimed trial.

11. To prove its case, the prosecution has produced the following evidence:

i. F.I.R. dated 10.10.2015, Exhibited as Ka-8

ii. Written Report dated 10.10.2015, Exhibited as Ka-1

iii. Statement of victim dated 8.10.2015, Exhibited as Ka-6

iv. Medical Examination Report dated 11.10.2015

v. Injury Report dated 8.10.2015

vi. Post-mortem Report dated 15.10.2015, Exhibited as Ka-12

vii. Death Report dated 15.10.2015, Exhibited as Ka-4

viii. F.S.L. Report dated 4.2.2017

ix. Charge sheet dated 15.12.2015, Exhibited as Ka-11

12. In addition to the above documentary evidence, the prosecution has produced Rakesh (PW-1); Sanjiv Kumar (PW-2); S.I. Manish Bhati (PW-3); A.S.I. Satpal Singh (PW-4); Constable Sanjay Kumar (PW-5); Inspector Avanish Kumar (PW-6); Inspector Deepak Tyagi (PW-7), and Dr. Shalini Razdan (PW-8) during the trial.

13. Even though eleven prosecution witnesses were arrayed in the charge sheet, only eight witnesses were adduced by the prosecution before the court below. It is evident that the prosecution dropped Pinku, an eyewitness of the F.I.R., by filing a discharge application before the trial court, and later on, he was produced as DW-1 by the defence/accused-appellants besides

other defence witnesses. It is relevant to note that Pinku is the witness of the fact, who had doused the fire by putting a blanket on the deceased and is also the cousin of the complainant (PW-1), the husband of the deceased.

14. In examination-in-chief, PW-1 reiterated the facts stated in the F.I.R. and stated that he runs a grocery shop in his village and had gone to Pilakhua to purchase groceries. On 8.10.2015, after the complainant returned from Pilakhua at around 07:15 in the evening, the complainant saw his wife on fire, and she fell in front of him. The complainant tried to douse the fire and received burn injuries on his feet and hand while dousing. After hearing the rescue call, Pinku, the cousin of the complainant, reached the place of the incident and covered the victim with a blanket. While the complainant was taking his wife to Delhi for treatment, she revealed that in his absence, Chintoo and Monti, who lived beside them, entered into their house and demanded money by extending a threat to her life. Chintoo forcibly committed rape upon her, and Monti attempted to commit rape. After that, they poured kerosene oil on her, set her on fire and fled away. The complainant further revealed that Chintoo and Monti were jealous of their family, and they thrashed her when she asked for the payments for groceries that they had purchased. Chintoo and his brother Praveen assaulted her few days before the incident.

15. PW-1 further stated that he got admitted his wife to the G.T.B. Hospital and gave a written report to the police at Police Station Pilakhua, District Hapur, UP. A person outside the police station scribed the report on his instruction, and he read out the contents of the report to him, and he had signed the written report outside the police station. Thereafter, the F.I.R. was registered against the accused-appellant.

16. In the cross-examination, PW-1 stated that when he returned home from Pilakhua market, nobody except his wife was present at his home. When he entered the house, his wife fell before him. His wife's whole body was on fire except her feet. High flames were coming out from his wife's body. At that time, his wife's voice was coming out, again said when he reached home, his wife was not crying. When he shouted, his cousin Pinku came. Titu did not come. Narendra also did not come. The blanket, which was thrown over the victim, was left a little. He did not see the container of kerosene oil lying near the victim or kept in the cupboard. He did not give the burnt blanket to Inspector. Some Dhoti was saved from burning, which was worn by the victim, and he did not give the Dhoti to the Investigating Officer. The stuff he had bought had fallen on the doorstep. He left Pinku there. He doesn't know where Pinku went. He took the victim to the hospital by putting her in Rakesh's car. He does not know how long it took to reach the hospital. When he reached the hospital, he signed some of the papers. There was a nurse with him, and he had not signed. His hands and feet were also burnt, but medical was not done in G.T.B. Hospital. He had a quarrel with the victim on 9.10.2015; after that, she did not talk, she talked through gestures, and she did not speak till death. Apart from him, the nurse and the driver were in the hospital. When he went to the market, his children were at their grandmother's house. His parents had come home after a lot of issue. Vehicle owner Rakesh did not accompany him; his brother's driver accompanied him. He does not know his name. Pinku's house was on

the left side of his house. Inspector went to G.T.B. Hospital on 9.10.2015. When the Inspector reached the hospital, his wife's eyes were open, and she could see. He did not get his hands and feet medically treated, and he had taken medicine from the doctors in the village. On the complainant's call, his uncle's son Pinku had come to the rescue and placed the blanket on his wife. He did not see a kerosene cane and did not hand over the blanket to the police. Neither can he produce any document substantiating that Chintoo owed his money, nor can he could produce any witness to this effect. The complainant's brothers live separately from him. At the time of the incident, his brothers were on duty. Pinku is his real uncle's son, who is a driver and did not go outside to drive the car on the date of the incident and was at home. He further says that none has cooperated except Pinku in dousing the fire. The relevant portion of the testimony of PW-1 is extracted herein below:

" जब में पिलखुआ बाजार से घर लौटकर अपने घर पंहुचा तो मेरी पत्नी के अलावा घर में कोई भी मौजूद नहीं था। जब में अपने घर के अंदर गया तो मेरी पत्नी गिरी पड़ी थी।

जब में घर के अंदर पंहुचा मेरी पत्नी चिल्ला नहीं रही थी। मेरे चिल्लाने पर मेरे चाचा का लड़का पिंकू आया था।

राकेश S/O उम्मेद की गाड़ी में डालकर में नेहा को ले गया था। उसकी मारुती वैन है । कितने बजे मैं जी टी बी पंहुचा मुझे टाइम का अंदाज़ा नहीं है।

जब में अस्पताल पंहुचा था मेरे कुछ कागज़ो पर हस्ताक्षर हुए थे। मेरे साथ में एक नर्स था। उसके अस्पताल में दस्तखत नहीं हुए थे। मेरा मेडिकल जी टी बी अस्पताल में नहीं हुआ था जिससे मेरे हाथ पाव भी जले थे ।

दिनांक 08.10.15 को अगले दिन 09.10.15 को उसका (नेहा) का बीच बचाव हुआ था । उसके बाद नेहा नहीं बोली। इशारे में बात कर रही थी। मृत्यु तक नहीं बोली।

मैं थाने में दस तारीख को आया था । शाम को चार पांच बजे आया था । मैंने जिस आदमी से रिपोर्ट लिखाई थी मैं उसका नाम नहीं बता सकता ।

मेरे दो भाई मुझसे अलग रहते है। घटना के समय मेरे भाई ड्यूटी पर थे। पिंकू मेरे सगा चाचा का बेटा है । पिंकू गाड़ी चलाता है। कार भी चलाता है। घटना के दिन पिंकू कार चलाने नहीं गया था घर पर ही था।"

17. The prosecution then produced PW-2, Sanjiv Kumar, who witnessed the deceased's post-mortem. The dead body was identified and sealed in his presence. In cross-examination, this witness stated that upon receiving a phone call from the deceased's husband, he reached the hospital on his motorcycle. He stated that the complainant is his nephew, and he identified the dead body in the presence of the police.

18. PW-3 S.I. Manish Bhati, who works in Delhi Police, stated, in examination-in-chief, that on 08.10.2015, he was on emergency duty and was posted at G.T.B. Enclave police station. On receiving a call at around 09:00 p.m. from the Duty Officer, he went to the emergency ward and found that a lady was admitted in burnt condition and was under treatment. He recorded her statement in which she stated that Chintoo and Monti, the accused-appellants, keep enmity with her husband. When her husband went to the market, the accused-appellants entered her house, demanded money, and threatened to kill her husband. Upon refusal to give money, Chintoo committed rape, and Monti attempted to commit rape. After that, they poured kerosene oil on her and set her on fire. Little later, her husband took her to G.T.B. Hospital, Delhi. The statement was recorded in the presence of Dr. Sushil, and the witness got her toe impression on the statement.

19. In his cross-examination, the witness stated that he received no written instruction from the police station and was orally asked to record the statement. There is no endorsement on the statement that the

victim was fit for recording her statement. The witness further stated that before taking the statement of the victim, he had confirmed that the victim was fit to give the statement.

20. PW-4 A.S.I. Satpal Singh had prepared the documents relating to the post-mortem in the presence of PW-1 Rakesh, PW-2 Sanjiv Kumar, and PW-5 Constable Sanjay registered the F.I.R. No.566 of 2015, under Sections 452, 376, 307, 386 and 506 I.P.C. against the accused Chintoo and Monti, on the written report of PW-1 Rakesh.

21. Avanish Kumar (PW-6) deposed that after registration of the F.I.R., the investigation was entrusted to him, and he inspected the place of the incident and prepared the site plan. In his cross-examination, the witness states that he recorded the statement of the complainant on 10.10.2015 at around 07:30 p.m. and recorded the statement of witness Pinku, son of Vijendra Tomar and Titu son of Bhagtu Kashyap, on 17.10.2015. On 18.10.2015, he arrested the accused-appellants and sent them to jail. The witness further states that he prepared the site plan at 08:10 p.m. on 10.10.2015. He inspected the place where the deceased was found burnt, he did not find any kerosene bottle, and the victim's clothes were not handed over to him. The witness further states that on 10.10.2015 at around 10:30 p.m. in the night, he went to the hospital to record the statement of the deceased, where on inquiry from the staff of the hospital, it had come to his knowledge that the victim had 90% burnt and is not in a position to give her statement. He also found that the deceased was not able to give a statement. He tried to meet Dr. Sushil, under whose supervision the victim received treatment, but he could not meet him. During the investigation on 18.10.2015, the witness told that the deceased has died.

22. Inspector Deepak Tyagi (PW-7), the second Investigating Officer of the case, recorded the statement of S.I. Satpal Singh, S.I. Manish Bhati and Dr. Shalini Razdan on 30.11.2015. After that, he submitted the charge sheet on 15.12.2015 against the accused-appellants.

23. Dr. Shalini Razdan (PW-8) deposed that she had conducted the post-mortem of the deceased. On internal examination, the autopsy doctor found that the deceased had superficial to deep burns over and above the hips. The deceased had 83% burnt injuries. The head and neck were found normal, and the hair of the head was in semi-burnt condition. The deceased had no internal injury over the lower part of the body. In cross-examination, the witness stated there was no possibility of the commission of rape with the deceased. The entire face of the dead body was found burnt, along with the neck.

24. The incriminating material produced by the prosecution during the trial was then confronted to the accused for recording their statements under section 313 Cr.P.C. The accused persons stated that police has falsely implicated them at the behest of the deceased's husband. The complainant Rakesh, murdered his wife and falsely implicated the accused persons to save himself.

25. The defence has produced Pinku, son of Vijendra Singh, aged 34 years, as DW-1, who stated that on 8.10.2015, at around 06:00 p.m., he was sitting on Mangtu’s terrace with Titu and Rakesh. The deceased and Rakesh fought an hour

before the incident. He heard the victim's voice of rescue. Hearing the call for help, he went to Rakesh's house and saw the victim burning in the flames. Only Rakesh and the victim were there. When he asked Rakesh to extinguish the victim's fire, Rakesh said, 'let the victim burnt'. The victim did not tell anything. She had fainted. When Rakesh did not save the victim, he saved the victim by covering her with a blanket. The victim was saying, Rakesh is killing me; save me. Other people of the village also gathered outside the door. He doesn't know why Rakesh used to beat his wife. Shortly before the incident, the victim told Rakesh to kill her, and Rakesh said he would finish her. At the time of the incident, the victim had not taken the names of Monti and Chintoo in front of the witness.

26. In his cross-examination, he stated that the police did not interrogate him and that Rakesh is his cousin (father's younger brother's son). He had indeed received the summon from the court, but the complainant did not allow him to depose in the court.

27. Suresh Singh, a resident of village Sikhadea, P.S. Pilakhua, District Hapur, was examined as DW-2. This witness has deposed that the deceased's husband runs a grocery shop in the village. He went to the grocery store to buy goods. He saw that Rakesh and his wife were fighting and abusing each other. Rakesh dragged his wife inside the room and locked the room from inside the outer gate. There was no one in the house except the victim and Rakesh. Pintu opened the door from inside. Rakesh was seen standing near his wife while she was on fire. Rakesh did not make any effort to save his wife. This witness denied the suggestion by the prosecution that he was deposing falsely to save accused persons.

28. Sanjiv Kumar, who was examined as DW-3, deposed that when the police reached his village, he came to know that Monti had been falsely implicated in an incident that took place on 8.10.2015 at about 07:00 p.m. One day before the incident i.e., 7.10.2015, he, along with Monti, had gone to Amroha to buy Crusher. He and Monti stayed in Amroha for three days and returned on 9.10.2015. Monti has remained with the witness in Amroha for three days. Monti's uncle runs Crusher, so I know him. In his cross-examination, the witness has denied the suggestion that he is deposing falsely to save accused persons.

29. Court below, upon evaluation of the evidence brought on record, has concluded that the prosecution has succeeded in proving the guilt of the accused-appellants beyond a reasonable doubt.

30. For arriving at such a conclusion, the trial court has relied upon the following evidence:

30.1 That the deceased revealed to her husband how she had been put on fire after the commission of rape upon her by the accused persons.

30.2 The dying declaration recorded by PW-3 S.I. Manish Bhati is consistent, and there is no reason to falsely implicate the accused persons at the behest of PW-3.

30.3 There was a definite motive, as proved by the prosecution, for the accused to commit the crime at the place, time and date.

30.4 The testimony of PW-1 and PW-3 is trustworthy, and their ocular testimony matches the post-mortem report.

30.5 The prosecution thus proved the incident that occurred in a manner as stated by the prosecution witness, proving

the guilt of the accused persons beyond a reasonable doubt.

30.6 The prosecution has successfully brought home the guilt of accused Chintoo @ Kuldeep and Monti @ Ravindra by leading evidence beyond a reasonable doubt.

31. The contentions of the defence, as set out before this court, are as under:

31.1 There is a delay of almost 48 hours in the registration of the F.I.R., which is not explained by the prosecution.

31.2 There is no eye witness to the incident.

31.3 There are major contradictions and improvements in the statement of PW-3, who had allegedly recorded the dying declaration, and his presence in the hospital is doubtful. There are considerable embellishments in the statement of PW-3.

31.4 PW-3 S.I. Manish Bhati has recorded the victim's statement without the authority and knowledge of senior officers. There is no witness to the statement, and the same has not been recorded in the presence of any independent witness, even though Dr. Sushil, driver Surendra and the nurse were allegedly present at the hospital.

31.5 Except for the statement recorded by S.I. Manish Bhati, there is no independent evidence to corroborate the case of the prosecution.

31.6 The hospital's post-mortem report and admission slip completely belie the prosecution story.

31.7 The trial court erroneously discarded the testimony of defence witnesses, even though DW-1's name is reflected in the F.I.R., and he is the one, who had doused the fire of the deceased by placing a blanket on her, and he is also the cousin of the complainant.

31.8 Looking into the entire evidence that surfaced during the trial, the conduct of PW-1, who is the deceased's husband, has been unnatural and suspicious. The complainant's name did not figure in the MLC prepared by Dr. Sushil.

32. In the given backdrop, the prosecution evidence could be appreciated in the following heads:

(i) Prosecution version of occurrence; (ii) Motive; (iii) Dying Declarations; (iv) Medical Evidences; (v) Conduct of PW-1 Complainant; (vi) Investigation; (vii) Conclusion.

33. It is an admitted case that the victim has died because of burn injuries in the G.T.B. Hospital in Delhi. So, there could be three alternatives for her being burnt- (i) Suicide; (ii) Accidental Fire; and (iii) Being put on fire.

34. On perusal of the statement recorded under Section 313 Cr.P.C., it transpires that as per the accused complainant set his wife on fire and falsely implicated the accused-appellants. Neither is it a case of prosecution nor of defence that the victim got accidental fire. Therefore, no case is made out to suggest that the victim sustained burn injuries because of an accidental fire. At best, it could be a case of suicide or being put on fire either by the accused or by the complainant. Suicide by setting on fire has not been pressed by either party, leaving only one alternative of putting the victim on fire and intentionally killing her by burning for our consideration.

35. For evaluating the merits of the case, below-mentioned facts emerge:

35.1 As per the prosecution, the victim disclosed the manner of the incident

to her husband and then, on the same day, to S.I. Manish Bhati, who was examined as PW-3.

35.2 The incident occurred on 8.10.2015 at about 07:15 in the evening in the house of the complainant-husband, who was examined as PW-1.

35.3 The victim was taken to Delhi for treatment and admitted to G.T.B. Hospital, Delhi, at 09:25 p.m. on the same day.

35.4 The MLC was prepared by Dr. Sushil, who first attended to the victim at 09:15 p.m. and allegedly endorsed a finding on the MLC that the victim is fit for statement.

35.5 S.I. Manish Bhati, after getting a telephonic call from Duty Officer Police Station G.T.B. Enclave, Delhi, reached the hospital in the evening and recorded the statement of the victim and got her toe impression on the statement without informing the Senior Officers.

35.6 The complainant, one Surendra Kumar and a nurse, who were present in the hospital at the time of the victim's admission are not made witnesses in the statement recorded by S.I. Manish Bhati.

35.7 Dr. Sushil, who was on duty, was also not made witness by S.I. Manish Bhati.

35.8 Pinku, the cousin of the complainant, was not examined as a prosecution witness even though he was a police witness in the charge-sheet.

35.9 Two dying declarations of the victim were recorded; the victim narrated the incident and commissioning of the offence to two different persons; i) to her husband, who was examined as PW-1; and ii) to S.I. Manish Bhati, who recorded her statement in the hospital and examined as PW-3.

35.10 The F.I.R. was registered after a delay of 48 hours on 10.10.2015 at 19:15 p.m. at Police Station Pilakhua, District Hapur, even though the police station was 5 km from the place of the incident.

36. On perusal of the first information report, it is revealed that DW-1 Pinku had placed the blanket on the victim to douse the flame. The police recorded his statement under Section 161 Cr.P.C., and he was a witness to the charge sheet as well, but the prosecution dropped this witness for the reasons best known to them. On perusal of the admission slip of the hospital prepared by Dr. Sushil, it found mentioned that the victim was admitted to the hospital at 09:25 p.m., but the date is not mentioned on the admission slip. It is further mentioned that the victim was brought to the hospital by one Sanjiv Kumar having Mob No.7830630993. It is further mentioned that the patient was conscious and obeying verbal commands and found fit for statement, whereas, on perusal of the testimony of PW-1, it transpires that he admitted the victim to the hospital, contrary to the medical evidence.

37. As per the testimony of PW-3 S.I. Manish Bhati, the victim was brought by PW-1 Rakesh, the husband of the victim, and in his cross-examination, he stated that he had gone to the hospital to record the statement of the victim on the oral instructions of the senior officer at around 09:15 p.m. He further stated that Dr. Sushil Kumar identified the patient but did not remember whether he had met with Dr. Sushil. He has further admitted that Exhibit-A12/6 (the statement of the victim recorded by PW-3) did not find any endorsement by Dr. Sushil. He recorded the statement after perusal of MLC in which it

was endorsed that the patient was fit for recording it. He has further stated that he has not taken the endorsement of Dr. Sushil upon Exhibit-A12/6. On scrutiny of the statement of PW-3 S.I. Manish Bhati, MLC prepared by Dr. Sushil, and on perusal of F.I.R., it could safely be concluded that the F.I.R. has been registered after many deliberations, and therefore a delay of 48 hours has occasioned in registration of the F.I.R.; which is not satisfactorily explained by the prosecution. The police station is only 5 km away from the place of the incident, and there is no satisfactory explanation forthcoming from the prosecution as to why there is a delay in the registration of the F.I.R. Further, Dr. Sushil, who prepared the MLC has not been produced as a prosecution witness despite the fact he is a police witness in the charge-sheet. Dr. Sushil could have been a potential witness of the prosecution to explain why the date is not mentioned on the MLC despite a specified column in the MLC Form whether the PW-3 has taken the statement of the injured on 8.10.2015.

38. In light of the statement of PW-1 and PW-2, it would be in the fitness of the case to take the rescue of the law on dying declaration since the defence counsel has disputed the presence of the complainant and the S.I. Manish Bhati at the G.T.B. Hospital in New Delhi on 8.10.2015, the date of admission of the victim in the hospital and other embellishments are also noticed, as discussed herein above. The law with regard to dying declaration are briefly enumerated below:

39. In **Dalip Singh & Ors. v. State of Punjab**, the Supreme Court has held:

"We may also add that although a dying declaration recorded by a Police Officer during the course of the investigation is admissible under section 32 of the Indian Evidence Act in view of the exception provided in sub-section (2) of section 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declarations out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a Magistrate or by a doctor. As observed by this Court in Munnu Raja v. State of Madhya Pradesh, [1976] 2 S.C.R. 764; A.I.R. 1976 S.C. 2199), the practice of the Investigating Officer himself recording a dying declaration during the course of investigation ought not to be encouraged....."

40. Hon'ble Supreme Court of India in **Nallapati Sivaiah vs Sub-Divisional Officer, Guntur,** has observed that the Dying Declaration must inspire confidence so as to make it safe to act upon. Whether it is safe to act upon a Dying Declaration depends upon not only the testimony of the person recording the Dying Declaration, be it even a Magistrate, but also all the material available on record and the circumstances, including the medical evidence. The evidence and the material evidence on record must be properly weighed in each case to arrive at a proper conclusion. The court must satisfy itself that the person making the Dying Declaration was conscious and fit to make a statement for which purposes not only the evidence of persons recording dying declaration but also the cumulative effect of the other evidence, including the medical evidence and the circumstances, must be taken into consideration.

41. It is unsafe to record a conviction on the basis of a dying declaration alone in cases where suspicion is raised as regards

the correctness of the dying declaration. In such cases, the court may have to look for corroborative evidence by treating the dying declaration only as a piece of evidence.

42. Resting the conviction solely based on dying declarations would be unsafe in the present case.

43. Learned counsel has cited **Nallapati Sivaiah vs. Sub-Divisional Officer, Guntur, Andhra Pradesh (supra).** The unreliability of an oral dying declaration made to a family member in the absence of the Doctor was sought to be questioned by citing **Arvind Singh v. State of Bihar, Arun Bhanudas Pawar vs. State of Maharashtra** and **Poonam Bai vs. State of Chhattisgarh.**

44. We have thoughtfully considered the arguments advanced by learned counsel for the parties and carefully perused the record.

45. Dying declaration is the last statement that a person makes as to the cause of his imminent death or the circumstances that had resulted in that situation, at a stage when the declarant is conscious that there are virtually nil chances of his survival. On the assumption that at such a critical stage, a person would be expected to speak the truth, courts have attached great value to the veracity of such a statement. Section 32 of the Indian Evidence Act of 1872 states that when a person makes a statement as to the cause of death or as to any of the circumstances which resulted in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased victim to the witness, is a relevant fact and is admissible in evidence. It is noteworthy that the said provision is an exception to the general rule contained in Section 60 of the Evidence Act that 'hearsay evidence is inadmissible' and only when such evidence is direct and is validated through cross-examination, is it considered to be trustworthy.

46. In **Kundula Bala Subrahmanyam and Another v. State of Andhra Pradesh**, Supreme Court highlighted the significance of a dying declaration in the following words :

"18. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence, and unless evidence is tested by cross-examination, it is not creditworthy. Under Section 32, when a statement is made by a person as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. A dying declaration made by a person on the verge of his death has a special sanctity as, at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny by the courts, it becomes a very important and reliable piece of evidence, and if the

court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration……."

47. In **Sudhakar v. State of Madhya Pradesh**, Supreme Court has opined that once a dying declaration is found to be reliable, it can form the basis of conviction and made the following observations :

"14 (1993) 2 SCC 684 15 (2012) 7 SCC 569 Criminal Appeal No.485 of 2012 "20. The "dying declaration" is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chance of his survival. At such times, it is expected that a person will speak the truth and only the truth. Normally in such situations, the courts attach the intrinsic value of truthfulness to such a statement. Once such a statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person; then, the courts can safely rely on such a dying declaration, and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration."

48. In **Paniben (Smt.) v. State of Gujarat**, on examining the entire conspectus of the law on the principles governing dying declaration, Supreme Court has concluded thus:

"18. ……(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja v. State of M.P.)

(ii) If the Court is satisfied that the dying declaration is true and voluntary, it can base its conviction on it without corroboration. (State of U.P. v. Ram Sagar Yadav; Ramawati Devi v. State of Bihar).

(iii) This Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy v. Public Prosecutor).

(iv) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P.)

(v) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P.)

(vi) A dying declaration that suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P.)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurti Laxmipati Naidu)

(viii) Equally, merely because it is a brief statement, it is not discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Ojha v. State of Bihar).

(ix) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. State of U.P. v. Madan Mohan)."

49. In **Lakhan v. State of Madhya Pradesh**, where the deceased was burnt by pouring kerosene oil on her and was brought to the hospital by the accused and his family members. The Supreme Court noticed that she had made two varying dying declarations and held thus :

"9. 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 the Evidence Act, 1872 (hereinafter called as "the Evidence Act") as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct, i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person who cannot be called a witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in some instances.

10. The Court has repeatedly considered the relevance/probative value of dying declarations recorded under different situations and in cases where more than one dying declaration has been recorded. f the court is satisfied that the dying declaration is true and made voluntarily by the deceased, a conviction can be based solely on it without further corroboration. It is neither the rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected. n case there is merely a brief statement, it is more reliable because the shortness of the statement guarantees its veracity. f the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Here the prosecution version differs from the version given in the dying declaration, and the said declaration cannot be acted upon. (Vide: Khushal Rao v. State of Bombay, Rasheed Beg v. State of M.P., K. Ramachandra Reddy v. Public Prosecutor, State of Maharashtra v. Krishnamurti Laxmipati Naidu, Uka Ram v. State of Rajasthan, Babulal v. State of M.P., Muthu Kutty v. State, State of Rajasthan v. Wakteng and Sharda v. State of Rajasthan)".

50. In **Amol Singh v. State of Madhya Pradesh**, when faced with two dying declarations containing inconsistencies, the approach to be adopted by the Supreme Court was summarized as under:

"13. The law relating to the appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there is more than one dying declaration, they should be consistent. (See: Kundula Bala Subrahmanyam v. State of A.P.) However,

if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances."

51. In **Sher Singh and Another v. State of Punjab**, Supreme Court has held thus:

"16. Acceptability of a dying declaration is greater because the declaration is made in extremity. When the party is on the verge of death, one rarely finds any motive to tell a falsehood, and it is for this reason that the requirements of oath and cross-examination are dispensed with in case of a dying declaration. Since the accused has no power of cross-examination, the court would insist that the dying declaration should be of such a nature as to inspire the full confidence of the court in its truthfulness and correctness. The court should ensure that the statement was not a result of tutoring or prompting or a product of imagination. The court must ascertain from the evidence that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit.

Usually, the court places reliance on the medical evidence for concluding whether the person making a dying declaration was in a fit state of mind, but where the person recording the statement states that the deceased was in a fit and conscious state, the medical opinion will not prevail, nor can it be said that since there is no certification of the Doctor as to the fitness of mind of the declarant, the dying declaration is not acceptable. That is essential is that the person recording the dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement without there being the doctor's opinion to that effect, it can be acted upon provided the court ultimately holds the same to 38 (2008) 5 SCC 468 39 (1993) 2 SCC 684 40 (2008) 4 SCC 265 Criminal Appeal No.485 of 2012 be voluntary and truthful. Certificate by the Doctor is essentially a rule of caution and, therefore, a statement's voluntary and truthful nature can be established otherwise."

52. It is thus clear that in cases where the court finds that there exists more than one dying declaration, each one of them must be examined with care and caution and only after satisfying itself as to which of the dying declarations appears to be free from suspicious circumstances and has been made voluntarily, should it be accepted. As observed in the judgments quoted above, and it is not necessary that in every case, a dying declaration ought to be corroborated with material evidence, ocular or otherwise. It is more a rule of prudence that courts seek validation of the dying declaration from attending facts and circumstances and other evidence brought on record. For the very same reason, a certificate by the Doctor that the declarant was fit to make a statement is treated as a rule of caution to establish the truthfulness of the statement made by the deceased.

53. In **Kundula Bala Subrahmanyam (supra),** Supreme Court has observed that if there is more than one dying declaration, then the court must scrutinize each one of them to find out whether the different dying declarations are

consistent with each other in material particulars before accepting and relying on the same. Such a case must be decided on its own peculiar facts. There can be no hard and fast rule on evaluating the evidence brought before the court, including the surrounding circumstances when the deceased had made the dying declaration. The focus of the court is on ensuring the voluntariness of the process, of being satisfied that there was no tutoring or prompting, being convinced that the deceased was in a fit state of mind before making the dying declaration or ascertaining that ample opportunity was available to the declarant to identify the accused.

54. Even on the sole basis of a dying declaration, the accused can be convicted. However, if a dying declaration suffers from some infirmity, it cannot be the sole basis for convicting the accused. In those circumstances, the court must step back and consider whether the cumulative factors in a case make it difficult to rely upon the said dying declaration. In this context, it would be profitable to refer to **Nallapati Sivaiah (supra),** wherein Supreme Court has held as under:

"46. It is the duty of the prosecution to establish the charge against the accused beyond a reasonable doubt. The benefit of the doubt must always go in favour of the accused. It is true that the dying declaration is a substantive piece of evidence to be relied on, provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. The evidence of the Professor of Forensic Medicine casts considerable doubt as regards the condition of the deceased to 41 (1976) 3 SCC 104 42 (1992) 2 SCC 474 43 (1985) 1 SCC 552 44 (1983) 1 SCC 211 Criminal Appeal No.485 of 2012 make a voluntary and truthful statement. It is for that reason non-examination of Dr. T. Narasimharao, Casualty Medical Officer, who was said to have been present at the time of recording of both the dying declarations, attains some significance. It is not because it is the requirement in law that the Doctor who certified the condition of the victim to make a dying declaration is required to be examined in every case. But it was the obligation of the prosecution to lead corroborative evidence available in the peculiar circumstances of the case.

xxxx xxxx xxxx

52. The dying declaration must inspire confidence so as to make it safe to act upon. Whether it is safe to act upon a dying declaration depends upon not only the testimony of the person recording the dying declaration—be it even a Magistrate but also all the material available on record and the circumstances, including the medical evidence. The evidence and the material available on record must be properly weighed in each case to arrive at a proper conclusion. The court must satisfy itself that the person making the dying declaration was conscious and fit to make a statement for which purposes not only the evidence of persons recording the dying declaration but also the cumulative effect of the other evidence, including the medical evidence and the circumstances must be taken into consideration."

55. In **Arvind Singh (supra),** Supreme Court has held that the dying declaration should be dealt with with care and caution, and corroboration though not essential, but expedient to strengthen the declaration's evidentiary value. Where independent witnesses may not be available, all the precautions should be

taken when accepting such a statement as trustworthy evidence. In other words, even though direct evidence may not be available, circumstantial evidence, without a break in the chain of events, would add weight to the evidentiary value of the dying declaration.

56. In the light of above-mentioned objective, we conclude the summary of finding in the succeeding paragraphs.

57. As per the prosecution, two persons were present when the victim was under flame; PW-1 Rakesh, the complainant and DW-1 Pinku, who is the cousin of PW-1. DW-1, Pinku was the first person who reached the place of the incident after hearing the rescue call of the deceased and placed the blanket on the victim to douse the flames. The Investigating Officer recorded his statement, and he was also made a police witness in the charge-sheet, but the prosecution dropped this witness for the reason best known to them, and after that he was brought by the accused-appellants as defence witness. On the minute scrutiny of the testimony of PW-1 and DW-1, it could safely be gathered that PW-1 is an unreliable witness, and it is not safe to accept the testimony of PW-1 in its entirety; it needs corroboration. PW-1 stated that he had brought the victim to the hospital, whereas the MLC reflects that one Surendra Kumar had brought the victim to the hospital. The PW-1 was not made a witness to the statement recorded by PW-3 at the hospital on the date of the incident at around 09:15 p.m., and no explanation came forth by PW-3 as to why he did not make any independent witness to the statement of the victim, even though PW-1 states that he was in the hospital along with the victim. Had PW-1 been in hospital in all possibilities, he should have been made witness to the alleged dying declaration recorded by PW-3, and his name must have figured in MLC. During this time, he has not registered the F.I.R. against the accused persons. No explanation comes forth by the prosecution about the non-availability of the complainant for the initial 48 hours. Therefore, the testimony of PW-1 could not be relied upon as it smacks untruthfulness in his statement. The presence of PW-1 in the hospital is also doubtful.

58. To buttress the submission, the counsel for the accused-appellants submitted that the testimony of PW-1 and PW-3 are inconsistent. The rule says if the dying declaration does not inspire the confidence of the court, it should not be acted upon without corroborative evidence. In the instant case, the presence of PW-3 has not been proved independently by the prosecution at the hospital; neither General Diary maintained at P.S. G.T.B. Nagar, New Delhi, has been examined by the investigating officer nor proved by PW-3, who was posted at Police Station G.T.B. Nagar, New Delhi at the time of the incident and recorded the alleged dying declaration. The relevant portion of the testimony of PW-3 is extracted herein *"यह कथन सत्य है कि जब मैं बयान लेने नेहा का हॉस्पिटल गया था उस समय मुझे किसी उच्च अधिकारी का आदेश नहीं था",* the CDR of the PW-3 has also not been brought before the court to show his presence in the hospital nor the concerned Executive Magistrate has been immediately informed by the PW-3 to record the statement of the victim immediately after receipt of information. This shows the unnatural conduct of a police officer who is well-versed with the legal procedure in such cases.

59. The relevant portion of the testimony of PW-3 is reproduced for the sake of convenience, to arrive at just and

right conclusion, to substantiate that the presence of this witness is doubtful at the hospital and smacks some ulterior motive. The witness said that *...मैने बयान किया उस समय डॉक्टर सुशील एम०एल०सी० बनाने वाले वहाँ मौजूद थे।*, *and further said "यह कथन सत्य है कि मैने कागज संख्या A12/6 पर वहाँ मौजूद व्यक्ति का बयान लेने के बाद हस्ताक्षर नहीं कराये"।* ……(Document No. A12/6 is the dying declaration recorded by PW-3).

60. There is a sense in the argument of defence counsel that the presence of PW-3 at the hospital is doubtful. The statement of PW-3 has no relevancy as it's not proved by the prosecution that he was asked by a senior officer to record the statement of the victim in the hospital at the given time and date. So, Dr. Sushil, who first attended to the victim in the hospital, is the only person, who could certify that victim was in a fit state of mind to give a statement, but he was not examined by the prosecution, neither he was made a witness in dying declaration recorded by PW-3. It has also not been proved that the victim was in a fit condition to give a statement. The DW-1 has stated in his testimony that the victim had fainted at the place of the incident itself, which is admitted by PW-1 in his testimony; the relevant portion is extracted herein after…. *"जब मैं घर के अन्दर पहुँचा मेरी पत्नी चिल्ला नहीं रही थी। मेरे चिल्लाने पे मेरे चाचा का लड़का पिन्कू आया था",* the defence counsel further urged that Dr. Sushil has not been examined during the trial, under whose supervision the deceased was getting her treatment, and who allegedly had endorsed on the MLC that the victim was fit to give a statement. The PW-3 has also not made Dr. Sushil as a witness on the statement of the victim, even though he was present in the hospital. Therefore, the presence of PW-3 at a given time and date is doubtful. If we go by the statement of PW-3, he had two options; either he should have informed the U.P. Police immediately at Police Station Pilakhua to register an F.I.R. or should have proceeded to register the F.I.R. at P.S. G.T.B. Nagar, New Delhi, immediately, thereafter, where he was posted, and should have informed the concerned Executive Magistrate to record the statement of the victim in hospital. He did not do anything. Hence the testimony of PW-3 also smacks doubt.

61. The defence counsel's argument that the motive is bleak and the prosecution has failed to establish a strong motive to convict the accused-appellants from the charges of rape or murder finds support from the fact that the conduct of the husband, all through, for two days has been unnatural. The testimony of PW-1 does not find corroboration from medical evidence, and there are substantial improvements and contradictions in his testimony, which are sufficient to discredit the prosecution's story. The PW-1 was out the scene for two days, and his presence was not recorded in any of the documents prepared during 48 hours.

62. DW-1 is the cousin of the complainant, the relevant part of his testimony is extracted herein below:

"घटना के पूर्व राकेश व नेहा की आपस में लड़ाई हुई थी। घटना के एक घंटा पूर्व लड़ाई हुई थी। मुझे नेहा की बचाओ बचाओ की आवाज़ सुनाई दी। बचाओ बचाओ की आवाज़ सुनकर के राकेश के जीने से राकेश के घर में गया। नेहा उस समय आग के लपटे में जल रही थी। जिस समय नेहा आग की लपटे में जल रही थी उस समय केवल राकेश व नेहा मौजूद थे। मैंने राकेश से नेहा की आग बुझाने के लिए कहा था जिस पर राकेश ने कहा था की "नेहा को जलने दो"। नेहा ने मुझे कुछ नहीं बताया वह बेहोश हो गई थी। जब राकेश ने नेहा को नहीं बचाया तो मैंने नेहा को कम्बल डालकर बचाया था। "

63. At this stage, we will refer to the decision of a Two-Judge Bench of the

Supreme Court in **Mahendra Singh and Others v. State of Madhya Pradesh**, the court has observed as follows:

"20. There is a settled law that the same treatment is required to be given to the defence witness(es) as is to be given to the prosecution witness(es)."

64. The conjoint appreciation of testimony of DW-1 along with PW-1 and PW-3 would become necessary in the given facts-circumstances when the evidence of PW-1 and PW-3 is in the serious zone of suspicion and creates doubt in the prosecution story, the credibility of PW-1 and PW-3 needs to be tested along with the conjoint reading of DW-1.

65. On scrutiny of the testimony of PW-1 and DW-1, it could be safely concluded that the victim had cried for help. If the relationship between her and her husband had been smooth, he should have made efforts to douse the fire and save the victim to the best of his efforts, but he did not do so. The DW-1 says that PW-1 said to him, *"let the victim die"*. It shows that they had a strained relationship. On perusal of MLC prepared on 8.10.2015, it transpires that the patient was admitted by one Surendra Kumar, not by PW-1, who claims to have taken the victim to the hospital. Furthermore, there is no animosity brought on record between the accused-appellants and the victim except the sole testimony of the complainant, who happens to be the victim's husband and whose testimony is under the serious cloud of suspicion. DW-1 not only rushed to the spot after hearing the rescue cry but also placed the blanket on the victim; hence, his testimony gained the faith of the court and is liable to be accepted as true and trustworthy in the light of the facts discussed herein above.

66. In the instant case, there is no dispute that the deceased received severe burn injuries on 8.10.2015 at her house. Dr. Shalini Razdan (PW-8), who had conducted the post-mortem, stated that she had received burn injuries on her chest, abdomen, back, head, neck and face to the extent of 83%. She has also deposed that the cause of death was burn injuries. If the extent of burn injuries are appreciated in view of the statement of DW-1, who says that she had fainted at the place of the incident, it could be safely concluded that the victim was not in a position to give a statement.

67. For convicting the appellants, the trial court has primarily relied upon two dying declarations of the deceased, one recorded by S.I. Manish Bhati (PW-3) and the other oral dying declaration stated to have been made by the deceased to her husband PW-1. However, there were several loopholes in the procedure adopted while recording the dying declaration by the PW-3. Still, the trial court erroneously found it safe to rely on it.

68. The above infirmities are more than adequate to wholly discard the written dying declaration recorded by PW-3.

69. Since the finding returned by the trial court is riddled with deficiencies, thus making them unreliable, we do not propose to dwell on their creditworthiness. Suffice it to say that there is every reason for us to have found them untrustworthy. While rejecting the written dying declaration of PW-3, we would like to point out that we are also not prepared to attach full credence

to the oral dying declaration made to PW-1. There have been instances where the conviction has been based solely upon a dying declaration when it has been found to be totally acceptable. In this case, we are not prepared to attach that kind of importance to the oral dying declarations.

70. In light of the evidence discussed above and being mindful of the principles governing appreciation of the evidence related to dying declarations, we find it difficult to endorse the conclusion arrived at by the trial court. The evidence of PW-1 and PW-3 cannot be treated as stellar enough to hold the appellants guilty of the offence of rape, attempt to rape and set the victim on fire.

71. Hence, the accused-appellants Chintoo @ Kuldeep and Monti @ Ravindra are entitled to the benefit of the doubt.

72. The aforesaid discussion results in the impugned judgment being **quashed** and set aside. Accordingly, the appeals are allowed. Consequently, the accused-appellants Chintoo @ Kuldeep and Monti @ Ravindra are acquitted of the charges framed against them. The accused-appellants are directed to be set at liberty forthwith subject to compliance of Section 437-A Cr.P.C., if not required in connection with any other case.

(2023) 6 ILRA 351
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 2818 of 2019

Rahul ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Sunil Kumar, Sri Akhilesh Singh, Sri Brajesh Kumar, Sri Shivam Yadav, Sri Ajay Yadav

Counsel for the Respondent:
G.A.

(A) Criminal Law - appeal against conviction - Indian Penal Code, 1860 - Sections 376(2)(i) & 323 - Rape , The Protection of Children from Sexual Offences Act, 2012 - Section 5(m)/6 , 42 , Criminal Law (Amendment) Act, 2018, The General Clauses Act, 1897 - Section 6 - Effect of repeal - evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof, which are admissible in law, can be used by the prosecution or the defence - a man can tell a lie, but the circumstances do not.(Para -57, 60,)

(B) Constitution of India, 1950 - *article 20(1) - ex post facto* - retrospective consequence on any act committed, which is not prohibited by law, before the enactment of a preceding law - provisions have to be strictly construed and cannot be given retrospective effect unless the legislative intent and expression are clear beyond ambiguity - a statute that affects substantive rights is presumed to be prospective in operation unless made retrospective either expressly or by necessary intendment. (Para - 36, 43)

(C) Criminal Law - levy of appropriate sentence - all punishments must be directly proportionate to the crime committed - normal sentence in a case of aggravated penetrative sexual assault is 10 years, and in exceptional cases may go to life imprisonment - Court's discretionary power to impose a sentence should not be used indiscriminately in a routine, casual and cavalier manner - special and adequate reasons must be

recorded for awarding life imprisonment.(Para - 78, 79, 82)

Aggravated penetrative assault on a child below 12 years - accused sentenced under Section 376(2)(i) of IPC - no longer part of penal code on the incident date - trial court should have tried and sentenced under Section 376(2) IPC under new law - which came into existence on date of incident - minimum sentence for rape with a woman under sixteen - increased to 20 years in new law - trial court convicted accused-appellant for life imprisonment - No prejudice caused - life sentence was already in existence in the pre and post-Criminal Law Ordinance, 2018.**(Para - 47, 54, 55)**

HELD:- Trial court's findings confirm ingredients of rape under IPC . Penetrative aggravating sexual assault under POCSO Act, 2012 established for accused-appellant. Trial court failed to record reason for awarding life imprisonment. Nothing on record to rule out probability of reformation and rehabilitation of appellant. Man of clean antecedents. Sentence modified to 20 years imprisonment. Punishment not awarded under Section 5 (m)/6 of POCSO Act 2012 due to mandate of Section 42. **(Para - 77, 83, 84)**

Criminal appeal partly allowed. (E-7)

List of Cases cited:

1. L.R. Brothers Indo Flora Ltd. Vs C.C.E. , (2020) SCC Online SC 705

2. Hitendra Vishnu Thakur Vs St. of Maha., (1994) 4 SCC 602

3. U.O.I. Vs Zora Singh , (1992) 1 SCC 673

4. Soni Devrajbhai Babubhai Vs St. of Guj. & ors. , (1991) 4 SCC 298

5. Kalpnath Rai Vs St. (through CBI), (1997) 8 SCC 732

6. Re: Barattero, (1994) 1 ALL ER 447 (CA)

7. St. of U.P. Vs Shubhash @ Pappu , (2022) 6 SCC 508

8. Fainul Khan , (2019) 9 SCC 549

9. Rajesh Yadav & ors. Vs The St. of U.P. , (2022) 12 SCC 200

10. Vinod Kumar Vs St. of Punj., (2015) 3 SCC 220

11. Mahendra Singh & ors. Vs St. of M.P., (2022) 7 SCC 157

12. Gulam Sarbar Vs St. of Bihar , (2014) 3 SCC 401

13. Vadivelue Thevar Vs St. of Madras, AIR 1957 SC 614

14. Kunju Vs St. of T.N., (2008) 2 SCC 151

15. Bipin Kumar Mondal Vs St. of W.B, (2010) 12 SCC 91

16. Mahesh Vs St. of M.P, (2011) 9 SCC 626

17. Prithipal Singh Vs St. of Punj. , (2012) 1 SCC 10

18. Kishan Chand Vs St. of Har. , (2013) 2 SCC 502

19. Shimbhu & Anr. Vs St. of Har. , (2014) 13 SCC 318

(Delivered by Hon'ble Vinod Diwakar, J.)

1. We have heard Shri Sunil Kumar, learned counsel for the appellant and Shri Arunendra Kumar Singh, learned AGA for the state.

2. This appeal has been filed against the impugned judgment and order dated 18.12.2018 passed by Ist Additional Sessions Judge, Orai, District Jalaun, in Session Trial No. 56 of 2018 (State vs. Rahul), arising out of Case Crime No.20 of 2018, U/S 376(2)(i), 323 IPC read with Section 5(m)/6 of The Protection of Children from Sexual Offences Act, 2012, by which the trial court has convicted the

accused-appellant Rahul for life imprisonment under Section 376(2)(i) IPC and to pay a fine of Rs. 50,000/-, and in default of payment of fine two years additional imprisonment.

3. In brief, the prosecution case is that on 21.04.2018 at about 07:46 p.m., the complainant Raghvendra Singh filed a written complaint at PS Kotra, District Jalaun, stating that his son went to school at 7:00 a.m., after that Rahul, son of Ramphal Singh, had come to his house on the date of incident and told his wife that he is taking his daughter aged two years (hereinafter referred to as victim "X") to the temple. Accused-appellant Rahul took his daughter to the temple after combing her hair and putting a frock on her. When Rahul did not return till 9:00 a.m. with the baby girl, the complainant's wife asked Udaypal Singh whether he had seen Rahul in the temple. Udaypal Singh said he was coming from the temple but could not find them. After that complainant's wife and his father reached Rahul's house in search of the victim "X". Accused Rahul is the first cousin of the complainant. On reaching the house of Rahul, the wife of the complainant, and his father saw that Rahul was on top of her daughter, and her daughter, victim "X", was crying. Seeing the complainant's wife and his father, Rahul left victim "X" and fled away. The complainant's wife and father of the complainant picked victim "X" and saw that X's genitalia was swollen and blood was coming out of her private parts. Rahul has committed rape upon the daughter of the complainant. The complainant's wife and his father told the entire incident over the telephone to the complainant, and after that, the complainant reached home and saw her daughter "X" weeping. She was scared, and her face was also swollen.

4. On the basis of the written report, an FIR was registered on 21.04.2018 at 19:46 under Sections 376(2) (i), 323 IPC read with Section 5 (m)/ 6 of the Prevention of Children from Sexual Offences Act, 2012 at PS Kotra, District Jalaun, U.P. against the accused Rahul. As there was an allegation of sexual exploitation in the FIR, Medico-Legal Examination of Sexual Violence was conducted on 21.04.2018 at 10.45 p.m. by Sr. Medical Officer posted at District Women Hospital, Jalaun.

5. After registration of the FIR, the police conducted the investigation and recorded the statement under Section 161 Cr. P.C of (i) Raghvendra Singh, (ii) Udaypal Singh; (iii) Virendra Singh; (iv) Smt. Deepa; (v) Head Constable Chandra Kumari; (vi) Dr. Sunita Banojha; CMO Jalaun; and (vii) Constable Ram Bihari Pandey, and (viii) Inspector Ashok Kumar Pandey.

6. After collecting all the materials and upon culmination of investigation against the accused Rahul, the police filed the charge sheet on 25.05.2018, under Section 376(2)(i) and Section 323 IPC read with Section 5 (m)/ 6 of POCSO Act, 2012 against the accused-appellant. The CJM took cognizance and after complying with the requirements of section 207 Cr.P.C., committed the case to the Court of Sessions for trial.

7. The trial court framed the charges under Section 376(2)(i) read with Section 323 IPC and Section 5(M)/6 of POCSO Act, 2012. The order of charge dated 11.07.2018 was read out to the accused, and the accused-appellant denied the charges and demanded trial.

8. In order to prove its case, the prosecution has produced the following documentary evidence.

(i) Written Report dated 21.04.2018, Exhibited as Ka.1

(ii) FIR dated 21.04.2018, Exhibited as Ka. 4

(iii) Medico-Legal Examination Report dated 21.04.2018, Exhibited as Ka.

(iv) Charge sheet dated 25.04.2018, Exhibited as Ka.6.

9. Besides the above documentary evidence, the prosecution has examined complainant Raghvendra Singh as (PW-1); The victim's mother Smt. Deepa as PW-2; Dr. Sunita Banojha as (PW-3); Constable Ram Bihari Pandey as PW-4; Inspector Ashok Kumar as (PW-5).

10. Complainant Raghvendra Singh- the father of the victim- was examined as PW-1; in examination-in-chief, he reiterated the facts as stated in FIR;, he stated that on 21.04.2018 at about 7.00 a.m., he was at village Hematpur, Jila Parishad Barier, when his wife Deepa telephonically informed that Rahul had come to his house and told her that he is taking victim "X" to Akshara Devi Temple. As Rahul is the complainant's first cousin, his wife allowed the child to go with Rahul. When Rahul did not return till 9.00 a.m. with the baby girl, his wife asked Udaypal Singh- the complainant's nephew- whether he had seen Rahul and victim "X" in the temple. Udaypal said he was coming from the temple but could not find them. Then his wife and his father -Virendra Singh reached Rahul's house and saw that Rahul was naked and was lying on top of his daughter, who was crying; on his wife's challenge, Rahul fled, leaving his daughter crying. His wife noticed that blood was coming out from the daughter's private part, and there was swelling on the genitals. Rahul had raped his daughter "X". His wife informed the complainant about the incident from his father's phone. After coming home, the complainant went to the police station with his wife and father, and registered the FIR against Rahul.

11. In his cross-examination, PW-1 stated that he is 12th pass and Kahtampur village- the place of his work, is about 90 km away from his village. His wife informed him about the incident at 10 a.m. over the telephone. The wife has studied till class V and his wife has a mobile. His uncle's son Udaypal had informed him on the phone about the incident. When he reached home, he found the girl at home. The girl could not speak as she was two years old. Rahul was alone at home at the time of the incident. The girl was wearing a frock. There was blood on the frock. He further stated that the blood had not reached her legs, and her mother gave a statement as the girl could not speak. The complainant was not at home, and his wife waited for him to reach home so that FIR could be lodged.

12. The mother of victim "X" was examined as PW-2; she has supported the prosecution case in examination-in-chief, which was recorded on 31.08.2018 but resiled from her statement during cross-examination, which was recorded on 07.09.2018- nine days thereafter. This witness stated that she saw that the accused-appellant Rahul was lying naked on her daughter, and on her challenge, the accused Rahul fled.

13. In cross-examination, PW-2 stated that her earlier statement recorded on 31.08.2018 was based on what the police

and the lawyer had told her. The police told the witness that if she did not state as they suggested, her husband would go to jail, so out of fear, she stated facts based on the suggestion given by the police and the advocate on the prosecution's line in the examination-in-chief.

14. The witness further stated that on the date of the incident, at around 6–7:00 a.m., when the victim woke up, she was made to urinate, but the victim "X" faced difficulty in urinating and started crying. She noticed that she had redness on her genitals. On this, she gave the victim "X" to her father-in-law, who was working outside the house and got busy with work. When she came out, she could not see victim "X", and on asking about the victim, he said she must be playing somewhere, and after that, her father-in-law went to find her. After 10-15 minutes, he brought her home and said that she was playing on the way – at some distance from their house- and the victim had some difficulty in passing urine and developed redness over her private parts. Meanwhile, someone called the police, and on the villager's complaint, the police took Rahul with them. The victim had also suffered an infection in the vagina on earlier occasions, and after local treatment, the same was cured.

15. Dr. Sunita Banojha, who had prepared the Medico-Legal Examination Report on Sexual Violence, was examined as PW-3. She deposed that the mother and father of victim "X", aged about two years, had brought her to the hospital for internal and external examination. On external examination, it was found there was no fluid discharge or swelling on the opening part of the vagina, but there was a 01-inch injury and redness on her private parts, and, on the suggestion, she stated that the redness could come from rubbing or forceful entry of hard objects.

16. Constable Ram Bihari Pandey was examined as PW-4, who assigned Constable Muharir to register the FIR against the accused-appellant Rahul as Case Crime No. 20 of 2018 under Section 376(2)(i), 323 IPC read with Section 5(m)/6 POCSO Act, 2012 and proved the Chik FIR.

17. Inspector Ashok Kumar was examined as PW-5, who, after registration of F.I.R conducted the investigation and collected the oral and documentary evidence, and after that, filed the charge sheet against the accused-appellant under Section 376(2)(i), 323 IPC read with Section 5(m)/6 POCSO Act,2012 and proved the contents of the charge sheet.

18. Virendra Singh was examined as DW-1, who has stated that the victim is his grand-daughter, and the prosecution has developed a concocted story to implicate Rahul at the instance of one Vijay Gupta, who had enmity with the accused. The accused-appellant, Rahul, did not support Vijay Gupta in the village election, and therefore, he started carrying malice against the accused-appellant, Rahul and framed him in a false case in connivance with police and villagers.

19. On the basis of the material produced by the prosecution during the trial, the accused was confronted for recording his statement under section 313 Cr.P.C. The accused has stated that he has been falsely implicated at the behest of one Vijay Gupta, with whom the complainant's father works. He had opposed his candidature in the Pradhan election.

20. On the basis of the evidence produced, the trial court has concluded that the guilt of the accused-appellant has been proved beyond reasonable doubt and, accordingly, convicted the accused-appellant for the offence under section 376(2)(i), 323 IPC read with Section 5(m)/6 POCSO Act and awarded life imprisonment with lesser sentences.

21. The trial court has concluded that the testimony of PW-3 is consistent, and there is no reason for the doctor to implicate the accused-appellant, falsely. As per the opinion of the Doctor, there was sexual assault by the aggressor on the child victim "X", and the trial court found the testimony of PW-1 and chief examination of PW-2 reliable and trustworthy.

22. Shri Sunil Kumar, learned counsel for the accused-appellant, has argued that the evidence was so scanty that there was no evidence of a minor child being put to aggravated sexual assault by the accused-appellant. The conviction can't be based on scanty testimonies, and that learned trial court had committed patent illegality in appreciation the evidence.

23. Referring to certain portions of the testimony of PW-1, PW-2 and PW-3 on the subject, learned counsel has argued that the trial court erroneously failed to appreciate the following arguments.

23.1 PW-1- The first informant- is not the eyewitness of the incident; the entire evidence that comes forth from the PW-1 is hearsay evidence; the same is not admissible under the law.

23.2 PW-2, the mother of the victim, who is a witness to the fact, has resiled in the cross-examination; hence, her testimony recorded under examination-in-chief needs corroboration with medical evidence with precision.

23.3 The prosecution has failed to produce Shri Udaypal Singh- the nephew of the complainant, even though he was a police witness in the charge sheet, whose name was also revealed in the FIR. He could be a potential witness of the prosecution, who could shed light on the prosecution's case about how the offence was committed.

23.4 The statement of PW-3, Dr. Sunita Banojha, who had prepared the Medico-Legal Examination Report of Sexual Violence, mentioned that no bleeding, tear, swelling or discharge from the vagina was detected.

23.5 Sexual assault is an independent offence viz a viz aggravated sexual assault.

23.6 The Court has also erred in discarding the testimony of DW-1, who was a witness of fact and had gone with PW-1 to the house of the accused-appellant and allegedly seen the incident.

23.7 There are inconsistencies and improvements in the statement of the prosecution witness. The ocular testimony of the witness does not corroborate the medical reports, and the medical reports do not substantiate the ingredients of Section 5(m)/6 of the POCSO Act,2012 and 375 IPC.

23.8 The trial court has failed to appreciate the statement of the accused recorded under Section 313 Cr.P.C. in which he has stated that he has been falsely implicated because of enmity.

23.9 The ingredients of an offence under Section 376(2)(i), 323 IPC read with Section 5(m)/6 POCSO Act are not made out in the facts of the case as no evidence of penetrative sexual assault and rape has been substantiated against the accused-appellant during the trial.

23.10 As Section 376(2)(i) had been omitted with effect from 21.04.2021 from the Penal Code through the Criminal Law (Amendment) Act, 2018, hence, the punishment awarded to the accused-appellant is hit by restrictions placed by Article 20(1) of the Constitution of India.

24. Learned counsel for the accused-appellant has drawn the attention of the Court succinctly on four points;

(i) No case against the accused-appellant is made out, as the testimonies of PW-1 and PW-3 are highly unreliable, and the cumulative effect of PW-2, and DW-1 makes the medical evidence unreliable, and therefore, the testimony of PW-3 be discarded. The trial court has committed patent illegality in discarding the testimony of DW-1, who is an eyewitness of the incident and has been dropped by the prosecution for the reason best known to them.

(ii) The ingredients of an offence under section 5(m)/6 of the POCSO Act has not been proved in the facts-circumstances of the case.

(iii) The punishment awarded to the accused-appellant is hit by Article 20(1) of the Constitution of India as section 376(2)(i) was not in existence on the date of the incident.

(iv) The punishment is disproportionate to the alleged offence, and the sentencing policy has not been followed in letter and spirit.

25. Per contra, learned A.G.A submits that the evidence on record proves the commission of rape punishable under section 376(2)(i), read with section 5(m)/6 of POCSO Act, 2012. The statement of the complainant, who was examined as PW-1 is definite with respect to the commission of the offence. The PW-2, the mother of the victim and the eyewitness of the case, is the sterling witness of the prosecution; this witness has supported the prosecution's case in examination-in-chief, even though she has resiled in her cross-examination. The examination-in-chief of PW-2 proves the allegation of rape against the accused-appellant. Dr. Sunita Banojha, who medically examined the victim, supported the case of the prosecution and stated that there was a patch of redness on the private parts of the victim and referred to the Medico-Legal Examination Report of Sexual Violence prepared by PW-3, which proved the commission of the offence of rape. The learned A.G.A urges that the cumulative effect of testimony of PW-1, PW-2 and PW-3 proves the guilt of accused-appellant beyond reasonable doubt.

26. He has urged that there is no reason for PW-3 to falsely implicate the accused-appellant, and from the opinion of the Doctor, it could safely be made out that there was a penetrative sexual assault by the aggressor on the child victim.

27. Before coming to the case in hand, it would be in the fitness of the case to go into the brief history of post-Nirbhaya case amendments in criminal law.

28. The brutal gang rape of a 23 years old physiotherapist on a bus in Delhi on 16 December 2012, shocked the entire nation and led to widespread outrage and protest. The Criminal Law (Amendment) Act, 2013 was introduced in the Parliament, which made significant changes in the Indian Penal Code 1860, Indian Evidence Act 1860, Code of Criminal Procedure 1973 and Protection of Children from Sexual Offence Act 2012, and received the

Presidential assent on 02.04.2013, and deemed to come into force w.e.f 03.02.2013, when The Criminal Law (Amendment) Ordinance, 2013 came to effect. It was initially an Ordinance promulgated by the President of India on 03.02.2013 and became an Act w.e.f 03.02.2013.

29. Post- *Nirbhaya case,* in the wake of the ***Kathua Case***-as a consequence of the public uproar, the Cabinet approved the Criminal Law (Amendment) Ordinance 2018, and the President of India signed the Ordinance on April 21, 2018. Subsequently, to fulfil the constitutional obligation, the Ordinance became Act by the act of Parliament, which received the Presidential assent on August 11, 2018, and came into existence as the Criminal Law (Amendment) Act, 2018 with retrospective effect.

30. One of the salient features of the Criminal Law Amendment Act 2018, is that if a person rapes a woman under sixteen years of age, he be punished with not less than 20 years, which may extend to imprisonment for life, imprisonment for life means for the remainder of persons natural life.

31. Now the question that arises before this Court is whether the trial court was justified in convicting the accused-appellant for committing the offence punishable under Section 376 (2)(i) IPC despite the same having been omitted by the promulgation of Criminal Law (Amendment) Ordinance, 2018 on the date of incident/ commission of the offence.

32. To avert this legal issue, we would, therefore, like to extract the relevant portion of the Criminal Law Ordinance, 2018, which received the Presidential assent on 21.04.2018:

"THE CRIMINAL LAW (AMENDMENT) ORDINANCE, 2018
No. 2 OF 2018

Promulgated by the President in the Sixty-nine Year of the Republic of India.

An Ordinance further amended the Indian Penal Code, the Indian Evidence Act, of 1872, the Code of Criminal Procedure 1973 and the Protection of Children from Sexual Offences Act 2012.

WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

NOW, THEREFORE, in the exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:-

4. In section 376 of the Penal Code,-

(a) in sub-section (1), for the words "shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine", the words "shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine" shall be substituted;

(b) in sub-section (2), clause (i) shall be omitted;

(c) after sub-section (2), the following sub-section shall be inserted, namely:-

"(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that

person's natural life, and shall also be liable to fine:

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

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

33. In this regard, it is also necessary to extract the relevant portion of The Criminal Law (Amendment) Act, 2018, which was notified in the official Gazette on 21.04.2018:

"THE CRIMINAL LAW (AMENDMENT) ACT, 2018
NO. 22 OF 2018
[August 11, 2018.]

An Act further to amend the Indian Penal Code, Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 and the Protection of Children from Sexual Offences Act, 2012.

Be it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:-

CHAPTER I
PRELIMINARY

1. (1) This Act may be called the Criminal Law (Amendment) Act, 2018.

(2) It shall be deemed to have come into force on April 21, 2018.

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4. In Section 376 of the Penal Code-

(b) in sub-section (2), clause (i) shall be omitted;

(c) after sub-section (2), the following sub-section shall be inserted, namely:-

"(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

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

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

34. The contention of Shri Arunendra Kumar Singh, learned counsel for the state, is that all of the cases pending investigation/ trial on the date when this amendment came into effect were deemed to be covered by this amendment and to substantiate his argument has relied upon Section 6 of the General Clauses Act, 1897. Section 6 of the General Clauses Act, 1897 is reproduced hereinbelow for ready reference:

"6. Effect of repeal. – *Where this Act, or any [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.

35. In the light of the Criminal Law (Amendment) Act, 2018, as extracted hereinabove, we proceed to avert the legal arguments of Shri Sunil Kumar.

36. It is a settled principle of interpretation of Criminal Law that the provisions have to be strictly construed and cannot be given retrospective effect unless the legislative intent and expression are clear beyond ambiguity. There is a plethora of judicial pronouncements on consideration of *ex post facto* law, a few of which need to be noted at this stage**. L.R. Brothers Indo Flora Ltd. v. Commissioner of Central Excise; Hitendra Vishnu Thakur v. State of Maharashtra; Union of India v. Zora Singh**

37. In **Hitendra Vishnu Thakur v. State of Maharashtra and Ors.,** the Apex Court dwelled upon the ambit and scope of the amending Act and the retrospective effect of the Act/ Statute and eventually, ruled thus:

(i) A statute that affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly- defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to the right of action and right of appeal, even though remedial, is substantive in nature.

(iii) Every litigant has a vested right in substantive law, but no such right exists in procedural law.

(iv) A procedural statute should not, generally speaking, be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties regarding transactions already accomplished.

(v) A statute that changes the procedure and creates new rights and liabilities shall be construed as prospective in operation unless otherwise provided, either expressly or by necessary implication.

From the aforesaid analysis of law, it is graphically clear that there is a presumption against the retrospective operation of a statute, and further, a greater retrospective cannot be conferred on a statute than the language makes it necessary....."

38. The Hon'ble Supreme Court in the case of **Soni Devrajbhai Babubhai vs. State of Gujarat and others** has occasioned to examine the applicability of Section 304-B of IPC where the dowry death had occurred prior to the insertion of Section 304-B of IPC and held that penal statute, which creates offences or which

have the effect of increasing penalties for existing offences, would only be prospective because of the constitutional restriction imposed by Article 20 of the Constitution, because it manifestly shock's one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment.

39. As held in **Kalpnath Rai vs. State (through CBI)** all legal ingredients of the offence must happen before the new offence comes into existence.

40. The defence counsel argued that the punishment awarded under Section 376(2)(i) IPC is hit by the restrictions placed under Article 20(1) of the Constitution of India as the penal provision has no applicability in the facts-circumstances of this case. The relevant portion of the Article 20(1) of the Constitution of India is extracted hereinbelow:

"20. Protection in respect of conviction for offences- *(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."*

41. The Criminal Law (Amendment) Ordinance, 2018 came into existence on 21.04.2018, i.e., on the fateful date of the incident and subsequently, the Ordinance got the approval of the Parliament and became Criminal Law (Amendment) Act, 2018 retrospectively. Therefore, on the date of the incident, the Ordinance had already been notified after receipt of Presidential assent. As a consequence, Section 376(2)(i) IPC had been omitted from the penal code. The object of bringing the Criminal Law (Amendment) Ordinance, 2018 was to rationalize the sentencing structure of offences against women and children by providing graded sentences linked to the age of the victim and the nature of the crime. It has not brought any change in the ingredients of the offence of rape under I.P.C and aggravated penetrative sexual assault in POCSO Act, 2012.

42. Any provision which increases the penalty, particularly if coupled with an additional liability to imprisonment, cannot be construed as retrospective when all the ingredients of the offence happened as per the existing law, as held in **Re: Barattero**, needless to say, by bringing Criminal Law Ordinance 2018, the minimum sentence has been increased from ten to twenty years for the commission of the offence of rape with a girl under sixteen years of age, whereas the maximum sentence is unchanged. The appellant's conviction was held under the old sentencing system; therefore, the provisions of the Criminal Law Ordinance 2018 have not been invoked against the accused-appellant. The maximum sentence, post and after the Criminal Law (Amendment) Act, 2018 is the same; its only minimum sentence for rape which is increased to twenty years. So, in the instant case, whether the accused-appellant is awarded a sentence under Section 376(2)(i) IPC or Section 376(2) IPC has no bearing on his sentence as he has been awarded the maximum sentence of life imprisonment.

43. Thus, the legal position is that a statute that affects substantive rights is presumed to be prospective in operation unless made retrospective either expressly or by necessary intendment. Indian Penal Code is a substantive law that cannot have

a retrospective operation unless otherwise provided, either expressly or by necessary implication, The same is valid subject to the restrictions placed by Article 20(1) of the Constitution of India.

44. Regrettably, the trial court has failed to notice the effect of the Criminal Law (Amendment) Ordinance, 2018, in the facts-circumstances of this case.

45. We may observe, straightaway, that we are not impressed by the argument of defence counsel that by omitting Section 376(2)(i) IPC through the Criminal Law (Amendment) Act, 2018, the ingredients of the offence of rape would ipso-facto be omitted. It is conspicous that, there was no change in the definition of rape under the Indian Penal Code and aggravated penetrative sexual assault under POCSO Act 2012 by the Amendment Act of 2018. The ingredients required for convicting the accused-appellant under rape with the minor are intact in pre and post-Amendment 2018, in criminal law. Only the punishment has been increased by inserting Section 376 (3) in IPC, resulting in the enhancement of the minimum punishment to twenty years.

46. As per The Criminal Law (Amendment), 2018, the words *"shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine"* has been substituted by *"whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment of life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."* in section 376 IPC.

47. The conviction of the accused-appellant under Section 5(m)/6 of the Protection of Children from Sexual Offence Act, 2012. Section 5(m) of the POCSO Act, 2012 deals with an aggravated penetrative assault on a child below 12 years, and Section 6 prescribed the punishment for aggravated penetrative sexual assault with rigorous imprisonment not less than ten years, which may extend to imprisonment for life and fine.

48. Now, we will test the legality of the implications in awarding the sentence under section 376(2)(i) IPC to the accused–appellant in view of the law discussed herein above, in preceding para's.

49. The trial court has sentenced the accused-appellant under Section 376 (2) (i) IPC because of the provision of Section 42 of the POCSO Act, 2012. Section 42 of the POCSO Act provides that where the specified offence is punishable both under the IPC and the POCSO then the accused shall be punished where it is greater in degree.

50. Reliance is placed on **State of Uttar Pradesh vs. Shubhash @ Pappu** where the Apex Court while dealing with omission to frame, or absence of or error in charge has reiterated that the accused has to show failure of justice/prejudice caused to him. Mere defect in framing of charge would not render the conviction unsustainable, if the ingredients of the Section/Sections concerned are obvious or implicit in the incharge.

51. The trial court has framed the charge under Section 376(2)(i) and read

over and explained the same to the accused-appellant of the said charge. From the aforesaid charge framed it can safely be said that the ingredients for the offence of rape were specifically brought to the notice of the accused. Therefore, at the most, it can be said to be a defective framing of charge by not specifically charging the accused under Section 376(3) of IPC.

52. While interpreting Section 464 of Cr.P.C., the Apex Court in **Fainul Khan** case has observed and held that in case of omission or error in framing a charge, the accused has to show failure of justice/prejudice caused thereby.

53. In the light of the aforementioned principle of law stated by Apex Court which is now fairly settled, we have to examine the evidence of this case with a view to find out as to whether the trial court was justified in convicting the accused under Section 376(2)(i) of IPC which was not in-existence on the date when the Criminal Law (Amendment) Ordinance, 2018 came into effect.

54. Having perused the entire evidence and legal position, and the issue arising in the case, we have formed an opinion that the accused could not be sentenced under Section 376(2)(i) of IPC as the section was no longer part of the penal code on the date of the incident and should have been tried and sentenced under Section 376(2) IPC, under the new law, but unfortunately that's not what has been done by the trial court, even though the act of the accused-appellant was fulfilling all the ingredients of the offence of rape on the date of the promulgation of the Criminal Law (Amendment) Ordinance, 2018. The accused-appellant should have been awarded sentence under the new law which came into existence on the date of the incident and was the law applicable on such date. The minimum sentence for the commission of the offence of rape with a woman under sixteen years of age has since been increased to twenty years in the new law.

55. Be that as it may, so far as the case of the accused-appellant is concerned, the trial court has convicted the accused-appellant for the maximum sentence of life imprisonment–which is the same in both scenarios - it's only the minimum sentence which has been enhanced to twenty years in the new law. Therefore, no prejudice is caused to the accused-appellant. The life sentence was already in existence in the pre and post-Criminal Law (Amendment) Ordinance, 2018, against the ingredients of the offence committed by the accused-appellants, so the restriction imposed by Article 20 (1) would not come in the way of trial court to award life imprisonment or lessor sentence to the accused-appellant.

Analyses of evidence

56. The defence counsel has urged that there are material contradictions and embellishments in the testimony of PW-1 and PW-2. Witness PW-1 states in his examination-in-chief that he had received the intimation from his wife through his father's phone, and his wife told him that her daughter was bleeding from the private parts and had swelling, whereas in examination-in-chief, the witness states that he was informed by one Udaylal Singh- the nephew of the complainant, and further stated that the frock had blood and blood had not reached her legs, an on perusal of Medico-Legal Examination Report of Sexual Violence prepared by Dr. Sunit Bhanojha, who was examined as PW-3, it

transpires that there was reddishness on the vagina and no bleeding, tear, swelling and discharge from the vagina is detected.

57. It's a well-accepted phrase in criminal jurisprudence that a man can tell a lie, but the circumstances do not—the Hon'ble Supreme Court in **Rajesh Yadav and others Vs. The state of Uttar Pradesh** has occasion to deal with in criminal appeal arising out of the judgement rendered by the High Court convicting the accused for life while acquitting all of them for the charges framed under Section 307 IPC. Aggrieved by the conviction by the High Court, the accused preferred criminal appeal before Supreme Court. While dealing with the appreciation of evidence, the Apex Court has classified the evidence broadly into three categories, namely;

(i) wholly reliable;
(ii) wholly unreliable and;
(iii) neither wholly reliable nor wholly unreliable;

58. The offence, if the evidence and circumstances surrounding it make the Court believe it is wholly reliable qua an issue, it can decide its existence on a degree of probability. Similar is the case where evidence is not believable. When evidence produced is neither wholly reliable nor wholly unreliable, it might require corroboration, and in such a case, the Court can also note the contradictions available in evidence.

59. The relevant portion of **Rajesh Yadav's** case is extracted hereinbelow:

"22. The expression "hostile witness" does not find a place in the Evidence Act. It is coined to mean testimony of a witness turning to depose in favour of the opposite party. We must bear in mind that a witness may depose in favour of a party in whose favour it is meant to be given through his chief examination while changing his view in favour of the opposite side. Similarly, there would be cases where a witness does not support the case of the party starting from chief-examination itself. This classification has to be borne in mind by the Court. With respect to the first category, the Court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. Even a chief-examination could be termed as evidence. Such evidence would become complete after the cross-examination. Once evidence is completed, the said testimony as a whole is meant for the Court to assess and appreciate qua a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief-exmination was completed and there are circumstances indicating the reasons behind the subsequent statement, which the Court could decipher. It is well within the powers of the Court to make an assessment, being a matter before it and come to the correct conclusion."

60. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof, which are admissible in law, can be used by the prosecution or the defence.

61. Apex Court in **Vinod Kumar v. State of Punjab** had already dealt with a situation where a witness, after rendering testimony in line with the prosecution's version, completely abandoned it, in view

of the long adjournments given permitting an act of manoeuvring. While taking note of such situations occurring with regularity, it expressed its anguish and observed that: (SCC pp. 244-46, paras 51-53 & 57)

"51. Though painful, it is necessary to note that PW 7 was examined-in-chief on 30-09-1999 and cross-examined on 25-05-2001, almost after 1 year and 8 months. The delay in said cross-examination, as we have stated earlier, had given enough time for prevarication due to many a reason. A fair trial is to be fair both to the defence and the prosecution as well as to the victim. An offence registered under the Prevention of Corruption Act is to be tried with all seriousness. We fail to appreciate how the learned trial Judge could exhibit such laxity in granting so much time for cross-examination in a case of this nature. It would have been absolutely appropriate on the part of the learned trial Judge to finish the cross-examination on the day the said witness was examined. As is evidence, for no reason whatsoever, it was deferred and the cross-examination took place after 20 months. The witness had all the time in the world to be gained over. We have already opined that he was declared hostile and re-examined.

52. It is settled in law that the testimony of a hostile witness can be relied upon by the prosecution as well as the defence. In re-examination by the Public Prosecutor, PW 7 has accepted about the correctness of his statement in the Court on 13-09-1999. He has also accepted that he had not made any complaint to the Presiding Office of the Court in writing or verbally that the Inspector was threatening him to make a false statement in the Court. It has also been accepted by him that he had given the statement in the Court on account of fear of false implication by the Inspector. He has agreed to have signed his statement dated 13-9-1999 after going through and admitting it to be correct. It has come in the re-examination that PW 7 had not stated in his statement dated 13-09-1999 in the Court that recovery of tainted money was not effected in his presence from the accused or that he had been told by the Inspector that amount has been recovered from the accused. He had also not stated in his said statement that the accused and witnesses were taken to the Tehsil and it was there that he had signed all the memos."

62. As has been noticed earlier, in the instant case, the examination-in-chief of PW-2 was recorded on 31.08.2018, wherein the witnesses supported the prosecution case, and the cross-examination was conducted on 07.09.2018- after a gap of seven days- the witness resiled from the examination-in-chief and came up with an altogether new explanation about the injury on the private part of the girl child and about the manner in which the examination -in- chief has been recorded, allowing ample time to pressurize the witness and to gain over her by adopting all kind of tactics. In fact, it is not at all appreciable to call a witness for cross-examination after a week. It is imperative, in such circumstances, if the examination-in-chief is over, that the cross-examination should be completed on the same day. If the examination continues till late hours, the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination has been deferred for a week for the mother of the victim, who has limited say in the patriarchal society in such nature of crimes and the accused is the cousin of her husband.

63. PW-2 - the mother of the victim - in her statement, stated two material facts;

(i) She and Virendra Singh- her father-in-law, who has been examined as DW-1, had seen the accused-appellant committing rape upon the victim.

(ii) The victim was bleeding from her private parts; but resiled in cross-examination, which was conducted more than a week later, leaving space for improvements and embellishment in favour of the accused.

64. It is the duty of the Court to see that not only the interest of the accused is protected but also that the societal and collective interest is safeguarded.

65. Child rape is a heinous crime that occurs in our society and is often perpetuated by close relatives. It violates a child's right to protection and is an egregious breach of trust; poverty, illiteracy and social stigma which are prevalent in families that dissuade them from reporting the case. The consequences of child rape are devastating and long-lasting. Apart from the physical and emotional trauma faced by the child, they also have to deal with society's stigma and discrimination. The crime affects their mental health, educational and career prospects, and even their ability to form healthy relationship in the future.

66. There is a societal stigma around discussing or reporting sexual abuse, specially when it involves close relatives. This perpetuates a culture of secrecy and silence, allowing the abuse to continue. Children from poorer families may be more vulnerable to abuse, as their parents may need to rely on extended family members for help and support, and the children may be sent away to play, work or study in other households.

67. Coming back to the appreciation of evidence at hand, at the outset, our attention is drawn to the fact that the witness, victim and accused are lineal ascendants. The victim is a lineal ascendant of the accused related by the first degree of the relationship. The mother of the victim has stated in her examination-in-chief that the accused is the *"राहुल मेरे चचेरे देवर हैं।"* In such circumstances, there is all likelihood that the immediate relatives would have pressurized the witness to resile from her previous statement recorded on 31.08.2018.

68. The trial court has heavily relied upon the testimony of Dr. Sunita Bhanojha, who was examined as PW-3. She is a prosecution's sterling witness. Dr. Sunita Bhanojha prepared the Medico-Legal Report of Sexual Offence, which is Ex-Ka-2. The relevant portion of the Medico-Legal Report of Sexual Offence Report is extracted herein after:

" 15. A History of Sexual Violence "पीड़िता का पारिवारिक चाचा जो पीड़िता के तीन चार घर छोड़ कर रहता है। आज सुबह सात बजे पीड़िता की माँ से पूंछ कर पीड़िता को ले गया और करीब 10.00 बजे पीड़िता के साथ राहुल नाम का लड़का उम्र करीब 22 साल मिला।"

17. Examination of injuries on the body, if any – about 1-inch slight reddish colour injury seen around vulva genitals.

23. Provisional/primary opinion there is suggestive use of recent forceful injury around the internal vulva."

69. The relevant portion of the testimony of PW-3 is been extracted hereinbelow:

"मेरी राय मे- पीड़िता की बैजाइना के मुंह पर ऐसा निशान है जिसमे ताजा बल पूर्वक चोट पहुंचाई हो यह चोट लिंग के रगड़ने व प्रवेशन से भी आ सकती है। मेरे पूछने पर उसकी मां ने मुझे यह नही बताया कि उसकी बैजाइना मे खुजली है या इन्फैक्शन है। साक्षी ने पत्रावली मे कागज सं० 10क/1 लगायत 10क/15 देखकर कहा कि यही मेडीकल रिपोर्ट मेरे हस्तलेख व हस्ताक्षर मे है। जिसकी पुष्टि करती हूँ। इस पर प्रदर्श क2 डाला गया।"

70. On appreciation of the statement of Doctor Sunita Bhanojha in the light of the statement of PW-2, we find that the medical evidence completely diffracts the oral testimony of PW-2, and the medical evidence makes the ocular testimony improbable and rules out the possibility of medical evidence being untrue. On perusal of the statement of Doctor Sunit Bhanojha in consonance with the Medico-Legal Examination Report of Sexual Violence dated 21.04.2018, it reflects that the victim had about 01-inch slight reddish colour injury around the vulva genitals and, therefore, the act of aggravated penetrative sexual seems quiet likely on the victim.

71. Learned defence counsel has heavily relied upon **Mahendra Singh and others vs. State of Madhya Pradesh** wherein it was held that it is the settled law that the same treatment is required to be given to the defence witness as is to be given to the prosecution witness. The relevant part is extracted herein below:

"20. It is a settled law that same treatment is required to be given to the defence witness(es) as is to be given to the prosecution witness(es)."

72. In the light of **Mahendra Singh and others case** (**supra**) the testimony DW-1 could not be discarded. He further urged that police had arrayed Virendra Singh as a police witness. As per the prosecution case, Virendra Singh is the eye witness of the case and had seen the accused-appellant committing rape upon the victim. PW-1 and PW-2 have also stated that Virendra Singh was present at the place of the offence, but the prosecution had dropped this witness for the reason best known to them. Virendra Singh was examined as a defence witness and submitted an explanation on the lines of the contents which comes in the cross-examination of the PW-2. Needless to say, Virendra Singh is the victim's grandfather, and PW-2 is the victim's mother; further states that the prosecution has not explained why the PW-2 had resiled in cross-examination, and Virendra Singh had to come in the witness box as a defence witness; this casts serious doubt on the prosecution story.

73. PW-2 and DW-1 are the mother and grandfather of the girl child, the victim "X". The medical evidence requires searching with precision for critical analysis of their testimony in the facts-circumstances of the case. The non-examination of police witnesses Uday Pal Singh and Virendra Singh, whose names are mentioned in the FIR, would not affect the prosecution case in the light of the law laid down in **Rajesh Yadav's** case (supra). A mere non-examination of a witness per se will not vitiate the prosecution case. It depends upon the quality, not the quantity of the witnesses and its importance. If the Court is satisfied with the explanation

given by the prosecution along with the adequacy of the materials, sufficient enough to proceed with the trial and convict the accused, there cannot be any prejudice. Similarly, if the Court is of the view that the evidence is not screened and could well be produced by the other side in support of its case, no adverse inference can be drawn. The onus is on the part of the party who alleges that a witness has not been produced deliberately to prove it.

74. Even though Virendra Singh has been examined as DW-1 but his testimony would not help the accused; if we believe the testimony of DW-1, it would render the testimony of PW-1, chief - examination of PW-2 recorded on 31.08.2018 and testimony of Dr. Sunita Bhanojha, who had examined the victim and prepared the Medico-Legal Sexual Examination Report on 21.04.2018 uncorroborated and unreliable, and the same would be the highly unrealistic and desultory approach, and shall not be in conformity with the settled law of evidence to deal with a hostile witness.

75. The Apex Court has reiterated the aforesaid principle in **Gulam Sarbar v. State of Bihar.** The relevant portion is extracted herein below:

"In a matter of appreciation of evidence of witnesses, it is not the number of witnesses but the quality of their evidence which is important, as there is no requirement under the law of evidence that any particular number of witness is to be examined to prove/disprove effect. It is a time-honoured principle that evidence must be weighed, not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on the value provided to each witness rather than the multiplicity or plurality of witnesses. It is quality, not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in probate cases, where the law requires the examination of at least one attesting witness, it has been held that the production of more witnesses does not carry any weight. Thus, conviction can ever be based on the testimony of a sole eyewitnesses if the same is inspires confidence. (Vide Vadivelue Thevar v. State of Madras, Kunju v. State of T.N., Bipin Kumar Mondal v. State of W.B, Mahesh v. State of M.P, Prithipal Singh v. State of Punjab and Kishan Chand v. State of Haryana"

76. The police recorded statements of four related witnesses, namely, (i) Raghvendra Singh-the father of the victim; (ii) Uday Pal Sing- the nephew of the complainant; (iii) Virendra Singh-the grandfather of the victim; (iv) Smt. Deepa-the mother of the victim. Out of four, two - Raghvendra Singh and Smt. Deepa - has been examined as a prosecution witness, whereas Virendra Singh has been examined as DW-1, and the prosecution has dropped Uday Pal Singh. All witnesses are related witnesses. The PW-1, PW-2 and DW-3 are related witnesses, they could be interested witnesses in the instant case as the victim is a lineal descendent of the accused related by the first degree of the relationship, but PW-3, who conducted the external and internal medical examination of the victim is an independent witness, and there is no reason for her to implicate the accused in the commissioning of the offence. There is no delay in the registration of the FIR. PW-2 though resiled, but supported the prosecution's case in examination-in-chief.

Strangely, in the cross-examination, she resiled. We do not wish to say anything about the credibility of PW-2 and DW-1 being the related and interested witnesses, and the evidence of PW-1 and PW-3 is found corroborated, cogent and reliable. The testimony of PW-1 and PW-3 and the chief examination of PW-2 are credible and reliable and hence deserve to be accepted. Merely because the prosecution did not produce the DW-1 and police witness, Uday Pal Singh, the entire prosecution case would not become false.

77. Thus, on the aforesaid conclusion, we are in conformity with the trial court's findings and can safely conclude that the ingredients of rape under IPC and the ingredients of penetrative aggravating sexual assault under the POCSO Act, 2012 are established qua accused-appellant.

78. The crucial stage in every criminal proceeding is the stage of sentencing. It is the most complex and difficult stage in the judicial process. The Indian legal system confers ample discretion on the judges to levy the appropriate sentence. However, this discretion is not unfettered in nature; rather, various factors like the nature, gravity, manner and circumstances of the commission of the offence, the personality of the accused, character, aggravating as well as mitigating circumstances, antecedents etc., cumulatively constitute as the yardsticks for the judges to decide on the sentence to be imposed. Indisputably, the sentencing Courts shall consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the crime committed as held in **Shimbhu and Anr. Vs. State of Haryana.**

79. Before we evaluate the case at hand in the light of the above-established principle that all punishments must be directly proportionate to the crime committed, it is imperative to comprehend the legislative intent behind Section 3(m)/6 POCSO Act, 2012, which is as under:

"6. Whoever, commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

80. A perusal of the above provision shows that the legislative mandate is to impose a sentence, for the offence of aggravated penetrative sexual assault, for a term, which shall not be less than 10 years, but it may extend to life and shall also be liable to fine. The Court may impose a sentence of either description of a term not less than 10 years but which may extend to life imprisonment. Thus, the normal sentence in a case of aggravated penetrative sexual assault is 10 years, and in exceptional cases may go to life imprisonment.

81. The defence counsel has urged that the punishment should always be proportionate/commensurate to the gravity of the offence. In the instant case, it is disproportionate to the gravity of the offence. Hence he prays for a reduction of sentence of imprisonment for a term less than life imprisonment *(Vide Vadivelue Thevar v. State of Madras, Kunju v. State of T.N., Bipin Kumar Mondal v. State of W.B, Mahesh v. State of M.P., Prithipal Singh v. State of Punjab and Kishan Chand v. State of Haryana".*

82. The Court's discretionary power to impose a sentence should not be used indiscriminately in a routine, casual and cavalier manner. The special and adequate reasons must be recorded for awarding life imprisonment. Regrettably, we noticed that the trial court has failed to record the reason for awarding life imprisonment in the facts- circumstances of the case.

83. That the accused has not caused any physical injury to the victim, the accused-appellants come from an impoverished socio-economic background, have a family comprising an aged father, and have unblemished jail conduct. When all these factors are added together, it is also visualized that there is nothing on record to rule out the probability of reformation and rehabilitation of the appellant. He is a man of clean antecedents; otherwise, nothing is brought on record to prove the contrary.

84. For the reasons elucidated herein above, we deem it appropriate to partly allow the appeal and modify the sentence, and award the rigorous imprisonment for a term of twenty years with a fine of Rs. 50,000/- and in default of payment of fine two years additional imprisonment and with R.I. for the offence of rape, and one year sentence under section 323 IPC. We refrain to award punishment under Section 5 (m)/6 of POCSO Act 2012, because of the mandate of Section 42 of the POCSO Act, 2012.

85. The accused-appellant's incarceration period in the aforesaid case crime shall be adjusted as per law. The fine imposed upon the accused shall be given to the victim " X" as compensation.

(2023) 6 ILRA 370

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Criminal Appeal No. 6920 of 2017

Rameshwar Lal Chauhan
...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Rajeev Kumar Singh, Sri Divyanshu Nandan Tripathi, Sri P.K. Singh

Counsel for the Respondent:
G.A.

(A) Criminal Law - appeal against conviction - Indian Penal Code, 1860 - Section 302 , Indian Evidence Act, 1872 - Section 32(1) - dying declaration is a substantive piece of relevant evidence - an order of conviction can be safely recorded on the basis of dying declaration - but it has to be considered as another piece of evidence - to be judged in the light of surrounding circumstances - with reference to the principles governing the weighing evidence - if it is not found wholly trustworthy or truthful, it should not form the sole basis of conviction without corroboration.(Para -21, 25, 54)

(B) Words and Phrases - "Nemo Morituros Praesumitur Mentire" - a man will not meet his maker with a lie in his mouth.(Para -24)

(C) Criminal Law - The Code of criminal procedure, 1973 - Section 313 - importance of statement under Section 313 of Cr.P.C., Sub-clause (5) - court to take help of prosecution and defence in preparing relevant questions which are put to the accused - Court should not miss

putting any incriminating circumstance to the accused while recording his statement.(Para - 75)

Statement of deceased in her statement (dying declaration) - accused poured Kerosene on her person and set her on fire - Trial court convicted accused-appellant only on basis of dying declaration - other witnesses of fact not supported prosecution version - turned hostile - no question with regard to the dying declaration - not put to appellant at the time of recording statement under Section 313 Cr.P.C. - prejudice caused to accused.**(Para -26, 64, 74)**

HELD:-Evidence on the dying declaration is doubtful and cannot be relied upon by the judicial mind. Prosecution failed to substantiate charges beyond reasonable doubt. If the dying declaration is excluded, nothing remains in the prosecution case. Appellant-accused entitled to avail the benefit of doubt. Impugned judgment and order of conviction set aside.**(Para -77)**

Criminal Appeal allowed. (E-7)

List of Cases cited:

1. Khushal Rao Vs St. of Bombay , AIR 1958 SC 22

2. Paniben Vs St. of Guj. , (1992) 2 SCC 747

3. Nallapati Sivaiah Vs S.D.O., Guntur, A.P. , (2007) 15 SCC 465

4. Jagbir Singh Vs St. (NCT of Delhi) , (2019) 8 SCC 779

5. KanchyKomuramma Vs St. of A.P. , 1996 SCC (Cri) 31

6. Puran Chand Vs St. of Har (2010) 6 SCC 566

7. Ramesh Harijan Vs St. of U.P. , (2012) 5 SCC 777

8. Reena Hazarika Vs St. of Assam , AIR 2018 SC 5361

9. Sharad Birdhichand Sarda Vs St. of Maha. , AIR 1984 SC 1622

10. Sujit Biswas Vs St. of Assam , (2013) 12 SCC 406

11. Asraf Ali Vs St. of Assam , (2008) 16 SCC 328

12. AndugulaShankaraiah Vs St. of A.P. , 2012 CRI.L.J.189

13. Nar Singh Vs St. of Har. , (2015) 1 SCC 496

14. Shivaji Sahabrao Bobade Vs St. of Maha. , (1973) 2 SCC 793

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. This criminal appeal has been filed against the judgment and order of conviction dated 30.11.2016 passed by learned Addl. District and Sessions Judge, Court no.7, Gorakhpur in Sessions Trial No.153 of 2015 whereby the learned Additional District and Sessions Judge, Court No.7, Gorakhpur (hereinafter referred as 'trial court') has convicted Rameshwar Lal Chauhan (appellant-accused) s/o late Mishri Lal Chauhan for the offence punishable under Section 302 IPC and sentenced him for life imprisonment and has ordered him to pay a fine of Rs. 25,000/-. In the default of the payment of fine, he had to further suffer rigorous imprisonment for a period of one year. By the same judgment dated 30.11.2016, learned trial Court acquitted the other co-accused namely Smt. Bela Devi, wife of late Mishri Lal Chauhan, Bhuvneshwar Lal Chauhan slo late Mishri Lal Chauhan, Parmeshwar Lal Chauhan, s/o late Mishri Lal Chauhan under Section 498A, 304B, 323, 302 IPC and ¾ Dowry Prohibition Act.

2. The factual matrix of the case is that the informant namely Sarju Chauhan s/o late Pyare Lal Chauhan submitted a

written complaint Ex.Ka-1 on which the First Information Report Ex.Ka-11 was registered in Case Crime No.487 of 2014 under Section 498A, 304B, 323 IPC and Section ¾ Dowry Prohibition Act at P.S. Cantt, Gorakhpur against Smt. Bela Devi, widow of late Mishri Lal Chauhan (mother-in-law), Bhuvneshwar Lal Chauhan, Kamleshwar Lal Chauhan, Parmeshwar Lal Chauhan, all sons of late Mishri Lal Chauhan (brother-in-laws), Rameshwar Lal Chauhan s/o late Mishri Lal Chauhan (husband) and Anuradha d/o late Mishri Lal Chauhan (Nanad).

3. As per the First Information Report, the informant stated that his daughter Pooja (deceased) was married to Rameshwar Lal Chauhan (appellant-accused) on 26.6.2012. It was further stated that in the marriage, the informant had given Rs.1,00,000/- cash, T.V., Fridge, Washing Machine, Almirah, Bed and other household goods but soon after the marriage, his daughter-Pooja was harassed by her mother-in-law, Bela Devi, husband, Rameshwar Lal Chauhan, brothers-in-law (devar), Bhuvneshwar Lal Chauhan, Parmeshwar Lal Chauhan and Sister-in-law (Nanad), Anuradha for dowry. It was further stated that all the persons used to beat his daughter and whenever informant visited daughter's place, he consoled his daughter that with the passage of time, everything would be alright but there was no improvement in the behaviour of Saas, Devar, Nanad and husband of the deceased-Pooja. On 31.5.2014, aforesaid persons had beaten his daughter for Rs.50,000/- and for a ring (angoothi). Upon being informed, the informant visited the house of his daughter and brought her back to his house. On 2.6.2014, when the informant came back with his daughter after her B.A. IIIrd year examination, his son-in-law Rameshwar Lal Chauhan took the daughter back to his house . On 11.6.2014, deceased-Pooja worked hard for making arrangements for the marriage of her sister-in-law, Anuradha and in the morning of 12.6.2014 at about 6-6:30 a.m., Pooja came from the place where the marriage was being solemnized in connection with some work. Her Devars Bhuvneshwar Lal Chauhan and Kamleshwar Lal Chauhan also came to the house and locked his daughter in a room and poured kerosine oil and set her to fire. On being informed by persons of the area, informant came to his daughter's house and saw that her daughter was burnt. With the help of other people, informant admitted his daughter to the District hospital, from where she was referred to the medical College, where during the course of treatment she died at about 8-8:30 p.m on 12.6.2014.

4. The dying declaration Ex.Ka-8 of the deceased-Smt. Pooja, was recorded on 12.6.2014 at about 10:20 a.m at B.R.D Medical College, Gorakhpur by Naib Tehsildar posted at Tehsil Sadar, Gorakhpur.

5. After the First Information Report was lodged, the Police investigated the crime and after collecting the evidence, a charge-sheet Ex.Ka-10 was submitted under Section 173(2) Cr.P.C. against Smt. Bela Devi, Bhuvneshwar Lal Chauhan, Parmeshwar Lal Chauhan and Rameshwar Lal Chauhan under Sections 498A, 304B, 323 IPC and Section ¾ Dowry Prohibition Act on 5.8.2014. The Investigating Officer found that Kamleshwar Lal Chauhan (devar) and Anuradha (nanad) were not involved in the crime. The learned Magistrate after taking cognizance and complying with the provisions of Section 207 Cr.P.C. committed the case for trial to

the court of sessions on 16.4.2015. On 2.7.2015, Bela Devi, Bhuvneshwar Lal Chauhan, Parmeshwar Lal Chauhan and Rameshwar Lal Chauhan (appellant-accused) were charged under Section 498A, 304B and alternatively under Section 302/34 IPC by the Sessions Judge, Gorakhpur. During the trial, statement of 17 persons were recorded by the prosecution namely Sarju Chauhan (father of the deceased) P.W.-1, Sudhir Chauhan (brother of the deceased) P.W.-2, Pushpa Devi (mother of the deceased) P.W.-3, Rajan Mishra (independent witness) P.W.-4, Guddu Chauhan (independent witness) P.W.-5, Ramrati Devi (independent witness) P.W.-6, Ashok Kumar Chauhan (independent witness) P.W.-7, Ram Ashish (independent witness) P.W.8, Mohd. Zeeshan (independent witness) P.W.-9, Naushad (independent witness) P.W.-10, Radhey Shyam Gupta (independent witness) P.W.-11, Subhash Chandra Chauhan (relative of the accused husband) P.W.-12, Nitish Kumar Chauhan (husband of nanad of the deceased) P.W.-13, Dayaram (Tehsildar) who conducted Panchayatnama, P.W.-14, Rakesh Ram (Naib Tehsildar) who recorded dying declaration, P.W.-15, Dr. Sant Lal Kanaujia (Doctor who conducted postmartem) P.W.-16, Dr. Chandradev (Doctor who gave fitness certificate) P.W.-17. Statement of all the accused namely Smt. Bela Devi, Bhuvneshwar Lal Chauhan, Parmeshwar Lal Chauhan and Rameshwar Lal Chauhan was recorded under Section 313 Cr.P.C.

6. The prosecution produced written complaint Ex.Ka-1, chik F.I.R Ex.Ka-11, Police reports Ex.Ka-2, memo of possession of burnt saree and other goods by Police Ex.Ka-3, letter sent along with the dead body Ex.Ka-4, letter to Chauki In-charge Medical College Gulriha Ex.Ka-5, photonash Ex.Ka-6, letter to the Chief Medical Officer Ex.Ka-7, dying declaration of deceased-Pooja Ex.Ka-8, post martem report Ex.Ka-9, charge-sheet Ex.Ka-10, General diary Ex.Ka-12, spot inspection report Ex.Ka-13, letter to Police control Ex.Ka-14, letter to Station House Officer, P.S. Gulriha, Ex.Ka-15, Nakal report Ex.Ka-16, report of medical college Ex.Ka-17, Nakal Report Ex.Ka-18 as documentary evidence during the trial.

7. After considering the entire evidence, the learned Sessions Judge acquitted Smt. Bela Devi, Bhuvneshwar Lal Chauhan, Parmeshwar Lal Chauhan under Section 498A, 304B, 323, 302 IPC and ¾ Dowry Prohibition Act and convicted Rameshwar Lal Chauhan (appellant-accused) under Section 302 IPC and sentenced the appellant with life imprisonment and fine of Rs.25,000/- and in case of default, one year rigorous imprisonment.

8. Heard learned Counsel for the accused-appellant, learned AGA for the State and perused the material on record.

9. Learned Counsel for the accused-appellant vehemently assailed the order of conviction and made following submissions that :-

(i) Accused-appellant is innocent and has not committed the alleged offence.

(ii) The order of conviction is based on conjecture and surmises.

(iii) All the prosecution witnesses of the fact have turned hostile and have not supported the prosecution case.

(iv) The trial court has held that the accused-appellant was guilty only on the basis of the dying declaration Ex.Ka-8.

(v) The trial court totally earred in relying upon the dying declaration Ex.Ka-8 which does not inspire confidence at all.

(vi) The certificate of fitness of deceased as to give dying declaration given by the Dr. Chandra Dev, Emergency Medical Officer, P.W.-17 was not in a proper format and had been transcribed on the left side of the page on which dying declaration was recorded, Ex.Ka-8. From the evidence of P.W.17 Dr. Chandra Dev, it cannot be said that the deceased was in a fit mental condition to give the dying declaration.

(vii) As per the post-mortem report Ex.Ka-9, deceased Pooja sustained 100% burn injuries and except for both sole (pair ka talwa) and hair (head) every part of the body was burnt and the deceased-Pooja was not in fit condition to give the dying declaration.

(viii) Evidence of P.W.-15, Naib Tehsildar who has recorded the dying declaration and P.W.-17, Dr. Chandradev, Emergency Medical Officer who gave the fitness certificate does not inspire confidence. The evidence of P.W.-15 and P.W.-17 creates a strong suspision about the consciousness and mental fitness of the deceased, while the statement was being recorded.

(ix) Death of the deceased was because of an accident and was not a homicide.

(x) And lastly, it was submitted by the learned Counsel for the appellant that the appellant was not confronted with the dying declaration at the time of recording his statement under Section 313 Cr.P.C. and, therefore, same cannot be relied upon and has to be excluded from the evidence.

10. Per contra, learned AGA for the State refuted the submissions made by the learned Counsel for the appellant and made following submissions that :-

(i) Trial Court rightly relied upon the dying declaration of the deceased for convicting the accused as the witnesses of fact were won over by the defence.

(ii) There is no impediment in convicting the accused only on the basis of a dying declaration without there being any other corroborative evidence.

(iii) No format has been prescribed for recording the dying declaration.

(iv) From the evidence of P.W.-15 and P.W.-17, it is established that the deceased was physically and mentally fit while recording the dying declaration by P.W.-15.

(v) P.W.-15 and P.W.-17 are independent witnesses and there is no suggestion by the defence as to why the P.W.-15 and P.W.-17 would give false evidence against the accused-appellant.

(vi) Not putting a question to the accused with regard to Ex.Ka.-8 i.e. the dying declaration during questioning the accused under Section 313 Cr.P.C. will not vitiate the trial and the accused had to establish the prejudice caused to him.

(vii) And it was lastly submitted that the trial court rightly passed the judgment convicting the accused-appellant after considering the entire evidence and the appeal had no merits and was liable to be dismissed.

11. With the help of both Counsel, learned Counsel for the appellant and learned AGA for the State, we have perused the record of the case from which, it is clear that P.W.-1 Sarju Chauhan who was father of the deceased-Pooja Chauhan and he had not supported the prosecution version and was declared hostile by the

prosecution. It was stated by the P.W.-1, Sarju Chauhan in his examination-in-chief that his daughter, Pooja while heating the milk for her daughter met with an accident in which she was badly burnt at about 6:30-7:00 a.m. on 12.6.2014. At the time of incident, Rameshwar Lal Chauhan, accused-appellant (husband of the deceased), Bela Devi (mother-in-law), Bhuvneshwar Lal Chauhan, Kamleshwar Lal Chauhan (brother-in-laws), Anuradha (Nanad) all were at Kamla Marriage House. It was further stated by P.W.-1 that somebody informed him at Kamla Marriage House that his daughter had been burnt at about 6:30-7:00 a.m. and on receiving the aforesaid information all of them reached the house and found that Pooja was badly burnt. P.W.-1 along with husband of the deceased (appellant) and other relatives rushed Pooja to the Sadar Hospital, Gorakhpur from where, she was referred to the Medical College and on the very same day at about 8:00-9:00 p.m. Pooja succumbed to her injuries at the Medical College, Gorakhpur. In his cross examination, P.W.-1 denied the prosecution story and stated that his daughter died due to an accident. It was stated by P.W.-1 that in the Medical College, neither the Doctor nor the Magistrate had taken the statement of his daughter, the allegation of dowry made in the First Information Report was also denied by the P.W.-1.

12. P.W.-2 namely Sudhir Chauhan, who was the brother of the deceased-Pooja also did not support the prosecution version and in his cross examination, stated that Pooja had died because of burning which was accidently caused while heating the milk for her daughter at about 6:30-7:00 a.m. on 12.6.2014. He stated that she died at about 8:00-9:00 p.m. on the same day in the Medical College. P.W.-2 was also declared hostile by the prosecution and in cross examination by the Additional Government Advocate, P.W.-2 denied the suggestion that there was settlement outside the Court with the accused and, therefore, P.W.-2 was not giving the correct statement.

13. P.W.-3, Pushpa Devi who was mother of the deceased-Pooja also did not support the prosecution version and stated in her examination-in-chief that Pooja died because of accidental fire while heating the milk for her daughter. P.W.-3 was also declared hostile by the prosecution and in her cross examination, P.W.-3 stated that after getting the information, she went to the Medical College, Gorakhpur where her daughter was unconscious and she remained with her unconscious daughter till she was alive.

14. P.W.-4, Rajan Mishra, P.W.5, Guddu Chauhan, P.W.-6 Ramrati Devi, P.W.-12, Subhash Chandra Chauhan, P.W.-13, Nitish Kumar Chauhan who were independent witnesses also turned hostile and not supported the prosecution case. P.W.-7, Ashok Kumar Chauhan, P.W.-8 Ram Ashish, P.W.-11 Radhey Shyam Gupta who were the witnesses of Panchayatnama were also declared hostile by the prosecution. P.W.-9, Mohd. Zeeshan, P.W.-10, Naushad who were witnesses of recovery were also declared hostile by the prosecution.

15. P.W-14, Daya Ram retired Naib Tehsildar who was the witness of the Panchayatnama proved the Panchayatnama and stated that Panchayatnama was conducted under his instructions on 13.6.2014.

16. P.W.-15 Rakesh Ram, who was Naib Tehsildar at the time of incident and recorded the dying declaration of the

deceased Pooja on 12.6.2014 proved the dying declaration.

17. P.W.-16 Dr. Sant Lal Kanaujia who conducted the post-mortem of the deceased Pooja on 13.6.2014 proved the post-mortem.

18. P.W.-17, Dr. Chandra Dev, Emergency Medical Officer Nehru Hospital B.R.D Medical College, Gorakhpur stated that he gave the certificate of fitness at the time when dying declaration was being recorded by the Magistrate and proved the same.

19. From the oral evidence as referred above, we find that all the witnesses of fact had not supported the prosecution version and were declared hostile by the prosecution. The learned trial court relying upon the dying declaration Ex.Ka-8 of the deceased-Pooja convicted the accused-appellant under Section 302 IPC but as all the witnesses were declared hostile acquitted the other accused for charges under Section 304B, 498A IPC and Section ¾ Dowry Prohibition Act.

20. It has been submitted by the learned Counsel for the appellant that since all the witnesses of fact had not supported the prosecution version, learned trial court ought not have convicted the accused-appellant only on the basis of dying declaration of the deceased without there being any other corroborative evidence. In this regard, submission of learned AGA on behalf of the State is that there is no impediment in relying upon dying declaration of the deceased without there being any corroborative evidence.

21. The question that whether a conviction can be recorded only on the basis of dying declaration without there being any corroborative evidence is no more res-integra as the dying declaration is a substantive piece of relevant evidence in view of Section 32(1) of the Evidence Act. Under Section 32, when a statement is made by a person, as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of person’s death comes in to question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased before death is called a dying declaration.

22. There is a historical and a literary basis for recognition of dying declaration as an exception to the Hearsay Rule. Some authorities suggest the rule is of Shakespearian origin. In "The Life and Death of King John", Shakespeare has Lord Melun utter what a "hideous death within my view, retaining but a quantity of life, which bleeds away,..lost the use of all deceit" and asked,"Why should I then be false, since it is true that I must die here and live hence by truth?" William Shakespeare, The Life and Death of King John Act. 5, Sc.2, lines 22-29.

23. It is not difficult to appreciate why dying declarations are admitted in evidence at a trial for murder, as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is a thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. A dying declaration has got sanctity and a person giving the dying declaration will be the last person to give an untruth as he stands before his creator.

24. There is a legal maxim "Nemo Moriturous Praesumitur Mentire" meaning, that a man will not meet his maker with a lie in his mouth. Woodroffe and Amir Ali, in their treatise on Evidence Act state :

"when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity and therefore the tests of oath and cross- examination are dispensed with."

25. It is also a settled principle of law that dying declaration is a substantive evidence and an order of conviction can be safely recorded on the basis of dying declaration.

26. Undeniably, the learned trial court has convicted the accused-appellant only on the basis of the dying declaration as the other witnesses of fact had not supported the prosecution version and had turned hostile. No doubt it is settled law that if a dying declaration inspires full confidence it can form the basis for conviction. There is neither rule of law nor of prudence that dying declaration cannot be relied upon without corroboration. Needles to say that if the Court is satisfied that the dying declaration is true and voluntary, it can base conviction on it without corroboration. Before going to award conviction against the accused, the trial court must be mindful of the fact that there should be no room to suspect the evidence led by the prosecution on which conviction is being awarded. As a general rule, while appreciating evidence in a criminal case, the Court should bear in mind that it is not the quantity but the quality of evidence which is material. It is the duty of the Court to consider the trustworthiness of the dying declaration, and whether the same inspires full confidence so as to accept rely act upon before recording conviction.

27. In ***Khushal Rao Vs. State of Bombay*** reported in ***AIR 1958 SC 22,*** a three Judges Bench of Supreme Court, after discussing the law in detail, observed as follows :-

"(16) On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) ***that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;*** *(3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4)* ***that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;*** *(5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human, memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view*

the. circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

(17) ***Hence, in order to pass the test of 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 circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court, after examining the dying declaration in Judgment 12 apeal71.19 .odt all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities, referred to above or from such other infirmities as may be disclosed in evidence in that case."*

28. On the same line we find it relevant to note following observations of Hon'ble Supreme Court in case of **Paniben Vs. State of Gujrat** reported in **(1992) 2 SCC 747** (Para 18 at page 480 and 481).

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.(Mannu Raja v. State of M.P., (1976) 2 SCR 764).

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164).

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy v. Public Prosecutor, AIR 1976 SC 1994).

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of Madhya Pradesh, (1974) 4 SCC 264).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M. P., AIR 1982 SC 1021)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P., 1981 SCC (Crl.) 581).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram and another v. State of M.P., AIR 1988 SC 912)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State U.P. v. Madan Mohan, AIR 1989 SC 1519)

29. It would be appropriate here to remind ourselves that generally, there are two issues with respect to a dying declaration. The first one would be, whether the declaration was actually made. Naturally, this would be assessed on the basis of the evidence of the witnesses, who claim that such declaration was made and witnessed by them. There would be a question of accuracy of the record of such declaration, if made or maintained by such witnesses. If the evidence in that regard is satisfactory, the Court would come to a conclusion that a particular statement was, indeed, made by the deceased. It is not the end of the matter, the Court thereafter would be required to decide whether such statement made by the deceased was true. In other words, the fact of having made the statement and the truthfulness of the said statement are both required to be established before a declaration is termed as reliable.

30. For ascertaining the truthfulness of the statement of a dying person, the parameters, which are applied to the witnesses while judging reliability of their evidence, must be applied. The reliability of a version of a witness would depend on several factors including opportunity available to witness to know, physical and mental capacity of the patient to convey, kind of treatment which the patient was undergoing, chances of tutoring, relation of witness with patient and so on. The law does not afford to take a risk of blindly relying on the statement only because it has been recorded by Executive Magistrate. Usual scrutiny from every possible angle is must and evidence of Executive Magistrate must withstand the test of reliability.

31. In case of ***Nallapati Sivaiah Vs. Sub-Divisional Officer, Guntur, Andhra Pradesh*** reported in ***(2007) 15 Supreme Court Cases 465*** (in paragraph no.26 of judgment at Page 475 SCC), Supreme Court observed as follows:-

"It is also a settled principle of law that dying declaration is a substantive evidence and an order of conviction can be safely recorded on the basis of dying declaration provided the court is fully satisfied that the dying declaration made by the deceased was voluntary and reliable and the author recorded the dying declaration as stated by the deceased. This Court laid down the principle that for relying upon the dying declaration the court must be conscious that the dying declaration was voluntary and further it was recorded correctly and above all the maker was in a fit condition-mentally and physically- to make such statement."

32. The above noted principles have been recently reiterated by the Apex Court in the case of ***Jagbir Singh Vs. State (NCT of Delhi)*** reported in ***(2019) 8 SCC 779.***

33. In the light of such settled legal position, the facts of the case are to be assessed. On the basis of the factual aspects one has to independently decide whether the evidence of dying declaration inspires confidence. The principles would provide a guide but one has to decide the worth of a dying declaration only on the basis of facts and the attendant circumstances. The law is well settled that there is no specific format for writing a dying declaration, meaning thereby, written dying declaration can be in any form, but the essence is, it should inspire full confidence of the Court regarding its correctness and the statement of deceased was not a result of tutoring or product of imagination. More importantly, there should be evidence that the victim was well oriented and in a fit state of mind to give statement. It is duty of the recorder to satisfy himself that the deceased was in fit mental condition to give the statement and later the Court should also satisfy that the deceased was in a fit state of mind while giving statement.

34. Learned Counsel for the appellant drew our attention to the dying declaration Ex.Ka-8 and submitted that from the perusal of the dying declaration Ex.Ka-8, it is clear that the dying declaration was recorded at about 10:20 a.m. on 12.6.2014. It has been contended by learned Counsel for the appellant that Dr. Chandra Dev, Emergency Medical Officer, Nehru Hospital B.R.D. Medical College, Gorakhpur, P.W.-17 has transcribed on the left margin of the page on which dying declaration was recorded that patient was mentally fit for giving the dying declaration on 12.6.2014 before, during and after 10:15 a.m.-10:30 a.m. It has been contended by learned Counsel for the appellant that by one stroke of the pen the Doctor has given a certificate of fitness and that too on the left margin of page on which the dying declaration was recorded.

35. It was also contended by learned Counsel for the appellant that in his statement Dr. Chandra Dev, P.W.17 stated that Paper No.39-Ka, memo dated 12.6.2014 was prepared by the pharmacists and after being prepared, P.W.-17 signed the same and the aforesaid memo was sent to the Magistrate on which the Magistrate recorded the dying declaration. P.W.17 after looking at the Paper No.39-Ka, memo stated that it has been transcribed on the memo that a lady who was seriously burned was brought on 12.6.2014 at about 10:15

a.m. and her dying declaration was necessary to be recorded. It had also been stated by P.W-17 that the time 10:15 a.m. mentioned in the memo had been transcribed on the basis of bedhead ticket.

36. Assailing the statement of P.W.-17 learned Counsel for the appellant contended that as per the evidence of P.W.-17 deceased was admitted in the medical college on 12.6.2014 at about 10:15 a.m. whereas the dying declaration was recorded at 10:20 a.m. on 12.6.2014 i.e within five minutes after the admission of deceased in the hospital. From the evidence of P.W.-17, Dr. Chandra Dev and P.W.-15, Rakesh Ram Sub-Registrar who had recorded the dying declaration, it is clear the memo of request Paper no.39-Ka was prepared by the Doctor after the admission of the deceased in the hospital at 10:15 a.m. and the aforesaid memo was served upon the Magistrate by the Police at his residence and only after the service of memo Paper No.13-Ga the P.W.-15 came to the hospital and recorded the dying declaration. It has been further contended by learned Counsel for the appellant that it has come in the statement of P.W.-17 that he had no knowledge of the fact as to which Doctor admitted the deceased in the hospital and further from the statement of P.W.-17, it is also clear that P.W.-17 never treated the deceased but had given a certificate of fitness to the effect that the deceased was mentally fit for giving the dying declaration on 12.6.2014 before, during and after 10:15 a.m. -10:30 a.m. It has also been contended that the entire exercise of recording, the dying declaration was completed within a short period 15 minutes i.e. from 10:15 a.m. to 10:30 a.m.

37. It was further contended by learned Counsel for the appellant that P.W.-17 in his cross-examination stated that he had written on the left margin of Ex.Ka-8, after the same being prepared by the Magistrate, just as a formality that the patient is mentally fit for giving the dying declaration on 12.6.2014 before during and after 10:15 a.m.-10:30 a.m. Learned Counsel for the appellant further contended that P.W.-17 has not stated anything in his evidence as to how he came to the conclusion that the deceased was in a fit condition for recording the dying declaration. Referring to the statement of P.W.-15, Rakesh Ram, Sub-Registrar who recorded the dying declaration, learned Counsel for the appellant contended that P.W.-15 in his statement has stated that on 12.6.2014, he had not received any written intimation for recording the dying declaration and he was informed by the Police Control Room through telephone and thereafter a memo was also sent by the Police Control Room that one lady is admitted in B.R.D. Medical College and her dying declaration was to be recorded. It was further contended by learned Counsel for the appellant that in his statement P.W.-15 admitted that this information came to the P.W.-15 at about 8:00 a.m. on 12.6.2014 whereas as a matter of fact the deceased was admitted to the Medical College, as per the statement of P.W.-17, at about 10:15 a.m. P.W.-15 in his statement after looking at the memo Paper No.39-Ka stated that this memo i.e. Paper No.39-Ka was shown to the P.W.-15 at around 8:30 a.m. to 9:00 a.m. at his residence by the Police. It was further pointed out by learned Counsel for the appellant that in his statement, P.W.-15 stated that P.W.-15 started for medical college at about 9:00 a.m. from his house and reached the medical college within 15-20 minutes at about 9:20 a.m. After reaching the hospital, P.W.-15 came to know that the deceased-

Pooja was admitted in surgery OPD-C/Bed and on the basis of the same, P.W.-15 reached the deceased. P.W.-15 further stated that he did not remember that whether the deceased was in a burnt state or not. It was further stated by P.W.-15 that before recording the statement, he had taken a certificate from the Doctor as to whether the deceased was in a position to give her statement or not. Learned Counsel for the appellant further argued that dying declaration was recorded between 10:20 a.m. and 10:30 a.m. From the evidence of P.W.-15 and P.W.-17, it is clear that the deceased was admitted in the medical college at about 10:15 a.m. and P.W.-15 reached the hospital even before the deceased was admitted to the medical college at about 9:20 a.m. on the basis of an information given orally at about 8:00 a.m. in the morning by the Police at his residence and subsequently by a written memo Paper No.39-Ka which was served upon the appellant at about 8:30 a.m–9:00 a.m. at his residence. From the statement of P.W.-17, it is clear that the aforesaid memo Paper No.39 Ka was transcribed after the deceased was admitted in the medical college at about 10:15 a.m. and thereafter the same was sent to the P.W.-15 for getting the dying declaration recorded but the dying declaration itself as per Ex.Ka-8 was recorded at 10:20 a.m.

38. The learned Counsel for the appellant further drew out attention to the fact that P.W.-16, Dr. Sant Lal Kanaujia, who had conducted the post-mortem of the deceased stated that the deceased was in 100% burnt state. Except her hair and Talva, the entire body of the deceased was burnt. Referring to the post-mortem report Ex.Ka-9, it has been pointed out by the learned Counsel for the appellant that the deceased had superficial to deep burns all over the body except both sole and hair.

39. Learned Counsel for the appellant further contended that from the evidence of P.W.-15, P.W.-16 and P.W.-17 it is clear that the deceased was seriously burned in the incident to the extent of 100%. Except her sole and hair, the whole body was burnt. She was not in a position to give a dying declaration. Further, the timing of the recording of the dying declaration is also doubtful as from the dying declaration Ex.Ka-8, it is clear that the same was recorded between 10:20 a.m. and 10:30 a.m. on 12.6.2014, whereas the deceased was admitted to the medical college at about 10:15 a.m. It was further contended that though the deceased was admitted at 10:15 a.m. on 12.6.2014, from the evidence of P.W.-15, it revealed that the P.W.-15 was served with the memo Paper No.39 Ka for recording the dying declaration much before the deceased was admitted to the medical college i.e. at about 8:30 a.m.-9:00 a.m. on 12.6.2014 at his residence whereas from the evidence of P.W.-17, the aforesaid memo, Paper No.39-Ka was itself prepared after the admission of the deceased in the medical college at about 10:15 a.m. Thereafter, the same was sent to be served upon the Magistrate and as such it was not possible for the P.W.-15 to have recorded the statement, as recorded in Ex-Ka-8, at 10:20 a.m. on 12.6.2014 and as such the dying declaration does not inspire confidence and cannot be relied upon.

40. In rebuttal, learned A.G.A. contended that as there is no format prescribed for recording the dying declaration, the fact that certificate of fitness was transcribed by the Doctor on the

left margin of the page on which dying declaration was recorded would have no effect. It has been further contended by learned A.G.A. that though there were minor inconsistencies in the statement of P.W.-15 and P.W.-17 as to service of memo paper No.39Ka but the same would not render their testimonies unreliable. Learned A.G.A. stressed upon the fact that P.W.-15, Naib Tehsildar and P.W.-17, Doctor were responsible Government officials and there was no reason for them to give false evidence.

41. We have considered the rival submissions of the parties and perused the statement of P.W.-15 and P.W.-17. In our view the dying declaration Ex.8ka does not inspire confidence for more than one reason.

42. As per the memo Paper No.39Ka, the deceased was admitted at Medical College at about 10:15 a.m on 12.6.2014. P.W. 17, Dr. Chandra Deo in his statement had stated that after the deceased was admitted in the medical college, the aforesaid memo paper No.39 Ga was prepared by the pharmacist, and thereafter the same was signed by P.W.-17. The memo Paper No.39 Ka was then sent to P.W.-15 for recording the dying declaration. P.W.15, Rakesh Ram, Naib Tehsildar in his statement initially denied that any written information was received by him and stated that Police had informed the P.W.-15 on mobile phone (No.9454416245) for recording the dying declaration at about 8:00 a.m. In the later part of his statement P.W.-15 stated that Police Constable brought a memo for recording the dying declaration. It was further stated that memo was shown to P.W.-15 at about 8:30-9:00 a.m. P.W.-15 further stated that he had seen the memo and the same was Paper No.39 Ka. It was further stated by P.W.-15 that he had started for the medical college at about 9:00 a.m. and reached medical college at about 9:20 a.m.

43. From the statements of P.W.-17, Dr. Chandra Deo, who had signed the memo 39-Ka, it is clear that the memo Paper No.39 Ka was prepared only after deceased was admitted in medical college i.e. after 10:15 a.m. On the other hand from the evidence of P.W.-15, Rakesh Ram, the information was received by P.W.-15 on his mobile phone and was given by the Police at about 8:00 a.m. and the memo paper No.39Ka was served by Police Constable to P.W.-15 at about 8:30-9:00. Statement of both the witnesses i.e. P.W.-17 and P.W.-15 are inconsistent so far as the memo sent to P.W.-15 for recording the dying declaration.

44. P.W.-15 Rakesh Ram, who recorded the dying declaration had stated that on being informed by the Police (orally as well as by memo in writing Paper No.39Ka), P.W.-15 reached the medical college at about 9:20 a.m. on 12.6.2014 for recording the dying declaration. From Paper No.39Ka, it is clear that deceased was admitted in medical college at about 10:15 a.m. Learned A.G.A. contended that it is possible that deceased might have been admitted prior in time than as had been mentioned in Paper No.39 Ka. Prosecution had only produced Paper No.39 Ka in evidence. Bed head ticket of the deceased which would be the best evidence to demonstrate the time of admission of deceased in medical was not produced by prosecution.

45. Further as per the prosecution story, the incident occurred at about 6:00

a.m. -6:30 a.m. on 12.6.2014 thereafter the information was received by the informant who was at Kamla marriage hall and after receiving the information reached the house where the deceased was found in a burnt state by the informant and the other family members. Thereafter she was taken to the District Hospital, Gorakhpur from where she was referred to the medical college. The prosecution failed to prove by producing any evidence from the District Hospital, Gorakhpur as to at what time the deceased was brought at District Hospital, Gorakhpur and was referred to the Medical College.

46. Thus from the evidence of P.W.-17, P.W.-15 and Paper No.39 Ka, timing of recording the dying declaration becomes doubtful. As per the evidence of P.W.-17 and Paper No.39Ka, the requisition sent to P.W.-15 for recording the dying declaration was sent after the 10:15 a.m. i.e. after the admission of deceased in the medical college. Whereas from the evidence of P.W.-15, he was informed (orally as well as in writing by Memo Paper No.39Ka) at about 8:30-9:00 a.m. i.e. much before deceased was admitted in medical college. From the dying declaration Ex.Ka-8, it appears that the dying declaration was recorded between 10:20-10:30 a.m. on 12.6.2014 by P.W.-15. The recording of dying declaration at 10:20 a.m. itself creates a doubt in view of the fact that the P.W.-15 was informed much prior to the admission of the deceased in the medical college through a memo Paper No.39 Ka which was subsequently prepared after the admission of the deceased i.e. after 10:15 a.m. on 12.6.2014 as per evidence of P.W.-17.

47. P.W.-15, Rakesh Ram, Naib Tehsildar, who had recorded the dying declaration has stated that prior to the recording of the dying declaration, P.W.-15 had taken a certificate from the doctor as to whether patient was capable of giving the statement or not. P.W.-17, Dr. Chandra Deo who gave the medical certificate stated that before the Magistrate, I recorded my opinion as to condition of deceased to give her statement. On the left margin of Ex.Ka-8 I recorded " Patient is mentally fit for dying declaration on 12.6.2014 before, during and after the recording of dying declaration between 10:15 a.m. and 10:30 a.m. In his cross-examination, P.W.-17 stated that after Ex.-8 was prepared by Magistrate, and as a formality I wrote on the left side of Ex-8 that "Patient is mentally fit for dying declaration on 12.6.2014 before and during and after 10:30 a.m."

48. Thus there are apparent inconsistencies between the statements of P.W.-15 and P.W.-17 as to the timing of the certificate given by P.W.-17. From the reading of certificate given by P.W.-17 which is on left margin of Ex.8, it is clear that the same was given after the dying declaration was recorded by the P.W.-15.

49. From the evidence of P.W.-17 nothing has come as to how the Doctor came to the conclusion that the deceased was in a fit mental condition to give her dying declaration. Dr. Chandra Dev had not stated as to how he had examined the patient. Neither he stated that he had checked her blood pressure, pulse rate or any other parameter to ascertain her mental fitness. It has also not come in evidence of P.W.-17, Dr. Chandra Dev that he had knowledge as to what treatment/medication was given to the deceased at the time, she was admitted in the medical college by the attending doctor. In the peculiar facts of the

case, a mere omnibus statement that he gave the certificate of fitness would not suffice.

50. Even P.W.-15 who recorded the dying declaration stated that he got a certificate of fitness from the Doctor but has not stated that he was himself satisfied with regard to the fitness of the deceased to get her statement recorded. He has also not stated as to whether he had put any preliminary questions to the deceased or by any other mode he himself got satisfied about the mental fitness. Such evidence is totally absent.

51. In order to establish dying declaration the evidence of P.W.-17, Dr. Chandra Dev and evidence of P.W.-15, Rakesh Ram Sub-Registrar were taken into consideration by the prosecution. Neither the Medical Officer, P.W.-17 nor the Magistrate, P.W.15 has detailed as to how they got satisfied about the mental fitness of the patient, therefore, such type of evidence coupled with the fact that all the other prosecution witnesses of fact had turned hostile and had not supported the prosecution version the whole case becomes suspicious. The time of recording the dying declaration i.e. 10:20 a.m. to 10:30 a.m. on 12.6.2014 becomes absolutely doubtful. Prosecution has failed to establish that the dying declaration was recorded at the time when it is alleged to have been recorded as per Ex.Ka-8 specially in view of evidence P.W.-15 and P.W.-17, which contradict, the timing of recording the evidence. Even more suspicious the evidence becomes when the Doctor in his statement had admitted that he had given the certificate just as a formality.

52. The Apex Court in case of ***Kanchy Komuramma Vs. State of A.P. reported in 1996 SCC (Cri) 31*** has held that the dying declaration has been recorded by a judicial Magistrate, by itself is not a proof of truthfulness of the dying declaration, which in order to earn acceptability has still to pass the test of scrutiny of the court. There are certain safeguards which must be observed by a Magistrate when requested to record a dying declaration. The Magistrate before recording the dying declaration must satisfy himself that the deceased is in a proper mental state to make the statement. He must record that satisfaction before recording the dying declaration. He must also obtain the opinion of the doctor, if one is available, about the fitness of the patient to make a statement and the prosecution must prove that opinion at the trial in the manner know to law. (Para 11)

53. The Apex Court in the case of ***Puran Chand Vs. State of Haryana (2010) 6 SCC 566*** advised the courts to remain alive to all attending circumstances when the dying declaration comes into being before making the same the basis of conviction. The relevant observations are contained in paragraphs 15 of the judgment extracted below:-

"15. The Courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigation agency who

may be interested in the success of investigation or which may be negligent while recording the dying declaration."

54. No doubt, a dying declaration is a valuable piece of evidence but it has to be considered as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing evidence and if it is not found wholly trustworthy or truthful, it should not form the sole basis of conviction without corroboration.

55. Although, P.W.-1 informant/father of deceased, P.W.-2, brother of the deceased and P.W.-3, mother of the deceased were declared hostile. The testimony of P.W.-3, mother of the deceased could have been considered to test the veracity of the dying declaration. P.W.-3 in her statement had stated when P.W.-3 reached the medical college, her daughter (deceased) was unconscious and that P.W.-3 remained with her daughter during the period deceased was unconscious and remained alive. Considering the evidence of the P.W.-3, mother of the deceased and of Dr. Sant Lal Kanaujia, P.W.-16 who had conducted the post-mortem and stated that the deceased was 100% burnt, further, creates doubt as to the fact that whether deceased was in fit physical and mental condition to have recorded the dying declaration as alleged by the prosecution.

56. It be noted that law in respect of value of the testimony of hostile witnesses has been settled by a catena of decisions of the Supreme Court. Their testimony can be utilized either by the prosecution or by the defence and the court may accept their testimony if it considers it truthful.

57. In the case of **Ramesh Harijan Vs. State of Uttar Pradesh (2012) 5 SCC 777,** the Supreme Court observed :-

"24. In State of U.P. Vs. Ramesh Prasad Misra and another (1996) 10 SCC 360, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde Vs. State of Maharashtra, (2002) 7 SCC 543; Radha Mohan Singh @ Lal Saheb & others Vs. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla Vs. Daroga Singh and others, AIR 2008 SC 320; and Subbu Singh Vs. State (2009) 6 SCC 462.

Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."

(See also case of ***C. Muniappan Vs. State of T.N. (2010) 9 SCC 567*** *(SCC P.596, para 83) and* ***Himansh Vs. State (NCT of Delhi) 2011 (2) SCC 36****)*

58. It is also noteworthy that as per the evidence of P.W.-15 and P.W.-17, the dying declaration was recorded at about 10:20 a.m. on 12.6.2014. There is no evidence as to when the same was handed over to the Investigating Officer. Incident allegedly had taken place at about 6:00-6:30 a.m. on 12.6.2014. The dying declaration was recorded at about 10:20 a.m. and the deceased got her injuries at about 8:00 a.m.-8:30 a.m. on 12.6.2014. The First Information Report, which was lodged on a written complaint made by the

father of the deceased P.W.-1 on 14.6.2014 at about 1:30 p.m. In the First Information Report, there was no mention of the dying declaration of the deceased, though the same was recorded two days prior to the lodging of the First Information Report. The Investigating Officer, was not examined by the prosecution who could have deposed the fact as to when the alleged dying declaration was handed over to the Police either by the Doctor or by the person who had recorded the dying declaration. Even in the charge-sheet, P.W.-17 was not named as a witness by the prosecution. The aforesaid facts create a doubt as to whether the dying declaration was recorded as alleged by the prosecution at the time when it is said to have been recorded.

59. That apart, the natural instinct of the patient would be to immediately tell her nearest available relation, and there could be none more nearer to her than her own mother, as to how she received the burn injuries and who was responsible for the same. As per prosecution case, dying declaration was recorded at 10:20 a.m. on 12.6.2014 and the deceased remained alive till 8-8:30 p.m., but there is no evidence that during this period, the deceased informed about the incident to her near relatives who were present along with the deceased in the medical college. The non-mentioning of the dying declaration in the F.I.R. itself creates a doubt as to the recording of dying declaration itself specially when the deceased had not informed any other near relative as to how she had received the burn injuries.

60. The appellant has stated in his reply to Qus No.7 in his statement under Section 313 Cr.P.C. that deceased was heating the milk for the child and accidentally her clothes got fire and she was burnt. During the course of treatment, she died. At the time of incident, I was in Kamla Marriage Hall and I am innocent. A reply to question no.7 is quoted as under :-

"प्रश्न संख्या- 7- क्या आप को और कुछ कहना है ?

उत्तर- मृतका पूजा अपनी बच्ची के लिए दूध गर्म कर रही थी। दुर्घटनावश उसके कपडों में आग लग गयी। जिससे वह जल गयी और दौरान इलाज उसकी मृत्यु हो गयी। घटना के समय मैं कमला मैरिज हाउस में था। मैं निर्दोष हूँ। "

61. The answer to the question no.7 clearly shows that the appellant has come with a clear and plausible explanation of his innocence. This specific explanation offered by the appellant finds support from the statement of all the witnesses of fact. The trial court while convicting the appellant completely failed to take note of the explanation offered by the appellant in his statement under Section 313 Cr.P.C. which was probable in the facts of the present case.

62. The Supreme Court in the case of ***Reena Hazarika Vs. State of Assam, reported in AIR 2018 SC 5361***, in paragraph-16 of the judgment, observed as follows :

16. Section 313, Cr.P.C. cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of

substantive evidence, not being on oath under Section 313(2), Cr.P.C. The importance of this right has been considered time and again by this court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word 'may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing"

63. In the present case, as the appellant has come with a specific and plausible defence but the trial court did not consider it and without considering it convicted the appellant. In our considered opinion, therefore, the conviction of the appellant from this angle too, is unsustainable.

64. Lastly, it was submitted by learned Counsel for the appellant that no question with regard to the dying declaration was not put to the appellant at the time of recording his statement under Section 313 Cr.P.C., and, therefore, the same cannot be relied upon and has to be excluded from the evidence.

65. In support of his contention, learned Counsel for the appellant referred the judgment of Hon'ble Apex Court in ***Sharad Birdhichand Sarda Vs. State of Maharashtra, reported in AIR 1984 SC 1622*** and contended that if the circumstances are not put to the accused in his statement under Section 313 of Cr.P.C., 1973, they must be completely excluded from consideration because the accused did not have any chance to explain them. In Sharad Birdhichand Sarda (supra), the Hon'ble Supreme Court in paragraph nos.142 and 144 of the judgment has held as under :-

"142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4,5,6,8,9,11,12,13,16, and 17. As these circumstances were not put to the appellant in his statement under s.313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Fateh Singh Bhagat Singh v. State of Madhya Pradesh(1) this Court held that any circumstance in respect of which an accused was not examined under s. 342 of the Criminal procedure code cannot be used against him ever since this decision. there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under s.342 of the or s.313 of the Criminal

Procedure Code, the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra(2) this Court held thus:

"The fact that the appellant was said to be absconding not having been put to him under section 342, Criminal Procedure Code, could not be used against him."

144. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decision of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code have to be completely excluded from consideration."

66. Learned Counsel for the appellant also referred to the judgment in ***Sujit Biswas Vs. State of Assam,*** reported in ***(2013) 12 SCC 406*** for the proposition that the very purpose of examining the accused persons under Section 313 Cr.P.C., 1973 is to meet the requirement of the principles of natural justice, i.e., audi alteram partem. The accused, thus, must be given an opportunity to explain the incriminating material that has surfaced against him and in the circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., 1973, cannot be used against him and must be excluded from consideration.

67. Section 313 Cr.P.C., 1973 has amended by Act no.5 of 2009, Section 22 (w.e.f. 31.12.2009) is quoted as under :-

313. Power to examine the accused.- *(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-*

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."

68. The forerunner of the said provision in the Old Code was Section 342 therein. It was worded thus :-

342.(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the

witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused when he is examined under sub-section (1)."

69. In view of the judgments referred to by the learned Counsel for the appellant, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. The Hon'ble Supreme Court in ***Asraf Ali Vs. State of Assam*** reported in ***(2008) 16 SCC 328*** has made following observations in paragraphs 21 and 22 of the judgment which are quoted as under :-

"21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22.The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in S. Harnam Singh v. The State (AIR 1976 Supreme Court 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non- indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

70. The learned Counsel for the appellant further referred to a judgment passed by Division Bench of Andhra Pradesh High Court in case of ***Andugula Shankaraiah Vs. State of Andhra Pradesh*** reported in ***2012 CRI.L.J.189*** wherein in paragraph 25 of the aforesaid judgment, the Andhra Pradesh High Court has held as under :-

"25. It is pertinent to mention here that in a case of dying declaration, the opportunity of cross-examination of the declarant will not be available to the accused. Hence, it is necessary for the trial

Judge to put the incriminating material in a perfect manner to the accused so as to give an opportunity to him to explain his case. It is also to be noted that the Legislature taking into consideration the importance of provision under Section 313 Cr.P.C. amended the same by incorporating a new provision, which runs as follows:

"313(5) The court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit fil written statement by the accused as sufficient compliance of this section."

In view of the above discussion, we are of the view that it is unsafe to convict the accused basing solely on the dying declaration. Hence, the same is liable to be set aside."

71. Learned Counsel for the appellant also referred to statement of the appellant under Section 313 Cr.P.C., 1973. Learned Addl. Sessions Judge, Court No.7, Gorakhpur on the basis of evidence of prosecution put following questions during the examination of accused under Section 313 Cr.P.C. :-

प्रश्न संख्या-1- अभियोजन साक्ष्य में आया है कि वादी मुकदमा सरजू चौहान की पुत्री पूजा की शादी दिनांक 26.6.2012 को रामेश्वर लाल चौहान से हिन्दू रीति रिवाज के साथ हुई थी। कुछ दिन बाद से ही मु० 50,000/- नगद एवं सोने की अंगूठी की मांग करते हुए उसे प्रताडित करने लगे और दिनांक - 12.06.14 को समय करीब 6.00 से 6.30 बजे के मध्य पूजा के ऊपर मिट्टी का तेल छिडकर जला दिये, जिसकी मृत्यु दवा इलाज के दौरान उसी दिन हो गयी। इस सम्बन्ध में आप को क्या कहना है?

उत्तर- गलत है।

प्रश्न संख्या-2- अभियोजन साक्ष्य में आया है कि उक्त घटना के सम्बन्ध में प्रथम सूचना रिपोर्ट पंजीकृत किया गया जिसके आधार पर चिक एफ०आई०आर० तैयार किया गया जिसका इन्द्राज जी०डी० में किया गया विवेचना विवेचक को सौपी गयी जिनके द्वारा घटना स्थल का निरीक्षण किया गया नक्शा नजरी बनाया गया गवाहान के बयान लिये गये विवेचना पूर्ण होने पर आरोप पत्र न्यायालय में प्रेषित किया गया। इस सम्बन्ध में आप को क्या कहना है ?

उत्तर- झूठी रिपोर्ट लिखाई गयी। गलत आरोप पत्र प्रेषित किया गया।

प्रश्न संख्या-3- अभियोजन की तरफ से आरोप को साबित करने के लिये अभियोजन साक्षी संख्या-1 सरजू चौहान, अ०सा०स०-2 सुधीर चौहान, अ०सा०स०-3 पुष्पा देवी, अ०सा०स०-4 राजन मिश्रा, अ०सा०स०- गुड्डू चौहान, अ०सा०स०-6 रामरती देवी, अ०सा०स०- 7 अशोक कुमार चौहान, अ०सा०स०-8 राम अशीष, अ०सा०स०-9 जीशान, अ०सा०स०-10नौशाद,अ०सा०स०-11राधेश्याम गुप्ता , अ०सा०स०-12 सुभाष चन्द्र कसौधन,अ०सा०स०-13 नीतिश कुमार चौहान को परीक्षित किया गया है। इस सम्बन्ध में आप को क्या कहना है ?

उत्तर- कुछ नहीं।

प्रश्न संख्या-4- अभियोजन पक्ष की ओर से अ०सा०स०-14 दयाराम सेवा निवृत तहसीलदार, अ०सा०स०- 15 राकेश राम सब रजिस्टार अ०सा०स०-16 सन्तलाल, अ०सा०स०-17 डा० चन्द्रदेव को परीक्षित किया गया है जो

आप के विरूद्ध साक्ष्य दे रहे है। इस सम्बन्ध में आप को क्या कहना है ?

उत्तर- गलत ब्यान दिया है।

प्रश्न संख्या-5- आप के विरूद्ध मुकदमा क्यों चला ?

उत्तर- सन्देहवश

प्रश्न संख्या-6- क्या आप सफाई में साक्ष्य देना है?

उत्तर- जी नहीं

प्रश्न संख्या- 7- क्या आप को और कुछ कहना है ?

उत्तर- मृतका पूजा अपनी बच्ची के लिए दूध गर्म कर रही थी। दुर्घटनावश उसके कपडों में आग लग गयी। जिससे वह जल गयी और दौरान इलाज उसकी मृत्यु हो गयी। घटना के समय मैं कमला मैरिज हाउस में था। मैं निर्दोष हूँ।

72. Per contra, learned A.G.A. has relied upon the judgment of the Apex Court in case of ***Nar Singh Vs. State of Haryana*** reported in ***(2015) 1 SCC 496***, wherein in Paragraph 30 of the aforesaid judgment, the Hon'ble Supreme Court has held as under :-

"30. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:-

(i) Whenever a plea of non-compliance of Section 313 Cr.P.C. is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer;

(ii) In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.

(iii) If the appellate court is of the opinion that non-compliance with the provisions of Section 313 Cr.P.C. has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh;

(iv) The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused."

73. Learned AGA also referred to the judgment of Apex Court in case of ***Shivaji Sahabrao Bobade Vs. State of Maharashtra*** reported in ***(1973) 2 SCC 793,*** which considered the fall out of the omission to put the accused, a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory

material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognized, that where there is a perfunctory examination under Section 313 of the Cr.P.C., 1973, the matter is capable of being remitted to the trail court, with the direction to retry from the stage at which the prosecution was closed.

74. The trial court, though recorded the statement under Section 313 of Cr.P.C., omitted to put questions regarding a vital circumstance to the accused during his statement. The trial court, while convicting the accused mainly relied upon the written dying declaration Ex.Ka.-8. However, the contents of written dying declaration were not put to the accused during his statement. It is really a matter of concern that the trial court did not frame the question specifically putting the incriminating material stated by deceased in her statement. Thereby, a very important circumstance was lost. The deceased in her statement (dying declaration) stated that the accused had poured Kerosene on her person and set her on fire. Particularly, this incriminating part of dying declaration has not been put to the accused to get his explanation. Although, the dying declaration Ex.Ka-8 was treated as the basis to convict the accused, the same was not put to the accused in her statement recorded under Section 313 Cr.P.C. Apparently, the accused was not given opportunity to explain this vital circumstance. Recording of statement under Section 313 of the Cr.P.C. is not an empty formality during trial. Section 313 Cr.P.C. prescribes the procedure to safeguard the interest of the accused. Obviously, in the absence of seeking explanation on this vital point, prejudice is caused to the accused.

75. We may note that considering the importance of statement under Section 313 of Cr.P.C., Sub-clause (5) has been added in Section 313 by amendment which permits the court to take help of prosecution and defence in preparing relevant questions which are put to the accused. One of the reasons for such amendment was to see that Court should not miss putting any incriminating circumstance to the accused while recording his statement.

76. In the result, the finding of guilt based on the written dying declaration for this reason alone would not sustain apart from the other reasons which we have recorded above. In the result, we hold that the dying declaration was not trustworthy and reliable.

77. To summarise we hold that, the evidence on the point of dying declaration does not inspire confidence and it cannot be relied upon. There is no reliable evidence to satisfy the judicial mind that the deponent was conscious and mentally fit at the time of giving her statement. Rather, the genesis of the case i.e. recording the statement of deceased itself becomes doubtful. From the material on record, we are absolutely not satisfied about the truthfulness of the voluntary nature of the dying declaration and the fitness of the mind of the deceased. In the aforesaid facts and circumstances, we find and hold that the prosecution failed to substantiate the charges levelled against the appellant-accused beyond all reasonable doubt by adducing consistent, cogent and reliable evidence. If dying declaration is excluded,

nothing remains in the prosecution case, therefore the appellant-accused is legitimately entitled to avail the benefit of doubt. Hence, the impugned judgment and order of conviction passed by learned Addl. Sessions Judge, Court No.7, Gorakhpur could not withstand the legal position and requires to be reversed by acquitting the accused from charges levelled against him. Consequently, the appeal deserves to be allowed by setting aside the impugned judgment and order of conviction.

In view of that following order :-

(I) The appeal stands allowed.

(II) The judgment and order of conviction dated 30.11.2016 passed by learned Addl. Sessions Judge, Court No.7, Gorakhpur stands quashed and set aside.

(III) The accused-appellant, Rameshwar Lal Chauhan is acquitted of the offence punishable under Section 302 of IPC.

(IV) The accused be released from jail forthwith, if not required in any other offence.

(V) The amount of fine, if deposited, be refunded to the accused.

(2023) 6 ILRA 394
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

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

Criminal Misc. Writ Petition No. 4675 of 2023

Abdul Hayee & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Mushir Khan

Counsel for the Respondents:
G.A.

Criminal Law - Arms Act, 1959-Section 37- police has proceeded on receiving information about a wanted criminal -where a Special Act provides for lodging of complaint for any offence committed thereunder- and any offence under I.P.C is also committed-the Police can register a case- investigate and submit a report-FIR was clearly maintainable and therefore, there is no bar in arrest, search and seizure by the Police as per Cr.P.C- as the provisions thereof are nowhere in contradiction of the provisions of the Arms Act and have been made applicable vide Section 37 Arms Act to arrest and seizure made under Arms Act.

W.P. dismissed. (E-9)

List of Cases cited:

1. U.O.I. Vs Ashok Kumar Sharma & ors., (2021) 12 SCC 674

2. Jayant & ors.Vs St. of M. P. (2021) 2 SCC 670

3. St. (NCT of Delhi) Vs Sanjay (2014) 9 SCC 772

4. St. of Haryana & ors.Vs Bhajan Lal & ors., 1992 Supp. (1) SCC 335

5. M/s Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah., AIR 2021 SC 1918

6. Special Leave to Appeal (Crl.) No.3262/2021 (Leelavati Devi @ Leelawati & another Vs the St. of Uttar Pradesh) decided on 07.10.2021

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Surendra Singh-I, J.)

1. Heard Shri Mushir Khan, learned counsel for the petitioners and Shri Manish Goyal, learned Additional Advocate

General assisted by Shri A.K. Sand, learned A.G.A.-I appearing on behalf of the State.

2. During the course of argument Shri A.K. Sand, learned A.G.A.-I submits that during investigation Section 216 I.P.C. has been added.

3. Learned counsel for the petitioners submits that he may be permitted to amend the prayer clause. He may do so during the course of the day.

4. This writ petition has been filed for quashing the impugned First Information Report dated 04.03.2023 in Case Crime No. 42 of 2023, under Sections 3/4/25 Arms Act, Section 4/5 of Explosive Substances Act 1908 and Section 216 I.P.C., Police Station Sarai Akil, District Kaushambi and for a direction to the respondent authorities not to arrest the petitioners in pursuance of the impugned first information report.

5. The submission of the learned counsel for the petitioners is that no offence has been made out against the petitioners. None of the petitioners herein were found or arrested on the spot and one Abdul Kawi has already surrendered before the C.B.I. Court. It is submitted that as per the first information report some arms and ammunition were found in the premises which were seized by the Police and the first information report was lodged under the provisions of Sections 3/4/25 Arms Act and Section 4/5 of Explosive Substances Act 1908. It is submitted that the provisions of Section 22 of the Arms Act have not been complied with at the time of making search and seizure and therefore, it cannot be said that any offence has been made out against the petitioners. On facts it is submitted that one of the co-accused was attending his service and other arguments on the merit of the case regarding Will dated 05.10.2020 by which Abdul Kawi was disowned by his father with all ties broken and that he was living separately. Other factual arguments have also been made in defence. It is submitted that the procedure for the seizure has not been adopted and the walls of the premises were damaged by JCB.

6. Learned counsel for the petitioners further submitted that since the offence in the present case under Section 25 Arms Act is punishable with two years imprisonment, as per Part II of the First Schedule of the Criminal Procedure Code, it is a non-cognizable offence and only a complaint can be lodged in it and lodging of the first information report is not maintainable. It was also submitted that in respect of the offences under the Arms Act only a complaint could have been filed and therefore, the first information report could not have been registered and is not maintainable. It is also submitted that the petitioners are not absconder. They were also not harbouring any offender, therefore, offence under Section 216 I.P.C. is not made out. Submission, therefore, is that the impugned FIR is liable to be quashed.

7. Per contra, Shri Manish Goyal, learned Additional Advocate General assisted by Shri A.K. Sand, learned A.G.A.-I submits that it is on the information while patrolling that one wanted criminal, namely, Abdul Kawi, who carries reward of Rs. one lac is hiding in his village, the Police had gone to his village in his search but as his house was very much inside the village, the accused wanted in Case Crime No. 34 of 2005, under Sections 147, 148, 149, 307, 302, 120-B, 506 I.P.C. and Section 7 Criminal Law Amendment Act, Police Station

Dhoomanganj, District Prayagraj and C.B.I. R.C. No. 02/S/2016 case no. 20432 of 2022, under Sections 147, 148, 149, 307, 302, 120-B I.P.C. and Section 27 Arms Act as well as present accused have absconded and illegal Arms and ammunition were found in the premises. Submission, therefore, is that due procedure was adopted by the Police Authorities in this search and seizure and there was no illegality in search and seizure which was made as per the provisions of the Arms Act read with the provisions of Cr.P.C. It was further submitted that the present FIR is in respect of commission of offences under Section 3/4 as punishable under Section 25 of the Arms Act including the offences under Section 4/5 of the Explosive Substances Act 1908 and Section 216 I.P.C. Shri Manish Goyal, learned Additional Advocate General further submitted that once a first information report can be lodged in respect of certain offences, the other offences in regard whereof ordinarily complaint is maintainable, can also be included in such first information report. He, therefore, submits that a bare reading of the first information report clearly reflects that a cognizable offence has been committed and no interference is warranted.

8. We have considered the rival submissions and perused the record.

9. Needless to say that Code of Criminal Procedure, 1973 extensively provides power for arrest, search and seizure covering all the circumstances as may be visualized including powers to do so even without warrant. Chapter V, VI, VII and XII are broadly relevant in this regard. Before proceeding further, it would be relevant to take note of provisions of the Arms Act and Cr.P.C. relevant in the present case.

10. Section 20, 22, 37 and 38 of the Arms Act are quoted as under:

"20. Arrest of persons conveying arms, etc., under suspicious circumstances.—Where any person is found carrying or conveying any arms or ammunition whether covered by a licence or not, in such manner or under such circumstances as to afford just grounds of suspicion that the same are or is being carried by him with intent to use them, or that the same may be used, for any unlawful purpose, any magistrate, any police officer or any other public servant or any person employed or working upon a railway, aircraft, vessel, vehicle or any other means of conveyance, may arrest him without warrant and seize from him such arms or ammunition.

22. Search and seizure by magistrate.— (1) Whenever any magistrate has reason to believe—

(a) that any person residing within the local limits of his jurisdiction has in his possession any arms or ammunition for any unlawful purpose, or

(b) that such person cannot be left in the possession of any arms or ammunition without danger to the public peace or safety,

the magistrate may, after having recorded the reasons for his belief, cause a search to be made of the house or premises occupied by such person or in which the magistrate has reason to believe that such arms or ammunition are or is to be found and may have such arms or ammunition, if any, seized and detain the same in safe custody for such period as he thinks necessary, although that person may be entitled by virtue of this Act or any other law for the time being in force to have the same in his possession.

(2) Every search under this section shall be conducted by or in the presence of a magistrate or by or in the

presence of some officer specially empowered in this behalf by the Central Government.

37. Arrest and searches.—Save as otherwise provided in this Act,—

(a) all arrests and searches made under this Act or under any rules made thereunder shall be carried out in accordance with the provisions of the [Code of Criminal Procedure, 1973 (2 of 1974)], relating respectively to arrests and searches made under that Code;

(b) any person arrested and any arms or ammunition seized under this Act by a person not being a magistrate or a police officer shall be delivered without delay to the officer in charge of the nearest police station and that officer shall—

(i) either release that person on his executing a bond with or without sureties to appear before a magistrate and keep the things seized in his custody till the appearance of that person before the magistrate, or

(ii) should that person fail to execute the bond and to furnish, if so required, sufficient sureties, produce that person and those things without delay before the magistrate.

38. Offences to be cognizable.— Every offence under this Act shall be cognizable within the meaning of the [Code of Criminal Procedure, 1973 (2 of 1974)]."

11. Sections 4, 5, 41, 47, 48, 94, 97, 100, 102 and 165 Cr.P.C. are quoted below. These provisions also include the provisions relied on by learned counsel for the petitioners.

"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.

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.

41. When police may arrest without warrant.-

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely,:-

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary-

(a) to prevent such person from committing any further offence;or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making 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 the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing:

[Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.]

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Subject to the provisions of section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.

47. Search of place entered by person sought to be arrested.-

(1) If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, any person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress to such place cannot be obtained under subsection (1), it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance:

Provided that, if any such place is an apartment in the actual occupancy of a female (not being the person to be arrested) who, according to custom, does not appear in public, such person or police officer shall, before entering such apartment, give notice to such female that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.

(3) Any police officer or other person authorised to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

48. Pursuit of offenders into other jurisdictions.- A police officer may, for the purpose of arresting without warrant any person whom he is authorised to arrest, pursue such person into any place in India.

94. – Search of place suspected to contain stolen property, forged documents, etc. - (1) If a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property, or for the deposit, sale or production of any objectionable article to which this section applies, or that any such objectionable article is deposited in any place, he may by warrant authorise any police officer above the rank of a constable—

(a) to enter, with such assistance as may be required, such place,

(b) to search the same in the manner specified in the warrant,

(c) to take possession of any property or article therein found which he reasonably suspects to be stolen property or objectionable article to which this section applies,

(d) to convey such property or article before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose of it in some place of safely,

(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or production of any such property or article knowing or having reasonable cause to suspect it to be stolen property or, as the case may be, objectionable article to which this section applies.

(2) The objectionable articles to which this section applies are—

(a) counterfeit coin;

(b) pieces of metal made in contravention of the Metal Tokens Act, 1889 (1 of 1889), or brought into India in contravention of any notification for the time being in force under section 11 of the Customs Act, 1962 (52 of 1962);

(c) counterfeit currency note; counterfeit stamps;

(d) forged documents;

(e) false seals;

(f) obscene objects referred to in section 292 of the Indian Penal Code (45 of 1860);

(g) instruments or materials used for the production of any of the articles mentioned in clauses (a) to (f).

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

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).

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, 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.]

165. Search by police officer.- (1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place with the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police officer proceeding under sub- section (1), shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search- warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub- section (1) or sub- section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate."

12. Before we proceed further, it would be apposite to take note of few judgements of Hon'ble Supreme Court.

13. The Apex Court in the case of **Union of India vs. Ashok Kumar Sharma and others, (2021) 12 SCC 674** has held as under:

"70. In State (NCT of Delhi) v. Sanjay [State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772 : (2014) 5 SCC (Cri) 437] , the matter arose under the Mines and Minerals (Development and Regulation) Act, 1957 ("the MMDR Act") as also under Sections 378 and 379IPC and the question which arose for decision was whether the provisions of Sections 21 and 22, apart from other provisions of the MMDR Act, operated as a bar to prosecution for the offences under Sections 379/114 and other provisions of the IPC. Section 21 of the said Act prescribes various penalties.

Section 22 deals with cognizance of offences and it reads as follows:

"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."

71. The Court was dealing with appeals from the judgments [*Sanjay v. State,* 2009 SCC OnLine Del 525 : (2009) 109 DRJ 594] , [*Vishalbhai Rameshbhai Khurana v. State of Gujarat,* 2010 SCC OnLine Guj 13915 : (2010) 3 GCD 2160] of the High Courts of Delhi and Gujarat. The registration of the cases was challenged on the basis of Section 22 of the MMDR Act. Paras 8, 9, 10 and 11 reveal the questions which arose and how they came to be dealt with by the High Court : *(Sanjay case [State (NCT of Delhi)* v. Sanjay, (2014) 9 SCC 772 : (2014) 5 SCC (Cri) 437] , SCC pp. 781-82)

"8. Criminal Appeal No. 499 of 2011, as stated above, arose out of the order [*Sanjay v. State [Sanjayv. State,* 2009 SCC OnLine Del 525 : (2009) 109 DRJ 594]] passed by the Delhi High Court. The Delhi High Court formulated three issues for consideration:

(1) Whether the police could have registered an FIR in the case;

(2) Whether a cognizance can be taken by the Magistrate concerned on the basis of police report; and

(3) Whether a case of theft was made out for permitting registration of an FIR under Sections 379/411 of the Penal Code.

9. The Delhi High Court [*Sanjay v. State,* 2009 SCC OnLine Del 525 : (2009) 109 DRJ 594] after referring to various provisions on the MMDR Act vis-à-vis the Code of Criminal Procedure disposed of the application directing the respondent to amend the FIR, which was registered, by converting the offence mentioned therein under Sections 379/411/120-B/34IPC to Section 21 of the MMDR Act. The High Court in para 18 of the impugned order [*Sanjay v. State,* 2009 SCC OnLine Del 525 : (2009) 109 DRJ 594] held as under : (*Sanjay case [Sanjay v. State,* 2009 SCC OnLine Del 525 : (2009) 109 DRJ 594] , SCC OnLine Del)

'18. In view of the aforesaid and taking into consideration the provisions contained under Section 21(6) of the said Act I hold that:

(i) The offence under the said Act being cognizable offence, the police could have registered an FIR in this case;

(ii) However, so far as taking cognizance of an offence under the said Act is concerned, it can be taken by the Magistrate only on the basis of a complaint filed by an authorised officer, which may be filed along with the police report;

(iii) Since the offence of mining of sand without permission is punishable under Section 21 of the said Act, the question of the said offence being an offence under Section 379IPC does not arise because the said Act makes illegal mining as an offence only when there is no permit/licence for such extraction and a complaint in this regard is filed by an authorised officer.'

10. On the other hand the Gujarat High Court [*Vishalbhai Rameshbhai Khurana v. State of Gujarat,* 2010 SCC OnLine Guj 13915 : (2010) 3 GCD 2160] formulated the following questions for consideration : (*Vishalbhai Rameshbhai Khurana case [Vishalbhai Rameshbhai Khurana v. State of Gujarat,* 2010 SCC OnLine Guj 13915 : (2010) 3 GCD 2160] , SCC OnLine Guj para 5)

'5. … (1) Whether Section 22 of the Act would debar even lodging an FIR before the police with respect to the offences punishable under the said Act and the Rules made thereunder?

(2) In case such FIRs are not debarred and the police are permitted to investigate, can the Magistrate concerned take cognizance of the offences on a police report?

(3) What would be the effect on the offences punishable under the Penal Code, 1860 in view of the provisions contained in the Act?'

11. The Gujarat High Court [*Vishalbhai Rameshbhai Khurana v. State of Gujarat*, 2010 SCC OnLine Guj 13915 : (2010) 3 GCD 2160] came to the following conclusion : (*Vishalbhai Rameshbhai Khurana case [Vishalbhai Rameshbhai Khurana v. State of Gujarat*, 2010 SCC OnLine Guj 13915 : (2010) 3 GCD 2160] , SCC OnLine Guj para 28.5)

'28.5 … "18. … (i) The offence under the said Act being cognizable offence, the police could have registered an FIR in this case;

(ii) However, so far as taking cognizance of offence under the said Act is concerned, it can be taken by the Magistrate only on the basis of a complaint filed by an authorised officer, which may be filed along with the police report;

(iii) Since the offence of mining of sand without permission is punishable under Section 21 of the said Act, the question of the said offence being an offence under Section 379IPC does not arise because the said Act makes illegal mining as an offence only when there is no permit/licence for such extraction and a complaint in this regard is filed by an authorised officer."

72. The Gujarat High Court also held that Section 22 did not prohibit registering an FIR by the police in regard to the offence under the MMDR Act and the Rules thereunder. However, it was not open to the Magistrate to take cognizance. This Court, after referring to the decisions in Sanjay [*Sanjay v. State*, 2009 SCC OnLine Del 525 : (2009) 109 DRJ 594] , held as follows : (*Sanjay case [State (NCT of Delhi) v. Sanjay*, (2014) 9 SCC 772 : (2014) 5 SCC (Cri) 437] , SCC pp. 811-12, paras 69-73)

"69. Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and absolute bar for taking action by the police for illegally and dishonestly committing theft of minerals including sand from the riverbed. The Court shall take judicial notice of the fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the ecosystem of the rivers and safety of bridges. It also weakens riverbeds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the groundwater levels.

70. There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other sections of the Act, the officer empowered and authorised under the Act shall exercise all the powers including making a complaint before the jurisdictional Magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the

complaint filed before it by a duly authorised officer. In case of breach and violation of Section 4 and other provisions of the Act, the police officer cannot insist the Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging contravention of the said Act. In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such person is sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitutes an offence under the Penal Code.

71. However, there may be a situation where a person without any lease or licence or any authority enters into river and extracts sand, gravel and other minerals and removes or transports those minerals in a clandestine manner with an intent to remove dishonestly those minerals from the possession of the State, is liable to be punished for committing such offence under Sections 378 and 379 of the Penal Code.

72. From a close reading of the provisions of the MMDR Act and the offence defined under Section 378IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravel and other minerals from the river, which is the property of the State, out of the State's possession without the consent, constitute an offence of theft. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such persons. In other words, in a case where there is a theft of sand and gravel from the government land, the police can register a case, investigate the same and submit a final report under Section 173CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(d) of the Code of Criminal Procedure.

73. After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under IPC. Hence, for the commission of offence under Section 378IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently, the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly."

73. Chapter XII CrPC carries the chapter heading "Information to the Police and their Powers to Investigate":

74. It comes under the section heading "Procedure for investigation". The body of the section can be split up into the following parts:

74.1. An officer in charge of a police station may from information received have reason to suspect the commission of an offence. He may also have reason to suspect the commission of cognizable offence not on the basis of any information but otherwise.

74.2. As far as information is concerned, it is clearly relatable to the information which has been provided to him within the meaning of Section 154. Cases where he acts on his own knowledge would be covered by the expression otherwise.

74.3. The offences must be an offence which he is empowered under Section 156 to investigate. We have noticed that a police officer is empowered to investigate a cognizable offence without an order of the Magistrate. As far as non-cognizable offence is concerned, he cannot investigate such offence without the order of the Magistrate having power to try or commit the case for trial.

170.2. There is no bar to the police officer, however, to investigate and prosecute the person where he has committed an offence, as stated under Section 32(3) of the Act i.e. if he has committed any cognizable offence under any other law."

14. In **Jayant and others vs. State of Madhya Pradesh (2021) 2 SCC 670** the Apex Court has laid down as follows:

"8.3. That thereafter, after considering the relevant provisions of the MMDR Act, this Court opined that there is no complete and absolute bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offence. Ultimately, this Court concluded in paras 72 and 73 as under: (SCC p. 812)

"72. From a close reading of the provisions of the MMDR Act and the offence defined under Section 378 IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravel and other minerals from the river, which is the property of the State, out of the State's possession without the consent, constitute an offence of theft. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such persons. In other words, in a case where there is a theft of sand and gravel from the government land, the police can register a case, investigate the same and submit a final report under Section 173 CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(d) of the Code of Criminal Procedure.

73. After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients

of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under IPC. Hence, for the commission of offence under Section 378 IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently, the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly."

8.4. Thus, as held by this Court, the prohibition contained in Section 22 of the MMDR Act against prosecution of a person except on a written complaint made by the authorised officer in this behalf would be attracted only when such person is sought to be prosecuted for contraventions of Section 4 of the MMDR Act and not for any act or omission which constitutes an offence under the Penal Code."

15. In **State (NCT of Delhi) vs. Sanjay (2014) 9 SCC 772** the Apex Court has held as under:

"72. From a close reading of the provisions of the MMDR Act and the offence defined under Section 378 IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravel and other minerals from the river, which is the property of the State, out of the State's possession without the consent, constitute an offence of theft. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such persons. In other words, in a case where there is a theft of sand and gravel from the government land, the police can register a case, investigate the same and submit a final report under Section 173 CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(d) of the Code of Criminal Procedure.

73. After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under IPC. Hence, for the commission of offence under Section 378 IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently, the contrary view taken by the different High Courts cannot be

sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly."

16. In **Sanjay** (supra) Hon'ble Supreme Court was considering as to whether the provisions of Mines and Minerals (Development and Regulation) Act 1957, and Rules framed thereunder (MMDR Act/Rules) operates as bar against prosecution of a person who has been charged with the allegation that constitutes an offence under I.P.C. The question was when the act of an accused is an offence both under I.P.C. and under the provisions of MMDR Act, whether the provisions of MMDR Act explicitly or implicitly excludes the provisions of I.P.C. It would be relevant to take note of paras 72 & 73 of **Sanjay** (supra).

17. In **Jayant** (supra) the judgment in **Sanjay** (supra) was considered with appraisal in 8.1 onward and in para 8.4 it was held as under:

"8.4. Thus, as held by this Court, the prohibition contained in Section 22 of the MMDR Act against prosecution of a person except on a written complaint made by the authorised officer in this behalf would be attracted only when such person is sought to be prosecuted for contraventions of Section 4 of the MMDR Act and not for any act or omission which constitutes an offence under the Penal Code."

18. From reading of above two judgements what can be safely gathered is that where a Special Act provides for lodging of complaint for any offence committed thereunder, if any offence under I.P.C is also committed, the Police can register a case, investigate and submit a report. Thus, in the present case FIR was clearly maintainable and therefore, there is no bar in arrest, search and seizure by the Police as per Cr.P.C. as the provisions thereof are nowhere in contradiction of the provisions of the Arms Act and have been made applicable vide Section 37 Arms Act to arrest and seizure made under Arms Act. In fact, this case is even on a better footing as the police has proceeded on receiving information about a wanted criminal, Abdul Kawi and his aids in a already pending case for offences committed under I.P.C.

19. It would also be relevant to take note of para 120.2 of **Ashok Kumar Sharma** (supra) wherein while drawing conclusions and issuing directions it was held that there is no bar to the police officers to investigate and prosecute person if he has committed any cognizable offence under any other law. In this case, the Hon'ble Supreme Court was considering the provisions of Drugs and Cosmetics Act 1940, wherein quite specific provisions for arrest, search and seizure and authority of the officer have been given. Relevant para 170.2 is quoted as under:

170.2. There is no bar to the police officer, however, to investigate and prosecute the person where he has committed an offence, as stated under Section 32(3) of the Act i.e. if he has committed any cognizable offence under any other law.

20. From a perusal of the FIR, we find that fire arms, cartridges and ammunition including bombs were recovered from the house of co-accused Abdul Kawi where petitioners are living being family members

of Abdul Kawi and on hearing the arrival of Police party they absconded from there and large quantity of firearms, cartridges and ammunition were recovered by the police party from their house. The alleged offence relating to possession of such firearms and ammunition is in contravention of Section 3 & 4 punishable under Section 25(1)(1-B) of the Arms Act. The FIR also includes offence under Section 216 I.P.C. as well, which is also a cognizable offence. Further as per section 38 of the Arms Act every offence under this Act (Arms Act) is a cognizable offence, therefore, FIR is clearly maintainable. Thus, the argument of the learned counsel for the petitioners that FIR is not maintainable, is misconceived and is, therefore, rejected.

21. From the perusal of the FIR it transpires that on the alleged date of occurrence in view of the forthcoming Holi and Shab-e-Barat festivals the police party was patrolling in its area. Suddenly they received information that co-accused Abdul Kavi who was wanted in the aforesaid case crime numbers is hiding in his house with his aids with illegal arms and ammunition in his parental house. Acting on that information police party immediately raided his house and huge quantity of arms and ammunition was recovered hidden in the walls of his house. Undisputedly, the police has proceeded on information about an absconder in pending cases (as noted in the FIR) registered under the provisions of I.P.C. and other offences, the power to arrest, search and seizure as provided under Cr.P.C. was clearly available to the police officer. Needless to say, upon such further investigation if recovery is made or any other offence is also found to have been committed, sections are added.

22. In the facts and circumstances, when information was received by police party while patrolling there was an urgency for making raid to apprehend the wanted accused absconder and his aids and to recover illegal arms and ammunition, search and seizure was made by the police in exercise of powers under relevant provisions of the Arms Act, 1959, as noted above, read with other provisions of Cr.P.C., as section 37 Cr.P.C. clearly provides that save as otherwise provided in the Act the provisions of Cr.P.C. would be applicable. In these facts and circumstances of the case provision of Section 22 Arms Act has no application. Therefore, the argument advanced on behalf of the petitioners, that the search and seizure was not made in the presence of the Magistrate or that the police did not contact the Magistrate before making search and seizure, has no force.

23. We find substance in the argument of the learned counsel for the State that as a detailed first information report has been lodged giving every minute detail the same clearly discloses cognizable offence. From perusal of the first information report we find that it is mentioned there that the accused Abdul Kawi is a wanted accused in the above noted case crime who ran away from the spot with all his aids and family members. We find that the procedure as provided in Cr.P.C. read with provisions of the Arms Act has been fully complied with and as such the argument placing reliance solely on provision of Section 22 of the Arms Act and on Section 94 Cr.P.C. is misconceived.

24. The provisions of Arms Act, Cr.P.C. and the judgments quoted above clearly reflects that there was no lack of powers on part of the Police in the present case. The manner in which the Police has proceeded on an information while

patrolling was well within their power and jurisdiction.

25. In view of the law laid down by Hon'ble Supreme Court in the case of **State of Haryana and others vs. Bhajan Lal and others, 1992 Supp. (1) SCC 335** and **M/s Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra, AIR 2021 SC 1918** and in **Special Leave to Appeal (Crl.) No.3262/2021 (Leelavati Devi @ Leelawati & another vs. the State of Uttar Pradesh) decided on 07.10.2021,** no case has been made out for interference with the impugned first information report.

26. For the discussion made herein-above, the writ petition is dismissed leaving it open for the petitioners to apply before the competent court for anticipatory bail/bail as permissible under law and in accordance with law.

(2023) 6 ILRA 409
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.06.2023

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Misc. Writ Petition No. 5682 of 2021

Prof. Ashish Wakhlu ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Dr. V.K. Singh, Pranjal Krishna

Counsel for the Respondents:
G.A., Arun Singh, Shubham Tiwari, Shubham Tripathi, Siddhartha Sinha

Criminal Law - Indian Penal Code, 1860 - Section 409-No allegation against the petitioner of having any financial gain in the process of the purchase of laptops nor there is any case of embezzlement or having committed breach of trust- no occasion or material to level charge u/s 409 IPC-policy decision of holding online examinations -reversed by the succeeding administration -distribution of laptops to the offices in order to save such equipment from going unused- by no stretch of imagination it would attract an offence u/s 409 IPC- against any person having performed duty in the accomplishment of online examination process jointly or severally-FIR as well as the investigation based on the abuse of the process of law and mala fide exercise of power-F.I.R. quashed.

W.P. allowed. (E-9)

List of Cases cited:

1. St. of Har. & ors.Vs Bhajan Lal & ors.reported in (1992) Supp (1) SCC 335

2. Kapil Agarwal & ors.Vs Sanjay Sharma & ors., reported in (2021) 5 scc 524

3. N. Raghavender Vs St. of Andhra Pradesh, CBI reported in 2021 SCC Online SC 1232

4. M/s Pepsi Foods Ltd. & anr. Vs S.J.M. & ors., reported in AIR 1998 SC 128

5. Vinay Tyagi Vs Irshad Ali reported in (2013) 5 SCC 762

6. Anand Kumar Mohatta & ors.Vs St. (Govt. of NCT of Delhi), Department of Home & ors., reported in AIR 2019 SC 210

7. M/s VSS. Pharma Lucknow & anr. Vs St. of U.P. & anr.- Criminal Misc. Writ Petition No. 17812 of 2015

8. Ashok Kumar Dixit Vs St. of U.P. & anr. reported in AIR 1987 All 235

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. The investigation of a crime is the bedrock of criminal administration of justice. For this reason, the fair investigation and fair trial is a part and parcel of Article 21 of the Constitution of India.

2. Normally this Court in exercise of its extraordinary powers under Article 226 of the Constitution of India, would not interfere with and delve into the legality of an FIR or investigation but for the exceptions which under well settled principles have been carved out by the apex court in catena of judgements and for our purpose, the broad principles laid down by the apex court in the case of **State of Haryana and others v. Bhajan Lal and others** reported in ***(1992) Supp (1) SCC 335***, as set out in paragraph 102 being relevant, are extracted 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."

3. Likewise in the case of **Kapil Agarwal and others v. Sanjay Sharma and others**, reported in ***(2021) 5 scc 524***, apex court while emphasizing upon the powers of this Court under Article 226 of the Constitution or Section 482 CrPC to quash the FIR if the same appears to be an abuse of process of law and has been lodged only to harass the accused, has observed as under:

"18. However, at the same time, if it is found that the subsequent FIR is an abuse of process of law and/or the same has been lodged only to harass the accused, the same can be quashed in exercise of powers under Article 226 of the Constitution or in exercise of powers under Section 482 Cr.P.C. In that case, the complaint case will proceed further in accordance with the provisions of the Cr.P.C.

18.1 As observed and held by this Court in catena of decisions, inherent jurisdiction under Section 482 Cr.P.C. and/or under Article 226 of the Constitution is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into weapon of harassment. When the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused, in exercise of inherent powers, such proceedings can be quashed.

18.2 As held by this Court in the case of Parbatbhai Aahir v. State of Gujarat (2017) 9 SCC 641, Section 482 Cr.P.C. is prefaced with an overriding provision. The statute saves the inherent power of the High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any Court; or (ii) otherwise to secure the ends of justice. Same are the powers with the High Court, when it exercises the powers under Article 226 of the Constitution.

4. The present writ petition has essentially questioned the legality of the FIR giving rise to Case Crime No. 56 of 2021 registered under Section 409, 420 IPC at PS Chowk, District Lucknow. The informant who is the Chief Proctor, KGMU, Lucknow, Prof. R.A.S. Kushwaha and the named accused in the FIR is Dr. Ashish Wakhlu, the petitioner herein who was a Surgeon in the department of Paediatric Surgery, presently terminated from service on the premise of proceedings not related to the present case.

5. The petitioner while praying for quashing of the FIR has, inter alia, prayed for any other writ, order or direction which the Court may deem fit and proper under the circumstances of the case.

6. This Court since the inception of present proceedings has taken a serious view of the allegations and while staying the arrest of the petitioner by order dated 15.3.2021, several observations were made in the order passed to the effect that the purchase of 300 laptops for carrying out the online examinations of the students was a policy matter and was duly approved at the appropriate level, therefore, counter affidavit was called for to explain the justification under which the FIR had come to be lodged. The detailed order passed by this Court calling upon the respondents to explain as to how an offence under Section 409, 420 IPC can be said to have been made out in a situation where the purchase

of laptops was transparently made from a government body and against the invoice of payment, goods were duly received by the University. The goods in question, however, at no point of time came to be used for any personal advantage by the petitioner or being entrusted to him were misused, therefore, the very ingredients of the offence under which the FIR was lodged, became questionable.

7. During pendency of this writ petition, this Court passed the following order on 15.11.2022:

"……..Learned counsel for the petitioner has vehemently submitted that twice the Final Report has been prepared in the present writ petition by the Investigating Officer, i.e., on 19.09.2021 and on 14.10.2022, respectively.

It transpires from the record that when the matter was taken up on 18.10.2022, learned AGA had informed this Court that Final Report dated 14.10.2022 would be submitted in the Court concerned shortly.

Today when the matter was listed, this Court made a query whether the Final Report dated 14.10.2022 has been submitted in the Court concerned or not, to which learned AGA submitted that Deputy Commissioner of Police, Lucknow West Commissionerate, Lucknow has ordered for further investigation in the matter on 04.11.2022.

In view of the above, we pass the following orders:-

(i) Deputy Commissioner of Police, Lucknow West Commissionerate, Lucknow is directed to ensure that the further investigation, which has been ordered by him, is concluded within a period of three weeks from today and submit police report in the Court concerned, in accordance with law.

(ii) The Commissioner of Police, Lucknow West Commissionerate, Lucknow (respondent no.2) shall monitor the investigation of the case.

(iii) Shri Siddhartha Sinha, learned counsel for respondent no.4- The University (K.G.M.U. Lucknow, Chowk, Lucknow) shall ensure that all the required documents would be made available to the Investigating Officer concerned, so that the investigation of the case is concluded as ordered above.

List the matter after three weeks, by which date learned AGA shall inform about the status of investigation."

8. The investigating officer, Sri Prashant Kumar Mishra, after passing of the aforesaid order, has filed a short counter affidavit on 20/21.2.2023, wherein it is stated that the final report in the case was drawn more than once but the same was not approved by the supervising authority/Circle Officer by raising certain objections with regard to the investigation and directed for further investigation in the matter. Several investigation officers have come to be changed in the present case. For a chronological view of the investigation, paragraphs 5 to 12 of the short counter affidavit being relevant are extracted below:

"5. That it is respectfully submitted after registration of the aforesaid F.I.R., the investigation of the case was started by Shri Amarnath Vishwakarma, Additional Inspector then posted at P.S. Chowk Lucknow and after his transfer, the investigation of the case was deputed to S.I. Shri Ramapati Singh, who after investigation has forwarded a Final Report

dated 19.09.2021 to the Supervisory Authority/Circle Officer, Chowk, Lucknow.

6. That the supervisory Authority/ Circle Officer, Chowk, Lucknow has raised certain objections and directed for further investigation in the matter.

7. That thereafter the investigation of the case was deputed to S.S.I. Chandra Shekhar Singh, then posted at Police Station-Chowk, District-Lucknow, who vide his report dated 14.10.2022 has also supported the earlier Final Report dated 19.09.2021 and forwarded the Supervisory Authority/ Circle Officer, Chowk, Lucknow.

8. That the Supervisory Authority/ Circle Officer, Chowk, Lucknow again raised some objections with regard to investigation and directed for further investigation in the matter.

9. That thereafter vide order dated 04.11.2022 of the Deputy Commissioner of Police, West, Lucknow, the investigation of the case was allotted to the deponent.

10. That the deponent after taking over the investigation, has perused the earlier Parchas of the Case Diary and investigated the aforesaid F.I.R. in a fair and impartial manner.

11. That during the course of investigation, no credible evidence regarding offence under Section 420 I.P.C. has been found, therefore, the deponent has deleted Section 420 I.P.C. from the array of offence. However, on the basis of evidences, Section 120B/201 I.P.C. were added in the array of offence and names of Dr.Ravikant (Ex-Vice Chancellor, KGMU) and Dr. Arun Kumar Singh (Ex-Controller of Examination, KGMU) have been added in the list of accused persons.

12. That it is respectfully submitted that from investigation, sufficient credible incriminating evidences have been found against named accused / Petitioner - Prof. Ashish Wakhlu and also against accused persons, whose names were came into light during investigation namely 1- Arun Kumar Singh and 2- Ravikant, for offence under Sections 409, 120B, 201 I.P.C., therefore, a report was sent to the Deputy Commissioner of Police, West, District Lucknow for cancelling the earlier Final Report dated 19.09.2021."

9. Sri Prashant Kumar Misra was the investigating officer at the final stage when the aforesaid counter affidavit came to be filed before this Court. Paragraphs 13 to 16 of the short counter affidavit filed on 20/21.2.2023 for our purpose are also relevant and the same are extracted below:

"13. That the Deputy Commissioner of Police, West, District Lucknow has cancelled the earlier Final Report dated 19.09.2021 on 18.02.2023.

14. That thereafter, the deponent has prepared a Charge-Sheet dated 19.02.2023 against the named accused/petitioner-Prof.Ashish Wakhlu for offence under Sections 409, 120-B IPC and forwarded to the Supervisory Authority/Assistance Commissioner of Police, Chowk, District Lucknow and will be filed in the Court concerned at the earliest. Photocopy of the Charge-Sheet dated 19.02.2023 is being annexed herewith as Annexure No.SCA-1.

15. That the investigation of the case has concluded against named accused - Petitioner Prof. Ashish Wakhlu.

16 That at present, the investigation is pending against the accused persons, whose names have came into light during investigation i.e. Dr.Ravikant (Ex-Vice Chancellor, KGMU) and Dr. Arun Kumar Singh (Ex-Controller of Examination, KGMU) and only their

arrest is remained. As soon as they are arrested, Supplementary Charge-Sheet will be filed against them and the investigation of the case will be concluded.

10. In a subsequent supplementary counter affidavit sworn by the same investigating officer on 25.2.2023 and filed on 2.3.2023, in paragraph-3, following statement was made:

"3. That it is respectfully submitted that the investigation of case is pending against Dr. Ravikant (Ex-Vice Chancellor, KGMU) and Dr. Arun Kumar Singh (Ex-Controller of Examination, KGMU). The deponent is not pressing the paragraph no.16 of his earlier short counter affidavit dated 20.02.2023."

11. The chronological order of events as regards investigation clearly reveal that S/Shri Ramapati Singh on completion of investigation submitted a final report on 19.9.2021 to the supervising authority/Circle Officer, Chowk Lucknow which he objected against and directed for further investigation. Therefter SI Sri Chandra Shekhar Singh took over investigation and submitted the final report to the supervising authority on 14.10.2022 by supporting the earlier final report submitted by his predecessor on 19.9.2021. The supervising authority appears to have raised certain objections again and directed for further investigation. For achieving the desired objective, the investigation was handed over to Sri Prashant Kumar Misra vide order dated 04.11.2022 who on completion of investigation reported to the supervising authority for cancellation of the earlier report submitted on 19.9.2021. It is only after cancellation of earlier final report on 18.2.2023, the police report drawn by Sri Prashant Misra was submitted on 19.2.2023. Two final reports drawn on 19.9.2021 and 14.10.2022, therefore, stood superceded by the police report submitted on 19.2.2023 without any mention to the final report submitted on 14.10.2022.

12. This Court may note that the investigation of cognizable offence lies within the exclusive domain of the investigating officer and the Code of Criminal Procedure does not conceive of a procedure of fresh investigation by entering into the exercise of annulling any material collected by the earlier investigation officer. Further investigation or an order to that effect does not mean that the supervising authority may annul the earlier investigation altogether that too on the recommendation of a new investigation officer authorised to carry out further investigation.

13. In the short counter affidavit, the investigating officer has stated that now the investigation has completed except the arrest of the other accused persons and it is for this reason that the charge sheet against the petitioner was forwarded to the supervising authority which shall be filed before the competent court. The investigating officer before arresting the other accused persons alleged to have been involved in the commission of offence, once again chose to submit the charge sheet only against the present petitioner and thereafter a supplementary affidavit came to be filed to the effect that paragraph-16 of the short counter affidavit was not being pressed. It is in this manner that a clear picture of completion of investigation projected by the investigating officer was again manipulated to defeat the Court order passed on 15.11.2022.

14. The supplementary affidavit in paragraph-3 takes somersault when the

investigating officer withdrew the statement made in paragraph-16 of the short counter affidavit. The malice is evident on the face of pleadings sworn in the two affidavits. It is also evident that there is no mention of the fact that the supervising authority on submission of the police report by the investigating officer under Section 409 IPC read with Section 120-B and 201 IPC had ever directed for further investigation, therefore, the supplementary affidavit indicating that further investigation was pending is clearly with an ulterior motive of prolonging the investigation indefinitely so as to malign the image and career of the petitioner in a manner subversive of law.

15. The charge sheet submitted under Section 120-B IPC against the petitioner alone is clearly indicative of a legal malice once by filing a supplementary affidavit, the contents of paragraph-16 sworn in earlier were disowned by the investigating officer at the sweet will of the supervising authority which gives a clear impression that the investigating officer and the supervising authority were in hand in gloves with each other so as to victimize the petitioner and tarnish his image otherwise all the three accused persons in a situation of offence being made out would have been subjected to the process of law in the like manner. Non-adherence to the well settled principles of investigation with an orientation of ulterior motive against the petitioner alone clearly smacks of abuse of process of law and the same is writ large on the face of record.

16. In the like manner since there is no allegation against the petitioner of having any financial gain in the process of the purchase of laptops nor there is any case of embezzlement or having committed breach of trust, therefore, there was no occasion or material before the investigating officer to level charge under Section 409 IPC against the petitioner. Reference may be made to an apex court judgement in the case of **N. Raghavender v. State of Andhra Pradesh, CBI** reported in ***2021 SCC Online SC 1232***, wherein following observations have been made by the Court in paragraphs 41 to 45:

41. Section 409 IPC pertains to criminal breach of trust by a public servant or a banker, in respect of the property entrusted to him. The onus is on the prosecution to prove that the accused, a public servant or a banker was entrusted with the property which he is duly bound to account for and that he has committed criminal breach of trust. (See: Sadupati Nageswara Rao v. State of Andhra Pradesh9).

42. The entrustment of public property and dishonest misappropriation or use thereof in the manner illustrated under Section 405 are a sine qua non for making an offence punishable under Section 409 IPC. The expression 'criminal breach of trust' is defined under Section 405 IPC which provides, inter alia, that whoever being in any manner entrusted with property or with any dominion over a property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property contrary to law, or in violation of any law prescribing the mode in which such trust is to be discharged, or contravenes any legal contract, express or implied, etc. 9 (2012) 8 SCC 547 shall be held to have committed criminal breach of trust. Hence, to attract Section 405 IPC, the following ingredients must be satisfied:

(i) Entrusting any person with property or with any dominion over property;

(ii) That person has dishonestly mis-appropriated or converted that property to his own use;

(iii) Or that person dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation of any direction of law or a legal contract.

43. It ought to be noted that the crucial word used in Section 405 IPC is 'dishonestly' and therefore, it pre-supposes the existence of mens rea. In other words, mere retention of property entrusted to a person without any misappropriation cannot fall within the ambit of criminal breach of trust. Unless there is some actual use by the accused in violation of law or contract, coupled with dishonest intention, there is no criminal breach of trust. The second significant expression is 'mis-appropriates' which means improperly setting apart for ones use and to the exclusion of the owner.

44. No sooner are the two fundamental ingredients of 'criminal breach of trust' within the meaning of Section 405 IPC proved, and if such criminal breach is caused by a public servant or a banker, merchant or agent, the said offence of criminal breach of trust is punishable under Section 409 IPC, for which it is essential to prove that:

(i) The accused must be a public servant or a banker, merchant or agent;

(ii) He/She must have been entrusted, in such capacity, with property; and

(iii) He/She must have committed breach of trust in respect of such property.

45. Accordingly, unless it is proved that the accused, a public servant or a banker etc. was 'entrusted' with the property which he is duty bound to account for and that such a person has committed criminal breach of trust, Section 409 IPC may not be attracted. 'Entrustment of property' is a wide and generic expression. While the initial onus lies on the prosecution to show that the property in question was 'entrusted' to the accused, it is not necessary to prove further, the actual mode of entrustment of the property or misappropriation thereof. Where the 'entrustment' is admitted by the accused or has been established by the prosecution, the burden then shifts on the accused to prove that the obligation vis-à-vis the entrusted property was carried out in a legally and contractually acceptable manner.

17. This Court in the normal circumstances does not enter into the merits of the FIR once the allegations levelled therein, *prima facie*, make out a cognizable offence, however, in exceptional circumstances the Court is under a bounden duty to lift the veil so that the criminal prosecution of an accused is not resorted to by way of a malicious and mala fide exercise.

18. From a perusal of the record it would transpire that though the FIR was lodged on 18.2.2021 pursuant to approval granted by the Vice Chancellor to the resolution adopted in the meeting of Executive Council held on 8.6.2020 as is evident from letter dated 12.6.2020 written by the Registrar to the Proctor, KGMU wherein it has been mentioned that the approval of the Vice Chancellor having been granted, an FIR be registered on behalf of the University in the light of the provisions of Clause 2.09 (13) of the First Statute, 2011 but neither in the resolution adopted in the meeting dated 8.6.2020 nor the letter written by the Registrar on 12.6.2020 addressed to the Proctor mentions therein the name of any suspect who may be prima facie guilty for the offence to be probed. The resolution only recites that it has been resolved by the Executive Council that an FIR be lodged

for the administrative/financial irregularities committed in the process adopted by the IT Cell in the matter of purchase of 300 laptops and all necessary assistance be extended to the police administration. The letter of the Registrar dated 12.6.2020 addressed to Proctor, KGMU reads as under:

पत्र सं0–3086/जी0ए0 एवं सम्पत्ति/2020
दिनांक 12.06.2020
सेवा में,
कुलानुशासक,
किंग जॉर्ज चिकित्सा विश्वविद्यालय उ0 प्र0,
लखनऊ।

महोदय,
कृपया मा0 कार्यपरिषद की बैठक दिनांक 08.06.2020 के ।दल वजीमत ।हमदकं ;15द्ध . प्जमउ छव.01 पर किये गए विनिश्चय का सन्दर्भ ग्रहण करने की कृपा करे जिसकी छायाप्रति संलग्न है।
कृपया उक्त के सन्दर्भ में मा0 कुलपति जी के अनुमोदनोपरान्त किंग जॉर्ज चिकित्सा विश्वविद्यालय उ0प्र0, लखनऊ की प्रथम परिनियमावली 2011 के परिनियम 2ण्09;13द्ध तीन में निहित प्राविधान के अन्तर्गत विश्वविद्यालय की ओर से प्राथमिकी दर्ज कराने की कृपा करें।
संलग्नक–यथोपरि।

भवदीय,
ह0 अपठनीय
12.6.2020
(आशुतोष कुमार द्विवेदी)
कुलसचिव

19. However, the letter written by the Chief Proctor, Prof. R.A.S. Kushwaha addressed to the Incharge Inspector, Kotwali Chowk, Lucknow on the same day i.e. 12.6.2020 mentions that the resolution arrived at in the agenda of the meeting held on 8.6.2000 having been approved by the Vice Chancellor, an FIR be lodged on behalf of the University against Sri Ashish Wakhlu without naming anyone else whereas the resolution clearly recited that there are administrative/financial irregularities in the process adopted by IT cell in the purchase of 300 laptops, therefore, an FIR be lodged. Though the petitioner was the Member Secretary of the IT Cell but it seems without seeking any preliminary probe in the matter by including the other personnel working in the IT Cell, he has been projected to be the main culprit, overlooking his status and unblemished past services.

20. It appears that the decision to lodge an FIR in the matter having been taken in haste with one and only the petitioner being named, pricked the conscience of the University authorities and another meeting of Executive Council was held on 27.6.2020 wherein a further resolution was adopted that an inquiry committee comprising of external experts preferably from the field of Forensics (Hand-writing expert), I.T./Cyber expert, Retired Police Officer, Retired Judge, Administrative Officers from Finance/Audit sector, be constituted to inquire the matter, so that detailed report may be prepared, for necessary action. The Committee was required to submit its report at the earliest, preferably within three months.

21. Accordingly, the Incharge Inspector (Prabhari Nirikshak) of the concerned police station was informed that the matter was **reconsidered** in the subsequent meeting of Executive Council on 27.6.2020 and a fresh resolution was adopted and that it was only after the recommendations of the Committee is received and a decision by the Executive Council taken, any further action would be possible to be ensured by the office of the signatory (Prof R.A.S. Kushwaha, Chief Proctor).

22. In the above conspectus, it is clear that while lodging the FIR in the matter, the

University did not feel it proper to obtain experts' advice and the opinion of the officers who are seized with such matters, before framing the petitioner as a suspect and in an unprepared and half hearted manner felt it convenient to implicate the petitioner and by the time they felt such necessity and convened the subsequent executive council meeting on 27.6.2020, the petitioner was publicized as the main accused of the entire irregularity, if any, though as is borne out of the record that he in the course of duty had associated in the purchase of laptops and tried to maintain total transparency in the transaction in consonance with the relevant guidelines and prevalent practice.

23. We may also take note of the fact that for any irregularity administrative or financial, it is permissible to the University to initiate disciplinary proceedings which in the ordinary course cannot be substituted by criminal proceedings but in the instant case, the haste on the part of the Chief Proctor in naming the petitioner in his letter dated 12.6.2020 was clearly driven by some ulterior motive which reflects nothing but the abuse of the process of law.

24. For understanding the FIR in question, certain facts are necessary to be pointed out viz. under the digitization policy of the Government, the process of holding online examination was continuing since the year 2010 which was felt necessary in order to curtail the lengthy manual process and at the same time to minimize the expenditure being incurred in the process. The process of online examination was also beneficial in maintaining accuracy and transparency in the conduction of examinations. In the above background a meeting of the Information Technology of the University was held on 13.8.2014 wherein the Vice Chancellor had opined that IT committee of the University also needs to work towards a totally computer based examination system where the students would answer questions on a computer screen and have the result declared at the end of their test with the provisions of 300 students in one seating. The minutes of the meeting were made a part of the annual report which was duly considered and resolved by the Executive Council of the University.

25. On 21.8.2015 the Assistant Accountant recorded on the concerned file that the Department of Medical Education vide letter dated 15.7.2015 had instructed that the computers could be purchased from the internal funds of the University and that the purchase may be approved by the Vice Chancellor from the examination fund. On 21.8.2015 itself the Finance Officer of the University granted his consent for purchase of the computers from the examination fund subject to the purchase being made on the minimum quoted price. The said proposal was duly approved by the Vice Chancellor on 28.8.2015.

26. Pursuant to the approval of the Vice Chancellor, the petitioner being the Member Secretary of the IT Cell issued a supply order on 11.9.2015 to M/s Uptron Powertronics, which is an authorised government nodal agency, for purchase of 300 laptops as it had quoted lowest price. On 18.1.2016 M/s Uptron delivered the laptops to the University against a sale invoice addressed to the Registrar who was also the consignee and also competent to make purchases on behalf of the University and to receive the consignment and forward the same to the relevant departments. The Registrar forwarded the consignment to the IT Cell which was duly received by the petitioner being the Member Secretary.

27. The petitioner vide letter dated 11.2.2016 informed the Vice Chancellor about the purchase of 300 laptops for online examinations in furtherance to the recommendations and instructions of the Examination Committee. It is thereafter that the payment against the supply of laptops was made by the Controller of Examinations Prof. A K Singh and the Additional Controller of Examinations, Dr Girish Chandra by cheque dated 31.3.2016 to the tune of Rs. 1,60,34,100/-.

28. It is submitted that on 13.4.2016 the online examination software of the University was tested by five senior professors and the test being successful, the University authorities were accordingly informed. It is thereafter that the petitioner on 21.1.2017 informed Vice Chancellor and Controller of Examination as well as Dean, Faculty of Medicine amongst others through email, that the paperless examination in Ophthalmology was scheduled for 25.1.2017. The examinations were thereafter solely conducted by the Controller of Examinations after due approval of the Vice Chancellor.

29. It would thus be seen that during all the above period i.e. from the date of order of supply till conduction of examination no question was raised and all the formalities were conducted with due approval of the competent authorities. However, in a meeting held on 29.5.2017 an agenda was dealt with by the Executive Council that due to lack of infrastructure and as per MCI/DCInorms **it was not possible to conduct online examinations in KGMU, therefore, a decision may be taken as to whether the said laptops may be distributed to various administrative offices and departments of the University/I.T. Cell wherever they are needed otherwise the same may become obsolete and unusable**. It is noteworthy that the agenda starts with the line *'with the approval of then Hon'ble Vice Chancellor, KGMU, IT Cell purchased 300 laptops'*. The Committee resolved to disburse the laptops to various administrative offices and at the same time constituted a three-member time bound enquiry committee to look into the matter of need, purchase of these laptops and KCI/DCI Norms for conduct of online exams. **This shift in the policy decision was taken without there being any complaint in regard to the purchase of laptops and it having been specifically mentioned in the agenda itself that the laptops were purchased with the approval of the then Hon'ble Vice Chancellor**. The Committee submitted its report on 6.6.2020 stating that in the record made available to the enquiry committee, justifiable proposal, detailed project report, approval of executive council and the examination committee were not found. The Committee also observed that in the KGMU Act/Statute as well as Snatak Chikitsa Shiksha Viniyamavali, 1997 and Snatakottar Chikitsa Shiksha Viniyamawali, 2000 issued by MCI for Graduate and Post Graduate Students, there is no mention of guidelines for conducting online examination.

30. It is thereafter that an FIR came to be lodged against the petitioner, as aforesaid, under Section 409, 420 IPC pursuant to the letter written by the Chief Proctor, Prof. R.A.S. Kushwaha to the Incharge Inspector, Kotwali Chowk, Lucknow on 12.6.2020.

31. At this stage it would be profitable to take note of some relevant provisions of the First Statute, 2011, namely clause

2.03(18) and clause 2.05(12) & 2.05(20) and which are reproduced hereunder:

"FINANCE OFFICER

2.03 (18) The Finance Officer shall arrange the conduct of continuous internal audit of the accounts of the University, and shall pre-audit such bills as may be required in accordance with any standing orders in that behalf. However the accounts of the confidential section of controller examination section shall not be audited.

THE CONTROLLER OF EXAMINATION

2.05 (12) The Controller of Examination shall adopt methodology, innovations and procedures for conducting the University examinations as may be necessary to be introduced and implemented from time to time under the approval of Vice-Chancellor after consultation with the Exam Committee.

(20) The Controller of Examination shall be directly answerable to the Vice-Chancellor for all actions taken by him pertaining to the examinations."

32. We are certainly displeased to notice that the administration in succession instead of streamlining the advanced technique of online examination has reversed the policy decision for the considerations right or wrong best known to them. The administration in succession has thereafter come out to defend the old pattern of conducting the examinations which in the wake of advanced technology and digitization is certainly unfriendly to the environment. **The conflict of opinion in policy decision i.e. to do away with the paper work and make the examination paperless has taken the controversy to the heights of wreak vengeance so as to justify the reversal of earlier policy decision by the new administration.** There is ample indication of internal conflicts of interest and the educational institution has not to suffer on that account at the cost of legal expenditure spent recklessly. We are certainly not oblivious of the fact that the online examination process would have brought about a positive change in the standards of medical education and there was nothing wrong with the online examination policy.

33. **The question that arises before us is as to whether a shift of policy decision of one administration and its reversal by the succeeding administration can at all be a subject matter of criminal prosecution and as to how the further investigation could go on once the Executive Council in its subsequent decision had resolved on 27.6.2020 for looking into the matter from a different angle.** The investigation which was attempted to be concluded more than once by submitting a final report seems to have been interfered with by the supervising authority for which no reason whatsoever has been brought to our notice and on the contrary, a police report finalized overnight has come to be filed before the court concerned half-heartedly as is evident from the stand adopted by the investigating officer which has not taken the supervising officer by any surprise.

34. In our considered opinion, the whole exercise lacks the sanctity of law. The lodging of FIR in a hurried manner and without allowing the resolution of the Executive Council passed subsequently on 27.6.2020 to discover any criminal intent, the investigating agency having failed to act fairly, leaves us with no manner of doubt that the entire action is nothing but an abuse of the process of law.

35. The policy decision of holding online examinations was clearly a collective decision and the same does not seem to have any trappings of dishonest or criminal intent that could be attributed singly against an individual. On reversal of such a policy decision by the succeeding administration which resulted into the distribution of laptops to the offices in order to save such equipment from going unused, by no stretch of imagination it would attract an offence under Section 409 IPC that could be attributed against any person having performed duty in the accomplishment of online examination process jointly or severally. The Investigating officer as well as the supervising authority having clearly conducted the proceedings unfairly and with an approach of utmost victimization against the petitioner clearly indicates that it does not serve the object for which the scope for booking a criminal case is postulated under criminal law. The lack of honesty has rather been fished out baselessly to settle scores on personal vendetta.

36. The State as well as the complainant (University) at this stage have argued that the police report having been filed against the petitioner followed by cognizance taken by the competent court, leaves no scope for this Court to exercise jurisdiction under Article 226 of the Constitution of India.

37. The submission put forth by learned counsel for the State and the counsel for the complainant when tested in the light of the judgement rendered by the apex court in the case of **M/s Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others**, reported in **AIR 1998 SC 128** repels the contention when we look at the observation of the Court made as under:

"Nomenclature under which petition is filed is not quite relevant and that does not debar the court from exercising its jurisdiction which otherwise it possesses unless there is special procedure prescribed which procedure is mandatory. If in a case like the present one the court find that the appellants could not invoke its jurisdiction under Article 226, the court can certainly treat the petition one under Article 227 or Section 482 of the Code. It may not however, be lost sight of that provisions exist in the Code of revision and appeal but sometime for immediate relief Section 482 of the Code or Article 227 may have to be resorted to for correcting some grave errors that might be committed by the subordinate courts. The present petition though filed in the High Court as one under Articles 226 and 227 could well be treated under Article 227 of the Constitution. "

38. It may also be profitable to refer to the decision of the apex court in the case of **Vinay Tyagi v. Irshad Ali** reported in **(2013) 5 SCC 762**, of which following paragraphs which deals with the 'further investigation' are relevant and the same are extracted hereinbelow:

22. 'Further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173(8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a 'further investigation'. Scope of such investigation is restricted to the discovery of further oral and documentary evidence.

Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as 'supplementary report'. 'Supplementary report' would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a 'reinvestigation', 'fresh' or 'de novo' investigation.

23. ***However, in the case of a 'fresh investigation', 'reinvestigation' or 'de novo investigation' there has to be a definite order of the court. The order of the Court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon.*** *Neither the Investigating agency nor the Magistrate has any power to order or conduct 'fresh investigation'. This is primarily for the reason that it would be opposed to the scheme of the Code. It is essential that even an order of 'fresh'/'de novo' investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just and fair investigation and trial. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed, this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the Court, the Court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a 'fresh investigation'.*

24. In the case of Sidhartha Vashisht v. State (NCT of Delhi) [(2010) 6 SCC 1], the Court stated that it is not only the responsibility of the investigating agency, but also that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. An equally enforceable canon of the criminal law is that high responsibility lies upon the investigating agency not to conduct an investigation in a tainted or unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society. The maxim contra veritatem lex nunquam aliquid permittit applies to exercise of powers by the courts while granting approval or declining to accept the report.

25. In Gudalure M.J. Cherian & Ors. v. Union of India & Ors. [(1992) 1

SCC 397], this Court stated the principle that in cases where charge-sheets have been filed after completion of investigation and request is made belatedly to reopen the investigation, such investigation being entrusted to a specialized agency would normally be declined by the court of competent jurisdiction but nevertheless in a given situation to do justice between the parties and to instil confidence in public mind, it may become necessary to pass such orders.

26. Further, in R.S. Sodhi, Advocate v. State of U.P. [1994 SCC Supp. (1) 142], where allegations were made against a police officer, the Court ordered the investigation to be transferred to CBI with an intent to maintain credibility of investigation, public confidence and in the interest of justice. Ordinarily, the courts would not exercise such jurisdiction but the expression 'ordinarily' means normally and it is used where there can be an exception. It means in the large majority of cases but not invariably. 'Ordinarily' excludes extra- ordinary or special circumstances. In other words, if special circumstances exist, the court may exercise its jurisdiction to direct 'fresh investigation' and even transfer cases to courts of higher jurisdiction which may pass such directions.

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."

39. The Court in its view is equally supported by the apex court verdict rendered in the case of **Anand Kumar**

Mohatta and others v. State (Govt. of NCT of Delhi), Department of Home and others, reported in ***AIR 2019 SC 210*** and reference may be made to paragraph 27 to 30 extracted below:

"27. We are of the opinion that the present case falls under the 1st, 3rd and 5th category set out in the para 102 of the judgment in the case of Bhajan Lal (supra). In such a situation, the High Court erred in dismissing the petition of the Appellants filed under Section 482 of Cr.P.C. This was a fit case for the High Court to exercise its inherent power under Section 482 of Cr.P.C. to quash the FIR.

28. It is necessary here to remember the words of this Court in State of Karnataka v. L. Muniswamy and others 1977 (2) SCC 699 which read as follows: -

"7. …..In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice….."

29. We find that the prosecution is mala fide, untenable and solely intended to harass the Appellants. We are forfeited in view of the Respondent not having made any attempt to recover the deposit of Rs. One Crore through a civil action.

30. We have, therefore, no hesitation in quashing the FIR and the charge sheet filed against the Appellants. Hence, the FIR No.0139/2014 dated 20.08.2014 and charge sheet dated 03.08.2018 are hereby quashed."

40. In its application to the case at hand, we gather from the record that the executive council in its subsequent resolution adopted on 27.6.2020 has not intended to proceed with the FIR and the matter is referred for experts' opinion which is yet to be arrived at. We may also note that the non-auditable fund spent by the Controller of Examination with its due approval by virtue of clause 2.03(18) and 2.05(12) reproduced in the earlier part of the judgement may even not be a financial lapse as alleged. It is not the case before us that there was anything wrong with the policy decision or the ingredients of Section 409 IPC, by any interpretation of law, are made out notwithstanding the approval by the Vice Chancellor, and that the criminal prosecution has become imminent as a consequence of reversal of the policy decision and is the only course open under law.

41. The Division Bench decision cited by learned counsel for the complainant in **M/s V.S. Pharma Lucknow and another v. State of U.P. and another** rendered by this Court in Criminal Misc. Writ Petition No. 17812 of 2015 as well as the Full Bench judgement in the case of **Ashok Kumar Dixit v. State of U.P. and another** reported in ***AIR 1987 All 235***, are based on entirely different set of facts and circumstances and have no bearing on the case at hand.

42. Thus the objection that the matter should have been raised in the petition under Section 482 CrPC does not stand to appeal and fails. Once the petitioner has approached this Court with promptitude under Article 226 of the Constitution, the prayer made by the petitioner can be moulded and considered by taking aid of Article 227 or Section 482 Cr.P.C. as these are the concomitant powers of the High Court itself. In appropriate cases the power under Article 226 for imparting complete justice stands strengthened by the supervisory or inherent jurisdiction of this Court provided under Article 227 or Section 482 CrPC deserving to be exercised sparingly.

43. Having applied our mind to the contents of the FIR as well as the investigation, as recorded above, the impugned FIR as well as the investigation held in pursuance thereof being based on the abuse of the process of law and guided by mala fide exercise of power does not stand in the eye of law and the same deserves to be quashed.

44. Accordingly the impugned FIR dated 18.2.2021 registered against the petitioner as Case Crime No. 56 of 2021 under Section 409, 420 IPC at Police Station Chowk, District Lucknow as well as the police report submitted in pursuance thereof under Section 409 read with Section 120-B and 201 IPC including the summon issued by the competent court based thereon, if any, are quashed. The Executive Council upon a fresh consideration in terms of the subsequent resolution dated 27.6.2020, if so chosen, may consider the whole issue in the light of observations made hereinabove and proceed accordingly in the matter in accordance with law.

45. Before parting, we hope that the university authorities shall remain committed to the upgradation of educational standards and work collectively to boost the educational values by respecting the policy decisions taken for the welfare of the institution. Discipline in education and administration both must be achieved in order to avoid undue conflicts.

46. Resultantly, the writ petition is allowed. No order as to cost.

(2023) 6 ILRA 425
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.04.2023

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.

First Appeal From Order No. 2300 of 2011

Mahendra Kumar & Ors. ...Appellants
Versus
Chhawali Devi & Ors. ...Respondents

Counsel for the Appellants:
Sri Nitin Kumar Agrawal, Sri Hari Om Yadav

Counsel for the Respondents:
Sri Uma Nath Pandey, Sri Ashok Gupta, Sri Kuldeep Kumar

A. Civil Law - Civil Procedure Code, 1908-Order 41 Rule 21-In the present case, the appeal was transferred before the respondents put their appearance in court and notice had already been issued by the parent court and it was found sufficiently served for final hearing-The case was taken up in the transferee court on the date fixed but no one appeared-the appellant had notice of the next date fixed prior to the transfer of the appeal-there was no occasion before the transferee court to examine as to whether the defendants have knowledge of transfer of

the matter or not-Therefore, the first situation as contemplated under Rule 89 A of General Rule Civil does not arise in the present case-Second situation, party being unrepresented had been satisfied as notice was found duly served upon the appellants and the excuse taken by the appellant that he began to reside in Ghaziabad continuously for 13- 14 years after filing of the written statement in the original suit has been exposed to falsity-Hence, it cannot be said that the appellant had no knowledge about the pending appeal-He appears to have not come with clean hands. (Para 1 to 33)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Ram Padarath & anr. Vs Smt. Chiraunji Devi (2015) 2 ADJ 619

2. Haryana Suraj Malting Ltd Vs Phool Chand (2018) 16 SCC 567 Smt. Poonam Gupta & ors. Vs Anil Agarwal (2019) 2 ADJ 768

3. Sikandar Vs Akhalak (2008) 2 ARC 231

4. Ashutosh Shrotriya Vs Rais Uddin (1994) 24 ALR 28

5. Chandra Bhan Srivastava Vs Smt. Prema Srivastava (1996) 27 ALR 175

6. Akttaryar Khan Vs Azhar Yar Khan (1994) All LJ 690

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Nitin Kumar Agrawal, learned counsel for the defendant-appellants, Sri Uma Nath Pandey, learned counsel for the plaintiff-respondents and perused the material as brought on record.

2. The first appeal from order has been preferred by the defendant-appellant against the judgment and order dated 05.04.2011 passed by the Additional District Judge, Court No.8, Bulandshshr, in Misc. Case No.7 of 2008 filed under Order 41 Rule 21 of the Civil Procedure Code 1908, in Civil Appeal No.204 of 2002, Smt. Chawali Devi and others Vs. Mahendra and others, whereby the application under Order 41 Rule 21 CPC filed against the ex parte decree in the aforesaid civil appeal no.204 of 2002 has been rejected.

3. Contention, in brief, has been floated to the ambit that in this case, it so happened that at the initial stage, a declaratory original suit no.97 of 1983 was instituted by Smt. Chawali Devi wife of late Makkhan Lal and four others (Mahesh Kumar, Kamal Kumar, Rakesh Kumar and Yogesh Kumar) against the appellant Mahendra Kumar and five others. In the suit, notice was issued to the defendants which was duly served upon them. However, the written statement was filed by the defendants, in particular, the present appellant Mahendra Kumar (since deceased) and it was urged and claimed that some oral assurance was given by the plaintiff-respondents that it being the dispute between family members, the suit shall be withdrawn. Thereafter, defendant-appellant went to Ghaziabad and began to reside there for 13-14 years. In Ghaziabad, the appellant suffered from many ailments / diseases. He came back to Bulandshahr on 13.02.2008 when Subhash and Rakesh told him that the cinema hall is going to be sold by the respondents - Mahesh Kumar, Kamal Kumar, Rakesh Kumar and Yogesh Kumar as they have won litigation. Thereupon, the appellant being anxious contacted his counsel in Bulandshahr and enquired about the original suit no.97 of 1983 whereupon it transpired that the original suit was dismissed on 18.09.2002

against which an appeal was preferred by the aforesaid plaintiff-respondents which appeal was numbered 204 of 2002.

4. Learned counsel proceeded further that upon inspection of the record, the appellant came to know about fake service of notice upon him after obtaining fake signature of the appellant Mahendra Kumar on the notice, the appeal proceeded ex parte against the appellant. Service of notice is denied as notice was never received by the appellant. Notice sent to the other respondents is highly suspicious and service upon them is doubtful. It was incumbent for the lower appellate court to have matched specimen signature of the appellant brought on record by placing several documents as copies of the income tax returns whereupon the appellant had made his signature and the two signatures on income tax returns do not match with signature of the appellant as endorsed upon notice.

5. Filing of the rejoinder affidavit is not mandatory but discretionary and would not adversely affect the case of the appellant and the lower appellate court wrongly held that the objection / counter affidavit filed by the plaintiff-respondents has not been rebutted by filing any rejoinder affidavit.

6. Learned counsel for the appellants has added that insofar the judgment, order and decree dated 05.04.2011 passed by the lower appellate court is concerned, the appeal was transferred by the District Judge, Bulandshahr to the other courts of the Additional District Judges, Bulandshahr where it proceeded ex parte without ensuring compliance of Rule 89A of General Rules (CIVIL) 1957 which provides that in case proceeding of a case is transferred to another court, then in case parties are represented then either of the party or his/her counsel will be informed about the transfer before proceeding with the case and in case a party is not represented then notice shall be sent to him prior to proceeding further with the case. In this case, transferee court bypassed above procedure and compliance of Rule 89A of General Rules (CIVIL) 1957 has not been ensured and notice has not been sent by the transferee court to the appellant, it proceeded ex parte and decided the civil appeal no.204 of 2002 on 23.01.2008 thereby allowed the original suit and the plaintiff-respondents were declared owner of the property in question.

7. In support of his contention, learned counsel for the appellants has placed reliance on the decision of Hon'ble Apex Court in the case of *Haryana Suraj Malting Ltd. Vs. Phool Chand, 2018 (16) SCC 567. He also placed reliance on the decisions of this Court in the case of Smt. Poonam Gupta and others Vs. Anil Agarwal 2019 2 ADJ 768, Sikandar Vs. Akhalak 2008 (2) ARC 231, Ashutosh Shrotriya Vs. Rais Uddin 1994 (24) ALR 238, Chandra Bhan Srivastava Vs. Smt. Prema Srivastava 1996 (27) ALR 175, Akttaryar Khan Vs. Azhar Yar Khan 1994 All.LJ 690.*

8. Learned counsel for the respondents has in reply submitted that in this case, no doubt the suit was instituted by Chawali Devi and the present answering respondents for declaration of their right as owner of the property in question which property was separate property of Makkhan Lal, who purchased it in court auction thus became owner of the property. Upon his death, the property devolved upon her wife

Chawali Devi who by will bequeathed the property in favour of the plaintiffs. No oral assurance, as claimed by the present appellants, whatsoever, was given by the plaintiffs that the suit will be withdrawn. It is an afterthought of the appellant that some oral assurance was given to withdraw the suit. The entire family including the plaintiffs and the appellant reside in Kala Aam, Bulandshahr and the entire family is well off. It is misleading to claim that the appellant began to reside at Ghaziabad and was unaware of development of the suit and the appeal in question.

9. It has been further submitted that notice was served upon the appellant Mahendra Kumar. To contend that signature on the notice was forged is absolutely unacceptable under circumstances of the case and to claim that signature made upon notice did not match with various signatures endorsed upon the income tax returns would not serve the purpose because signatures on various income tax returns, on the face, are different from each other and they do not match inter se. How can it be accepted that a man, who has left his native place where the entire family resides and went to Ghaziabad, resided there and did not return back to Bulandshahr to meet his real relatives.

10. Insofar as averments made in the counter affidavit filed by the plaintiff-respondents in rebuttal of claim raised by the appellant in his application under Order 41 Rule 21 CPC is concerned, the same have not been specifically denied / rebutted and no rejoinder affidavit filed (by the appellant).

11. Learned counsel for the respondents has proceeded further by claiming that the aforesaid application under Order 41 Rule 21 CPC was not supported by separate affidavit as was required but the affidavit filed in support of the interim application alone was there. Insofar as the application of Rule 89A of General Rules (CIVIL) 1957 is concerned, the same under facts and circumstances of the case is not applicable, for the reason that the appeal filed before the District Judge, Bulandshahr is reflective of various order-sheets and its outcome as such that all the respondents were found to have been served with the notice only then proceeding started. Pursuant to the notice issued by the District Judge, Bulandshahr in appeal, no one turned up from the appellant (the present appellant) side before the District Judge, Bulandshahr. Since notice was served prior to the transfer of the case and no one appeared before the District Judge, Bulandshahr, the case was transferred then under circumstances there was no need for the transferee court to issue fresh notice. Had the appellant put in appearance before the District Judge, Bulandshahr either personally or through counsel only then action would have arisen for information to the appellant but the appellant did not appear before the District Judge, Bulandshahr on the date fixed.

12. Learned counsel adds that in this case, facts are different which do not require mandatory compliance of Rule 89A of General Rules (CIVIL) 1957 and the entire proceeding is indicative and suggestive of fact that after filing of the written statement in the suit, the appellant Mahendra Kumar for reasons best known to him withdrew his participation suo motu in the proceeding of the suit and theory of "oral assurance" was cleverly set up by him which aspect is not supported by any material on record and it is not inferred by circumstances, either.

13. Upon appeal being preferred before the lower appellate court, notice was sent to the appellant which was duly served upon him, it bears his signature. The order sheet of the lower appellate court is reflective of that fact. On two occasions, even some counsel participated in the proceeding of the appeal as the order-sheets of the lower appellate court dated 06.12.2005, 15.12.2005 and 06.10.2006 proves it. Very cleverly, no Vakalatnama was filed by the counsel (appearing for the present appellant) in the proceeding of appeal and all this was done for watching the proceeding from outside the court. Thus, circumstances of the case pointed out deliberate avoidance of participation by the appellant in the proceeding of the appeal. In such circumstances, the lower appellate court passed the impugned judgment, order and decree dated 05.04.2011 which is just and reasonable and requires no interference by this Court.

14. In support of his claim, learned counsel for the respondents has placed reliance on the decision of this Court in the case of *Ram Padarath and another Vs. Smt. Chiraunji Devi 2015 (2) ADJ 619*, on the point of mandatory compliance of Rule 89A of General Rules (CIVIL) 1957 but the same is on different footing and not applicable to the facts and circumstances of this case.

15. Considered the submissions, as well.

16. The appellant is aggrieved by the judgment and order dated 05.04.2011 passed by the lower appellate court - Additional District Judge, Court No.8, Bulandshshar, in Misc. Case No.7 of 2008 on the application of appellant for recall of order under Order 41 Rule 21 of the Civil Procedure Code, 1908, in Civil Appeal No.204 of 2002, Chawali Devi and others Vs. Mahendra and others.

17. The chronological background of this case as reflected from record appears to be that a declaratory original suit no.97 of 1983 was instituted by Chawali Devi and four others against the present appellant and others in respect of the property located in Bulandshahr, thereon a cinema hall had been constructed. The suit was contested by the appellant by filing written statement. However, he absented himself from the proceeding subsequently, therefore, the suit proceeded ex parte against the appellant. After considering the merit, the suit was dismissed by the trial court with cost vide judgment and order dated 18.09.2002, against which an appeal was preferred by the plaintiff-respondents before the District Judge, Bulandshahr, whereupon the appeal was numbered as civil appeal no.204 of 2002 Chawali Devi - wife of Makkhan Lal and four others Vs. Mahendra Kumar and others.

18. The order sheet of the lower appellate court is reflective of fact that notice was sufficiently served upon the respondents. However, no one turned up for the respondents before the lower appellate court. Thereafter, the appeal was transferred to the court of the Additional District Judge, Bulandshahr. The transferee court found that notice upon respondents had been served and no one appeared on their behalf, therefore, the proceeding was directed to run ex parte against the appellant-respondents. Ultimately, the lower appellate court vide its judgment and order dated 23.01.2008, allowed the appeal ex parte and the judgement, order and decree dated 18.09.2002 passed by the trial court was set aside, the suit of the plaintiffs

was allowed and the plaintiffs were declared owner of the property of the suit.

19. It has been claimed by the appellant that he came to know about this development when he returned Bulandshahr on 13.02.2008, then he was informed by Subhash and Rakesh about the judgment being pronounced. After due inquiry, the appellant came to know about the aforesaid judgment and order dated 23.01.2008 passed by the lower appellate court. Consequently, he moved an application under Order 41 Rule 21 CPC for recall of the aforesaid order dated 23.01.2008 passed by the lower appellate court, which application was registered as misc. case no.7 of 2008 arising out of civil appeal no.204 of 2002, as aforesaid. This case was contested between the parties. The plaintiff-respondents filed their objections/counter affidavit. The lower appellate court after considering the case on merits vide judgment and order dated 05.04.2011 dismissed the aforesaid misc. case. Hence this appeal.

20. Now the moot point involved for adjudication before this Court pertains to fact whether notice of the appeal (204 of 2002) was sufficiently served upon the appellant, in particular, Mahendra Kumar and whether the transferee court was bound to act in compliance of Rule 89A of General Rules Civil or the case was different one?

21. Insofar as service of notice upon the appellant is concerned and the explanation given by the appellant regarding signature of the appellant on the notice being forged and fake is not supported by any cogent evidence or circumstances so as to believe the claim of the appellant that the signature of the appellant on the notice is fake. The process server has made an endorsement upon the notice itself that notice was personally served upon the appellant and it bore signature of the appellant Mahendra Kumar.

22. Insofar as the claim regarding comparison of the signature of the notice with the signature of the income tax returns as made by the appellant is concerned, the same has been, out and out, opposed by the respondents that the various signatures on various income tax returns / papers are, on the face, differently made and are not identical. That being the case, how can a worthy comparison be made between the two signatures. Nothing has been added in rejoinder by the learned counsel for the appellant on this count before this Court. Therefore, contention raised by the respondents on the point of signatures on the income tax returns filed by the appellant being differently made is thus found to be correct one and the same (signatures on income tax returns) are not identical. Moreover, it is wisdom of a person to make endorsement upon any notice sent by the court or any authority as he wishes to make endorsement on it and he can conveniently make it differently. It can be observed with utmost ease that in every case endorsement on a notice made by a person would not necessarily match with his official signature. He can make it differently. It can be in English language, Hindi language or in any other language.

23. On point of service of notice upon the appellant, it appears that the other family members say - Kusum Lata - defendant-respondent no.9 who also resides at Kala Aam Bulandshahr was was found to have been sufficiently served with the notice. Likewise, the other family members

of the appellants were also served. In case the entire family had joint interest over the property in question and any fraud had been played by one of the members of the joint family in making forged signatures on the notice sent by the court, in that event the other members of the family would have rushed to the lower appellate court and would have ventilated their grievance and would have claimed in line with the appellant that fraud had been played and notice of appeal had never been received by them. But no one except the appellant has come up before the lower appellate court by moving application under Order 41 Rule 21 CPC.

24. Initially, the suit was filed against five defendants, the present appellant was one among them. However, an application under Order 41 Rule 21 CPC was moved 'solely' by the appellant and the other defendants never challenged the judgment and order dated 23.01.2008 passed by the lower appellate court though it has been claimed that interest of all family members in property was joint.

25. Bare perusal of the order sheet of civil appeal no.204 of 2002, makes it obvious that notices have been sent to the respondents including the present appellant and the same were found to have been sufficiently served upon them by the court of the District Judge, Bulandshahr and the date fixed was 23.09.2003 for final hearing of the appeal, thereafter the case was transferred. Therefore, it cannot be said that the appellant had no notice of the date - say 23.09.2003 fixed by the District Judge, Bulandshahr, for final hearing, prior to transferring the proceeding of the misc. case to another court. That being the case, the next date fixed by the District Judge, Bulandshahr was 23.09.2003. Therefore, it was obligatory on the part of the appellant to have put in appearance on 23.09.2003 and to take stock of the situation, but he did not appear before the lower appellate court. Thereafter, the transferee court after considering the above aspect of the case rightly observed in the order dated 11.11.2003 that notice already served and case already fixed for final hearing, notice upon the respondents is sufficiently served by the order of the predecessor. However, no one turned up for the respondents before the lower appellate court, therefore, the proceeding was directed to run ex parte against the respondents including present appellant.

26. Now insofar as the factual issue of assurance being extended by the plaintiffs that the suit was promised to be withdrawn by the plaintiffs as assured by them to the appellant is concerned is merely a verbal claim for various sanguine reasons; not supported by any circumstances and evidence.

26 (i) The suit was filed in the year 1983 wherein written statement was filed by the appellant. Thereafter he absented himself from the proceeding of the suit after filing written statement. Assuming it to be that any such oral assurance for withdrawal of the suit was given by the plaintiffs to the appellant then a man of ordinary prudence would, under circumstances, shall be highly anxious to know about the outcome of the suit - whether the suit was withdrawn or not !

26 (ii) However, perusal of the record shows that the suit was decided on 18.09.2002. It almost took two decades to decide the suit, an ordinary man to whom a promise was made previously by the plaintiff-respondents for withdrawal of the

suit would take care to know about outcome of the suit, but the appellant has not elaborated on this aspect, this non-explanation, on the face, is intriguing and non-acceptable under facts and circumstances of the case. The conduct shown by the present appellant would be unbecoming of an ordinary prudent man.

26 (iii) The oral assurance given by any person, if denied by that person, requires to be established either by preponderance of probability or by evidence but in this case in hand preponderance of probability works against the appellant and favours the respondents and there is no evidence, whatsoever, regarding claim of oral assurance being given by the plaintiff-respondents for withdrawal of the suit, except the verbal claim alone and that is not sufficient.

27. Therefore, on both counts, theory of oral assurance being given by the plaintiffs for withdrawal of the suit appears, on the face, to be a false claim. Similarly, the plea raised by the appellant in his application under Order 41 Rule 21 CPC to the ambit that he continuously resided in Ghaziabad for 13-14 years after filing of the written statement is not sustainable as other family members were residing at Kala Aam Bulandshahr. All these aspects and circumstances cumulatively go to establish that the appellant is very clever and has not come with clean hands but he is trying to explain unsuccessfully things about fact of knowledge of the pending appeal (204 of 2002) in roundabout manner. It all connotes to fact that the appellant appears to have been watching the proceeding of the suit and appeal in question from outside. Subsequently, he moved application under Order 41 Rule 21 CPC within time after pronouncement of the verdict by the lower appellate court on 23.01.2008, in favour of the plaintiff-respondents.

28. Insofar as contention of the appellant regarding non-compliance of the mandatory Rule 89A of General Rule Civil is concerned to the import that after the case was transferred by the parent court of the District Judge, Bulandshahr to the court of the Additional District Judge, Bulandshahr, proper notice was required to be given and after service of notice, the transferee court would have proceeded further but instead of doing that, the transferee court proceeded ex parte and pronounced the verdict vide its judgment and order dated 23.01.2008 in civil appeal no.204 of 2002.

29. In that regard, bare perusal of the order sheet (of appeal) of the court of the District Judge, Bulandshahr, primarily - the order sheet dated 25.08.2003 and previous order sheets cumulatively reflect on point of service of notice sufficiently served upon the respondents and the date 23.09.2003 was the date fixed by the District Judge, Bulandshahr, for final hearing of the appeal. Thereafter, the case was transferred by the District Judge to the court of the Additional District Judge, Bulandshahr.

30. It is noticeable that in spite of service of notice upon respondents, no one put in appearance on behalf of the respondents on 25.08.2003. However, further date fixed was 23.09.2003 and the case was transferred in the meanwhile. The Presiding Officer of the transferee court was on leave, however, no one appeared for the either side on 23.09.2003 and on the next date 11.11.2003, the transferee court took notice of fact that no one appeared for

the respondents, however notice upon the respondents was found sufficiently served by his predecessor and he proceed to hear the appeal ex parte against the respondents. At this stage, it would be relevant to take note of Rule 89A as enumerated in General Rule Civil 1957, which is extracted as below:

"89-A. Procedure to be followed on transfer or withdrawal of cases.

"(1) When a case, i.e., a suit, appeal or other proceedings in which a date for attendance of a party or the parties in a particular Court has been fixed, is transferred from the Court to another, the former Court shall record the order of transfer in the order sheet and get it signed by counsel of the party or parties, if any party is unrepresented information shall be sent to his registered address. The case shall be called out by the other Court on the date already fixed by the transferring Court and the presence of the parties noted.

(2) A note to the effect that a party or the parties have been informed in accordance with sub-rule (1) shall be made on the record by the transferring Court.

(3) Where cases are transferred in a large number the Court from which they are transferred shall, besides following the procedure laid down in sub-rule (1), draw up a list mentioning in it the numbers and years of the cases and the names of the parties and their counsel, and shall cause one copy of it to be posted on the notice board of the local bar association for information of the members of the bar and another copy to be posted on the notice board of the Court for information of the general public. It shall also send to the other Court along with the records of the transferred cases, a copy of the list (or relevant extract of it); the other Court shall post it on its own notice board. If the other Court is situated in a different place in which there is another bar association, an extra copy of the list shall be sent to it for being posted on the notice board of the bar association.

(4) The Court to which cases are transferred shall not proceed without satisfying itself that the parties or their counsel, as the case may be, have been informed of the transfer.

(5) In sub-rules (1) to (4) "transfer' includes withdrawal of a case."

31. The mandate reflected by the aforesaid Rule is workable in two situations; first is whether the party or parties is/are already represented in court; the second situation is whether party is unrepresented, thus in a situation when a party is represented in a court and the case is transferred from that court to another court, former court shall record the order of transfer in the order sheet and get endorsement by the counsel for the party or parties. If any party is unrepresented and not served with notice then information shall be given to him. What the transferee court is required to ensure is the fact whether the party or parties is/are aware of the date fixed before proceeding on merits in a transferred matter.

32. In the present case, the appeal was transferred before the respondents put their appearance in court and notice had already been issued by the parent court and it was found sufficiently served thus fixing 23.09.2003 for final hearing. The case was taken up in the transferee court on the date fixed 23.09.2003 but no one appeared though the Presiding Officer was on leave. That by itself would indicate that the appellant had notice of the next date fixed i.e. 23.09.2003 prior to the transfer of the

appeal. In such situation, there was no occasion before the transferee court to examine as to whether the defendants have knowledge of transfer of the matter or not. Therefore, the first situation as contemplated under Rule 89 A of General Rule Civil does not arise in the present case. Second situation, party being unrepresented had been satisfied as notice was found duly served upon the appellants and the excuse taken by the appellant that he began to reside in Ghaziabad continuously for 13-14 years after filing of the written statement in the original suit no.97 of 1983 has been exposed to falsity as discussed hereinabove. In such circumstances, it cannot be said that the appellant had no knowledge about the pending appeal.

33. The other family members of the present appellants who were residing at Kala Aam, Bulandshahr were sufficiently served and it is not the case of the appellant that he had no communication with other family members residing at Kala Aam, Bulandshahr. How can it be accepted that the appellant had no knowledge about pendency of the appeal once notice was found to have been duly served upon him by the lower appellate court. In the circumstances, it can be conveniently observed that the defendant-appellant failed to establish fact that he had no knowledge of the proceeding of the appeal and he was prevented from appearing in the court on account of transfer of the appeal from the court of the District Judge, Bulandshahr to the court of the Additional District Judge, Bulandshahr when the appeal was called out for hearing. That being the case, the principle of the aforecited case of *Ram Padarath and another Vs. Smt. Chiraunji Devi 2015 (2) ADJ 619*, by the plaintiff-respondents is very much attracted and applicable in the present case, whereas, on account of above discussion, it is obvious that the following cases cited by the appellant's counsel; *Haryana Suraj Malting Ltd. Vs. Phool Chand, 2018 (16) SCC 567. He also placed reliance on the decisions of this Court in the case of Smt. Poonam Gupta and others Vs. Anil Agarwal 2019 2 ADJ 768, Sikandar Vs. Akhalak 2008 (2) ARC 231, Ashutosh Shrotriya Vs. Rais Uddin 1994 (24) ALR 238, Chandra Bhan Srivastava Vs. Smt. Prema Srivastava 1996 (27) ALR 175, Akttaryar Khan Vs. Azhar Yar Khan 1994 All.LJ 690*, are not applicable to the given facts and circumstances of the present case. Therefore, the same are not helpful to the appellant.

34. Before parting with the judgment, it can be observed that bare perusal of the record is replete with facts that predecessors of both the sides belonged to the same family and there were a number of litigation between and among them. One such litigation can be referred as original suit no.165 of 1942 Bhagwati Kunwar Vs. Makkhan Lal which has been placed on record of the trial court vide paper no.147-C, the written statement was filed in the aforesaid suit on 15.02.1943. Civil appeal no.86 of 1943 Makkhan Lal Vs. Bhagwati Kunwar, vide paper no.151-C, was also preferred against the aforesaid outcome in the suit wherein judgement was pronounced on 08.11.1943. Apart from that, a number of papers have been brought on record whereby long-drawn litigation between and among the family members of the appellant and the respondents is very much reflected. Therefore, in the present case in hand it is obvious that the suit was filed, the appellant himself did not care to know about the outcome of the suit and upon appeal being preferred by the

plaintiff-respondents, notice was sent to him by the lower appellate court which notice was found to have been sufficiently served upon him. The circumstances pointed out that the application under Order 41 Rule 21 CPC was moved by the appellant within time, that goes to give thrust to possibility and fact that the appellant was watching the proceeding from outside the court and he was compelled to seek recall of the judgment of the lower appellate court after delivery of the judgment by the lower appellate court. He appears to have not come with clean hands.

35. In view of the discussion made hereinabove, it is obvious that the appeal lacks merit and the same is dismissed. In turn, the judgment, order and decree dated 05.04.2011 passed by the lower appellate court is hereby sustained.

36. It is observed that nothing has been reflected by this Court on the merits of the judgment and order (dated 23.01.2008) passed by the lower appellate court and this order is confined to the consideration of the application under Order 41 Rule 21 CPC and this appeal in hand.

37. Both the parties shall bear their costs.

(2023) 6 ILRA 435
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Habeas Corpus Writ Petition No. 20 of 2023

Sarita Verma & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Sharad Chand Rai

Counsel for the Respondents:
G.A., Sri Sanjay Singh

Civil Law - Constitution of India, 1950 – Article 226, - Hindu Minority and Guardianship Act, 1956 – Section 6 & 6-A, : - Writ of Habeas Corpus – mother raised question of Custody of two minor child from their father – on rule nisi issued by court, both minor corpus are produced in court – children are themselves expressed tehri disinclination to go and reside with their mother – Maintainability - writ of Habeas Corpus is a prerogative writ and an extraordinary remedy, it is writ of right and not writ of course and may be granted only on reasonable ground or probable cause being shown – held, in custody of minor, writ of habeas corpus would be maintainable wherein it is established that the detention of minor child by the parent or other is illegal and have no authority of law – in present case, neither the custody of minor with their father or grand-parents appear to be unlawful in fact and circumstances of the of the case as well as under the provisions of the Guardianship Act, - hence, prayer made in petition is rejected – However, petitioner is at liberty to raise her claim for custody of children at Family court and all necessary claim are open to be raised before the said forum – mother have visitation rights over her children – directions issued, petition is disposed of.(Para – 14, 15, 17)

Writ Petition Disposed of. (E-11)

List of Cases cited:

1. Syed Saleemuddin Vs Dr. Ruksana& ors.(2001 vol. 5 SCC 247),

2. Nithya Anand Raghavan Vs St. (NCT of Delhi) (2017 vol. 8 SCC 454),

3. Kanu Sanyal Vs District Magistrate, Darjeeling (1973 vol. 2 SCC 674),

4. Tejaswini Gaud & ors.Vs Shekhare Jagdish Prasad Tiwari & ors.(2019 vol. 7 SCC 42).

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

1. Counter affidavit and Vakalatnama filed by Shri Sanjay Singh, learned counsel for respondent Nos. 4 to 7 is taken on record.

2. Learned counsel for the petitioner, Shri Sharad Chand Rai, learned counsel for private respondent Shri Sanjay Singh and learned A.G.A. for the State are present.

3. The corpus Vaishnavi and Ram Soni are produced before the Court by S.I. Mridul Mayank Pandey, P.S.- Kotwali Nagar, District Sultanpur and respondent No. 4 Shri Rakesh Soni. The statements of corpus Vaishanavi and Ram Soni has been recorded before the Court. Corpus Vaishnavi stated that she is aged around 13 years and her date of birth is 16.01.2010, she stated that she is receiving education in supervision of her father at Stella Maris Convent School, Sultanpur, her younger brother Ram Soni is also receiving education in same school. She stated that she is happily residing with her father and she is not willing to go with her mother, in fact, her mother never came to her parental home to meet her. She expressed her disinclination to go and live with her mother. Similarly, child Ram Soni stated her age around 10 years and there is no dispute regarding his age. He further submitted that he is studying in Class III in same school, where his sister is studying. He also stated that he is happily residing with his father and is not willing to go and live with his mother.

4. Heard submissions of learned counsel for the parties as well as learned A.G.A. for the State.

5. Learned counsel for the petitioner placed reliance on observations of this court in Habeas Corpus petition No. 165 of 2022 Km. Sanaya Sharma (Minor) and Another Vs. State of U.P. and 4 others, decided on 07.04.2022 wherein claim for custody was made by mother of the children Km. Sanaya Sharma aged 5 years and Master Tanisk Sharma aged around 2 and a half year, who were residing with their grand-mother due to death of their father, who committed suicide on 16.11.2020. On account of suicidal death of father of the children an F.I.R. was lodged by one Akash Sharma against their mother Seema Sharma, the petitioner and 5 others, in which investigation was under way. After sad and unfortunate demise of Akash Sharma, his wife Seema Sharma, the petitioner, started living with her sister at Moradabad, independently, whereas, her small kids, namely, Sanaya and Tanishk remained in the company of their grand-mother. This Court considered the provisions of *Section 6 of Hindu Minority and Guardianship Act, 1956, wherein it is provided that in case of a boy or an unmarried girl the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;*

6. *According to this Court, Section 6A of the said Act preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person, whilst the child is less than five years old. It carves out the exception of interim custody, in distinction of guardianship, and then specifies that custody of a minor who has not completed age of 5 years shall ordinarily be with the mother.*

7. In above case, this Court after considering the fact that one children out of two was barely of 5 years, whereas the younger one was about 2 and a half year old, both of them were minor and not of an impressionable age, who deserves unqualified love, affection and protection of their mother, who is their natural guardian and therefore, the custody of both children were handed over to their mother by orders of this Court and their grand-mother was provided a visitation right once in a week and every Saturday between 12.00 noon to 05.00 P.M.

8. However, the facts of present case are different as out of two children whose question of custody is under consideration before this Court, one of them is minor girl, namely, Vaishnavi aged around 13 years and the other is male child, namely, Ram Soni aged around 10 years and both of them were produced before this Court by their father on rule nisi issued by this Court. They are being imparted proper education by their father and a number of photographs of their extra-curricular activities in school as well as birthday celebration are filed along with counter affidavit of Respondent No. 4 to 7. The children have themselves expressed their disinclination to go and reside with their mother. Although, this is unfortunate, yet this is the state of affairs which reflects from their statement before the Court. Both the sides have made allegations against each other in their respective pleadings regarding the conduct and behaviour of other side, however, those facts are not to be gone into while deciding the present habeas corpus petition.

9. The writ petition of Habeas Corpus is a prerogative writ and an extraordinary remedy, it is writ of right and not writ of course and may be granted only on reasonable ground or probable cause being shown.

10. The Hon'ble Apex Court in **Syed Saleemuddin Vs. Dr. Ruksana and Others 2001 (5 SCC 247)** considered the object and scope of writ of habeas corpus in the context of a claim relating to custody of minor child and held that in Habeas Corpus petition, seeking transfer of custody of child from one parent to the other, *the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed. The principle is well settled that in a matter of custody of a child, the welfare of the child is of paramount consideration of the Court.*

11. Taking similar view in the case of **Nithya Anand Raghavan Vs. State (NCT of Delhi) 2017 8 SCC 454,** it was held by Apex Court that *the principal duty of the Court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.*

12. In this case, Apex Court quoted with approval its observation in **Kanu Sanyal Vs. District Magistrate, Darjeeling (1973) 2 SCC 674,** wherein it was held that habeas corpus is *essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to*

produce the body of such person before the Court. On production of the person before the Court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the Court and upon due inquiry into the alleged unlawful restraint pass, appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person?s freedom and his release when the detention is found to be unlawful.

13. The question of maintainability of habeas corpus petition under Article 226 of the Constitution for custody of minor was examined in **Tejaswini Gaud and others Vs. Shekhare Jagdish Prasad Tiwari and others (2019) 7SCC 42,** wherein the Supreme Court has held in para 20 and 26 as under:-

"20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exception cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child."

14. In custody of minor, writ of habeas corpus would be entertainable where it is established that the detention of minor child by the parent or others is illegal and have no authority of law. In writ court, the rights are determined on basis of affidavits, in a case where the Court is of the view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate forum. The remedy ordinary in such matters would lie under the Hindu Minority and Guardianship Act. In present case, even if the facts of the case are examined on anvil of provisions of Section 6 of Hindu Minority and Guardianship Act, the custody of the children Vaishnavi and Ram Soni with their father and grand-parents cannot be held to be unlawful or illegal, as the children have crossed the age limit of 5 years, which provides that custody of minor boy or an unmarried girl who has not completed the age of 5 years shall ordinarily be with the mother the and after him the father will be natural guardian of a Hindu minor boy or an unmarried girl. Therefore, neither the custody of minor with their father or grand-parents appear to

be unlawful in the facts and circumstances of the case as well as under provisions of Section 6 of Hindu Minority and Guardianship Act, 1956, it cannot be held that the custody of minor children with father and grand-parents is against their welfare or interest. They are receiving education in proper manner and have expressed their desire to live with their father and grand-parents at their parental home, unfortunately, the relationship between their parents are estranged and instead of residing together and offering their love and affection to the children, they are living separately for their own reasons and justification. The paramount consideration in such type of cases is welfare of the children also and in facts of present case, it does not permit the transfer of custody of the minor children from their father to mother. Therefore, the prayer made in the petition is rejected.

15. However, the petitioner is at liberty to raise her claim for custody of children at Family Court and all necessary claim are open to be raised before the said forum or in other appropriate proceedings.

16. Having regard to the aforesaid facts and circumstances, rule nisi issued earlier is not required to be made absolute, it is discharged. Keeping in view, the fact that both the sides have offered visitation right to the children to other party, in case of retention or transfer of custody in favour of the other and the welfare of the children also requires that they should receive love and affection of both parents which will help in their emotional, mental and psychological growth in proper manner.

17. Therefore, it is directed that the petitioner Sarita Verma, mother of the children have visitation rights over her children once in a week and every Sunday between 12 Noon to 05:00 P.M. usually, at the place of her husband, subject to proper arrangements made between spouse and the father of the children Rakesh Soni is bound to provide the congenial atmosphere and facilitate the proposed meeting between the mother and her two children and would not create any hindrance or obstacle in the same and in case of his non-cooperation, the petitioner will be at liberty to approach S.H.O. concerned, who will provide necessary arrangements, which will ensure the compliance of the direction of this Court with regard to visitation right of the petitioner. Respondent No.4 Rakesh Soni, the father of the children will also facilitate the WhatsApp and video call between mother and the children in case,she desires at least twice a week.

18. The corpus- Vaishnavi and Ram Soni are permitted to go back to the place from where they have been brought today by respondent No.4-Rakesh Soni.

19. With above observations, the habeas corpus petition is **disposed of.**

(2023) 6 ILRA 439
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 7531 of 2023

Ritu Tomar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Sunil Kumar Yadav, Sri Yashpal Yadav

Counsel for the Respondents:
C.S.C., Sri Amit Shukla

A. Service Law – Transfer – It is not for the employee to insist to transfer him/her and/or not to transfer him/her at a particular place. It is for the employer to transfer an employee considering the requirement. (Para 6)

Transfer and posting are within the domain of the authority concerned and it is for the authority to decide and determine as to where an incumbent is to be posted and as to where his/her services are to be best utilized. The issue of convenience and inconvenience is also to be examined by the authority concerned and not by this Court. (Para 5)

Writ petition dismissed. (E-4)

Precedent followed:

Namrata Verma Vs St. of U.P. & ors., Special Leave to Appeal (c) No(s). 36717 of 2017, decided on 06.09.2021 (Para 6)

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

1. Heard learned counsel for the petitioner, Sri Amit Shukla, learned counsel appearing on behalf of the respondent nos.2 and 3 and the learned Standing Counsel for the respondent no.1.

2. The present petition has been filed seeking a direction in the nature of mandamus to be issued in favour of the respondents to consider sympathetically the posting of the petitioner to any Primary School in her home district i.e. Shamli.

3. It is the case of the petitioner that she was appointed as an Assistant Teacher in Primary School Pachpera, Block Puranpur, District Pilibhit vide appointment letter dated 30.11.2015. She has been serving since more than 7 years in rural area and the Government Order has prescribed condition of three years of service for inter-district transfer of Assistant Teacher and as such, she had submitted her transfer application in the year 2017-18. The petitioner has also moved several representations for transfer from Pilibhit to Shamli which are still pending to be decided.

4. Learned counsel appearing on behalf of the respondent nos.2 and 3 vehemently opposed the prayer as made in the petition and argued that transfer is not the right of the petitioner.

5. Transfer and posting are within the domain of the authority concerned and it is for the authority to decide and determine as to where an incumbent is to be posted and as to where his/her services are to be best utilized. The issue of convenience and inconvenience is also be examined by the authority concerned and not by this Court.

6. The Hon'ble Apex Court in the case of **Namrata Verma Vs. State of U.P. and others** [Special Leave to Appeal (c) No(s).36717 of 2017, decided on 06.09.2021] held that it is not for the employee to insist to transfer him/her and/or not to transfer him/her at a particular place. It is for the employer to transfer an employee considering the requirement.

7. In view thereof, the present petition is not maintainable and is hereby **dismissed**.

(2023) 6 ILRA 441
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 8227 of 2023

Smt. Vishnu Kumari ...Petitioner
Versus
Sandeep Kumar & Ors. ...Respondents

Counsel for the Petitioner:
Sri Praveen Kumar, Sri Onkar Nath Vishwakarma, Sri Pradeep Kumar (Sr. Advocate)

Counsel for the Respondents:
Sri Punit Bhaduria

A. Property Law – Entitlement to recover arrears – Impleadment - Transfer of Property Act, 1882 - Section 109 - Under the provision of Section 109 of the Act of 1882 - transferee is entitled to recover the arrears of rent on transfer of the property, in case right to recovery of rent is also transferred and further, he could also maintain the suit for eviction on grounds of arrears pending earlier. (Para 13)

As per sale deed dated 29.07.1989, there is no dispute on the point that there is specific mention of SCC Suit No. 64 of 1975 pending before the SCC Court, Etawah for recovery of rent and eviction. Once there is averment that suit has been filed for recovery of rent and eviction, and further, authority has been given to subsequent purchaser to contest the case, there is no dispute that it also includes right to recover the rent. (Para 15)

B. Impleadment - Order XXII Rule 10, CPC provides that **in case of assignment, creation or devolution of any interest during the pendency of a suit by the leave of Court, suit may be continued by a person upon whom such interest has been devolved.** (Para 22, 23)

While considering the application u/Order XXII Rule 10, CPC, Court has only to be prima facie satisfied for exercising its jurisdiction in granting leave for continuation of the suit and remaining questions about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. (Para 20, 21)

In present case, there is no doubt that interest has been devolved in favour of Sri Govind Saran Dixit (since deceased) after execution of sale deed dated 29.07.1989. Further, sale deed is having specific averment about the pendency of SCC Suit No. 64 of 1975 for arrears of rent and eviction, therefore, there is no illegality in the order of trial Court dated 13.03.2023, affirmed by the impugned revisional order dated 26.04.2023. (Para 19, 24)

So far as second impugned order dated 26.04.2023 is concerned, the fact is that, during the pendency of suit proceedings, Sri Govind Saran Dixit-plaintiff died on 21.02.2018 and this Court exercising the power u/Order I Rule 10, CPC has directed legal heirs of Sri Govind Saran Dixit to file application for impleadment u/Order I Rule 10, CPC and Order VI Rule 17, CPC r/w Section 151 CPC. Once impleadment of Sri Govind Saran Dixit(since deceased) is valid in law, therefore, his legal heirs are also having right to be impleaded to contest the case. (Para 25, 26)

Writ petition dismissed. (E-4)

Precedent followed:

1. Amit Kumar Shaw Vs Farida Khatoon, 2005 AIR (SC) 2209 (Para 8)

2. Bhim Sen Wadhwa Vs Sri Om Prakash Batra & ors., 2010 (2) ARC 360 (Para 8)

Precedent distinguished:

Sheikh Noor Vs Sheikh G.S. Ibrahim (Dead) by Lrs., 2003 0 Supreme (SC) 712 (Para 6)

Present appeal challenges orders dated 13.03.2023 and 26.04.2023, passed by Addl. District Judge, Court No. 8, Etawah.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Praveen Kumar, learned counsel for the petitioner and Sri Puneet Bhadauria, learned counsel for the respondent No. 5.

2. Present petition has been filed seeking following relief:

"i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 13.03.2023, passed by Addl. District Judge, Court No. 8, Etawah, in SCC Revision No. 11 of 2004, Murari Lal Srivastava Vs. Sandeep Kumar & Ors.

ii) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 26.04.2023, passed by Addl. District Judge, Court no. 8, Etawah, in Rent Revision No. 19 of 2023, Vishnu Kumari Vs. Sandeep Kumar & Ors."

3. Since only legal question is involved, therefore, with the consent of parties without inviting for affidavits, the matter is being decided at the admission stage itself.

4. Undisputed facts of the case are that Smt. Ramdevi and Smt. Saral Kumari had filed SSC Suit No. 64 of 1975 before SCC Court for eviction and recovery of arrears of rent and damages, upon which Sri Murari Lal Srivastava defendant had filed written statement. During the pendency of the suit proceeding, Smt. Saral Kumari executed a sale deed dated 29.07.1989 in favour of Sri Govind Saran Dixit(since deceased). Thereafter, Sri Govind Saran Dixit(since deceased) moved an application dated 06.01.1990 under Order XXII Rule 10, Code of Civil Procedure (hereinafter, referred to as, 'CPC') for impleadment as plaintiff. Said impleadment application was allowed vide order dated 22.04.2004. Against the said order, defendant filed SCC Revision No. 11 of 2004. The said revision was dismissed vide first impugned order dated 13.03.2023. During the pendency of the legal proceeding, Sri Govind Saran Dixit died on 21.02.2018. The SCC Court vide order dated 01.04.2023 directed the legal heirs of Sri Govind Saran Dixit(since deceased) to file application under Order I Rule 10, CPC along with Order VI Rule 17, CPC and Section 151 CPC for impleadment. Against the order dated 01.04.2023, Revision No. 19 of 2023 was filed, which was also dismissed vide second impugned order dated 26.04.2023. Hence present petition.

5. Learned counsel for the petitioner submitted that impleadment under Order XXII Rule 10, CPC is barred by the provision of Section 109 of Transfer of Property Act, 1882(hereinafter referred to as, 'The Act of 1882') as there is no assignment in the content of sale deed dated 29.07.1989, therefore, the application of impleadment is not maintainable. He next submitted that Section 109 of the Act of 1882 provides that no arrears of rent can be recovered by the subsequent purchaser in case the rent case is pending unless there is specific provision for recovery of rent in the sale deed. In the present case, there is only mention of pendency of SCC Suit No. 64 of 1975, but there is no specific averment about the authorization of recovery of rent for Sri Govind Saran Dixit(since deceased) in whom favour sale

deed was executed. Therefore, orders dated 13.03.2023 and 26.04.2023 are bad and liable to be set aside.

6. In support of his contention, learned counsel for the petitioner has placed reliance upon the judgment of Apex Court in the matter of ***Sheikh Noor Vs. Sheikh G. S. Ibrahim(Dead) by Lrs.: 2003 0 Supreme(SC) 712.*** He lastly submitted that as there is no assignment and further there is no averment about the recovery of rent in the sale deed dated 29.07.1989, therefore, SCC Suit No. 64 of 1975 for eviction is not maintainable on behalf of legal heirs of Sri Govind Saran Dixit(since deceased).

7. Per contra Sri Puneet Bhadauria, learned counsel for the respondent-plaintiff No. 5 vehemently opposed the submission made by learned counsel for the petitioner and submitted that sale deed dated 29.07.1989 is having specific averment about the pendency of SCC Suit No. 64 of 1975 before Judge, Small Causes Court and also there is assignment that it is upon the purchaser to file application in the said case for impleadment and contest the case on his own expenses. The SCC Suit referred in the sale deed dated 29.07.1989 is for eviction and recovery of arrears of rent and damages, which includes right of recovery of rent also, in fact it is a clear cut assignment in the sale deed, therefore, there is no illegality in the impugned orders and the petition is liable to be dismissed.

8. In support of his contention, Sri Puneet Bhadauria, learned counsel for the respondent-plaintiff No. 5 has placed reliance upon the judgment of Apex Court in the matter of ***Amit Kumar Shaw Vs. Farida Khatoon: 2005 AIR(SC) 2209.*** He also placed reliance upon the judgment of this Court in the matter of ***Bhim Sen Wadhwa Vs. Sri Om Prakash Batra and others: 2010 (2) ARC 360.***

9. I have considered rival submissions made by learned counsels for the parties and perused the record as well as judgments so relied upon.

10. The issue before the Court to decide is, as to whether in light of Section 109 of the Act of 1882, Sri Govind Saran Dixit(since deceased) was entitled to receive the rent or not and further, application for impleadment filed under Order XXII Rule 10, CPC is maintainable or not.

11. To decide the controversy, provision of Section 109 of the Act of 1882 is relevant, therefore, the same is being quoted hereinbelow:

Section 109 of Transfer of Property Act, 1882

"109. ***Rights of lessor's transferee.—*** *If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:*

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the

lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased."

12. Learned counsel for the petitioner has placed reliance upon the judgment of Apex Court in the matter of ***Sheikh Noor(Supra),*** relevant paragrpahs of which are quoted hereinbelow:

"(15). In Girdharilal (dead) by LRs. v. Hukam Singh and Ors., AIR (1977) SC 129, the point as to whether the transfer is entitled to the rent due before the transfer of the property in his favour was considered. Interpretation put by the Rajasthan High Court of provisio to Section 109 of the Transfer of property Act, to the effect that usually the transferee is not entitled to the arrears unless there is a contract to the contrary was approved. It there was an assignment of arrears then certainly the transferee landlord could maintain the petition for eviction on the ground of arrears of rent including the arrears due prior to the transfer in favour. It was held: "An objection based upon the proviso to Section 109 of the Transfer of Property Act was, we think rightly, disposed of by the High Court as follows; "The next objection is that under the proviso to Section 109 of the Transfer of Property Act the transferee is not entitled to arrears of rent due before the transfer. In our opinion he ordinarily not so entitled unless there is a contract to the contrary. There was an express contract to the contrary contained in the compromise petition which was incorporated in the compromise decree passed by the Court."

(18.) In view of the cases referred to above, in our opinion, the correct position of law is that a transferee is not entitled to recover the arrears as rent for the property on transfer unless the right to recover the arrears is also transferred. If right to recover the arrears is assigned, then the transferee/ landlord can recover those arrears as rent and if not paid maintain a petition for eviction under the rent laws for those arrears as well. Since in this case we have found that there was an assignment of right to recover the arrears in favour of the respondent transferee he was entitled to recover the same as arrears of rent. If that period is taken into consideration then the tenant/ appellants were certainly in arrears of rent for more than six months and became liable to be evicted from the premises in dispute on the ground of default on their part in payment of rent for more than six months on the date of filing the suit.

13. From the perusal of the said judgment, it is very well settled that under the provision of Section 109 of the Act of 1882, transferee is entitled to recover the arrears of rent on transfer of the property, in case right to recovery of rent is also transferred and further, he could also maintain the suit for eviction on grounds of arrears pending earlier.

14. I have perused the sale deed dated 29.07.1989, relevant paragraph of which is being quoted hereinbelow:

" वाजै हो कि जो किरायेदारान मकान मुवैया में आवाद है उनकी किरायेदारी रखना अथवा उनको दखल करना खरीदार की मर्जी पर है हम मुकिरान की कोई जिम्मेदारी

वावत मकान मुवैया खाली कराने के न होगी। किराये पर बाबू मुरारी लाल श्रीवास्तव व हम मुकिरान के दरमियान एक वाद वावत किराया वसूली व वेदखली किराये दार मकान मुवैया से सम्बन्धित न्यायालय खफीफा मुसंफी इटावा को प्रचलित है जिसका मुकदमा नम्बर 64/75 है। इस मुकदमें में यदि खरीदार चाहे तो वह स्वंय प्रार्थना पत्र देकर मुकिरान के स्थान पर स्वंय पक्षकार वने तथा अपने खर्चे से उक्त किरायेदार के विरूद्ध मुकदमें में हस्व मंशा अपनी पैरवी करे हम मुकिरान को उक्त मुकदमें की पैरवी से कोई वास्ता व सरोकार न होगा। "

15. From the perusal of the averment made in the sale deed dated 29.07.1989, there is no dispute on the point that there is specific mention of SCC Suit No. 64 of 1975 pending before the SCC Court, Etawa for recovery of rent and eviction. Once there is averment that suit has been filed for recovery of rent and eviction, and further, authority has been given to subsequent purchaser to contest the case, there is no dispute that it also includes right to recover the rent. Therefore, submission of learned counsel for the petitioner that there is no authority given in the sale deed dated 29.07.1989 to plaintiff-Sri Govind Saran Dixit (since deceased) is incorrect.

16. Therefore, the judgment of Apex Court in the matter of ***Sheikh Noor(Supra)*** so relied upon by the learned counsel for the petitioner is not coming in the rescue of the petitioner rather it helps the plaintiff-respondent. Plaintiff-respondent is having full right to contest the case of eviction so pending earlier.

17. Now, coming to the second issue, that is about the filing of impleadment application under Order XXII Rule 10, CPC. Order XXII Rule 10, CPC provides that in case of assignment, creation or devolution of any interest during the pendency of a suit by the leave of Court, suit may be continued by a person upon whom such interest has been devolved.

18. To deal with the Order XXII Rule 10, CPC, the same is being quoted hereinbelow:

Order XXII Rule 10, CPC

Procedure in case of assignment before final order in suit— *(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.*

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

19. In the present case, there is no dispute on the point that interest of Sri Govind Saran Dixit(since deceased) has been devolved after execution of sale deed dated 29.07.1989 in his favour.

20. This issue has been considered by the Apex Court in the matter of ***Amit Kumar Shaw (Supra).*** Relevant paragraph of the said judgment is quoted hereinbelow:

"12. Under Order XXII, Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or

devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit."

21. From the perusal of said judgment, it is apparently clear that while considering the application under Order XXII Rule 10, CPC, Court has only to be prima facie satisfied for exercising its jurisdiction in granting leave for continuation of the suit and remaining questions about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings.

22. The very same issue was considered by this Court in the matter of ***Bhim Sen Wadhwa(Supra).*** Relevant paragraph of the said judgment is quoted herein below:

"6. A copy of the sale-deed is on record and it records that the right to sue together with the right to arrears of rent has also been assigned to the purchaser. The court below has considered the effect of provision of Order XXII Rule 10 CPC. It has also relied upon a decision of the Apex Court rendered in the case of Dhurandhar Prasad Singh Vs. Jai Prakash University [AIR 2001 SC 2552]. Apex Court in the aforesaid case has held that in case of devolution of interest during the pendency of a suit, it can be continued by or against persons upon whom such interest has devolved and this entitles the person who has acquired an interest in the subject matter of the litigation by an assignment or creation or devolution of interest pendentelite or suitor or any other person interested to apply to the Court for leave to continue the suit. In the opinion of the court, both the courts were fully justified in allowing both the applications, and the argument of the petitioner cannot be sustained."

23. From the perusal of the said judgment, it is clear that in case devolution of interest during the pendency of a suit, it can be continued by a person on whom such interest has been devolved.

24. So far as present case is concerned, there is no doubt about the fact that interest has been devolved in favour of Sri Govind Saran Dixit(since deceased) after execution of sale deed dated 29.07.1989. Further, sale deed is having specific averment about the pendency of SCC Suit No. 64 of 1975 for arrears of rent and eviction, therefore, there is no illegality in the order of trial Court dated 13.03.2023, affirmed by the impugned revisional order dated 26.04.2023.

25. So far as second impugned order dated 26.04.2023 is concerned, the fact is that, during the pendency of suit proceedings, Sri Govind Saran Dixit-plaintiff died on 21.02.2018 and this Court exercising the power under Order I Rule 10, CPC has directed legal heirs of Sri Govind Saran Dixit to file application for impleadment under Order I Rule 10, CPC and Order VI Rule 17, CPC read with Section 151 CPC.

26. From the perusal of Order I Rule 10(2), it is apparently clear that Court has right to strike out or add parties at any stage and in the present case, the SCC Suit was pending since 1975, therefore, the Court has rightly proceeded to pass order dated 01.04.2023 for impleadment of legal heirs

of Sri Govind Saran Dixit after his death. Against the said order, Revision No. 11 of 2004 was filed by the petitioner-defendant, which was rightly dismissed by the impugned order dated 13.03.2023 specifially in light of fact that once impleadment of Sri Govind Saran Dixit(since deceased) is valid in law, therefore, his legal heirs are also having right to be impleaded to contest the case.

27. Under such facts and circumstances of the case, I find no illegality in the impugned orders dated 3.03.2023 and 26.04.2023.

28. Petition lacks merit and is accordingly **dismissed**.

29. No order as to costs.

(2023) 6 ILRA 447
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 44517 of 2016

Jadhav Siddhodhan Ankush ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gulab Chandra

Counsel for the Respondents:
A.S.G.I., Sri Nand Lal. U.O.I.

A. Service Law – Termination – Misrepresentation - Central Civil Services (Temporary Service) Rules, 1965 - In order to elicit truth of 'knowledge' directly from the employee, given an opportunity, he would be explaining his conduct and that will do the needful. (Para 14)

Even though there is right to terminate the service of employee who is charged of furnishing false information and so there can be no compulsion for the appointing authority to continue with such employee, but **"McCarthyism" is antithesis to the constitutional goal which of course is on the bed-rock of reformative theory qua the young offenders in suitable cases.** (Para 13)

Whenever a fact is to be enquired into as to whether a candidate had the knowledge of a criminal case/proceeding lodged/instituted against him at the time he filled up the application form seeking selection and appointment on post advertised, the knowledge factor becomes important. In order to elicit this factum of knowledge of criminal case, it becomes imperative to hold atleast a preliminary fact finding enquiry even while an employee is still on probation, and therefore, such an employee must be put to a notice to explain his conduct in the matter. (Para 15)

Thus, if concealment or alleged concealment for want of knowledge of a candidate, in a criminal case becomes a dominant factor to reject his candidature and consequently to terminate him from service, **an order of termination may be an order simpliciter termination but department/employer must conform to the principles of natural justice in its action.** It is held that **continuance of an employee in service where he had knowledge or no knowledge at the time of filing up a form or signing the attestation form, will be well within the discretion of the employer.** (Para 16)

It is considered appropriate for the authority to give one opportunity to the petitioner to explain his conduct and then to take action in accordance with law. (Para 17)

Writ petition allowed. (E-4)

Precedent followed:

Avtar Singh Vs U.O.I. & ors. (2016) 8 SCC 471 (Para 4)

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

1. Heard Sri Gulab Chandra, learned counsel for the petitioner and Sri Nand Lal, learned counsel for the respondent no. 1 to 4.

2. The petitioner before this Court was validly selected and appointed as constable with Central Industrial Security Force and given posting at its Unit N.C.L. Indauli (M.P.). However, while he was working on probation, the Senior Commandant of CISF, Shakti Nagar, District Sonebhadra passed an order under the Central Civil Services (Temporary Service) Rules, 1965, by which his services were terminated as per Clause 3 of the Attestation Form filed by him.

3. Learned counsel for the petitioner submits that in the attestation form which he was required to submit at the time of his appointment with respondent, there was column no. 12 (b) which contained a clause with recital *"if you have ever been prosecuted"*, and was to be answered in either affirmative or negative. However, due to inadvertent mistake, petitioner put an astrick at word "No" instead world 'Yes'. He further submits that since petitioner had been acquitted in a criminal case instituted against him under Section 294, 352,506,509, 34 IPC , he thought that it was not necessary to refer to the prosecution case in which he was acquitted wayback in the year 2010. In the said case he claimed that petitioner had been acquitted much prior to his application submitted against vacancy in question. He further submits that the order in question though is termination simpliciter in nature taking recourse to the provision of subrule 4 of Rule 36 of Central Industrial Security Force Rules, 2001 and Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965, but lifting the veil the foundation for passing the order has been non disclosure of criminal case in which petitioner was prosecuted sometimes back, though acquitted in the year 2010.

4. Learned counsel for the petitioner has relied upon the judgment in the case of **Avtar Singh v. Union of India and Others (2016) 8 SCC 471** wherein Supreme Court was dealing with the matter in which an employee who had not made such disclosure was also acquitted .

5. *Per contra*, learned counsel for the contesting respondent submits that non disclosure of criminal case in which petitioner was prosecuted was well within his knowledge and non disclosure thereof would be taken to mean that he obtained appointment by misrepresentation. He submits that this is like a snatching of an appointment and dislodging other eligible candidate who might been possessed good and clean character for having never been even prosecuted in any criminal case.

6. It is further argued that it is a discretion of employer to retain a candidate or not if a candidate has not disclosed criminal antecedents in the column meant for the purpose and later on found to be having criminal antecedents. He further submits that even in Avtar Singh's case (*supra*) this discretion of employer has been retained and candidate even though if is acquitted in the criminal case, cannot make a rightful claim to appointment.

7. It is next submitted by learned counsel for the respndent that the petitioner

was still on probation, and therefore, his service could have been terminated without assigning any reason .

8. Having heard learned counsel for the parties, and their arguments raised across the bar, the fact that I find to be emerging out from the pleadings is that services of the petitioner came to be dispensed with in view of Clause 3 of the attestation form. Clause 3 of the attestation form declares that in the event any information furnished is found to be false or concealed then services can be terminated. The order of termination is absolutely silent qua non disclosure of a particular fact to the department. The order if was passed was based upon paragraph 3 of the attestation form, it ought to have detailed out reason for taking such action. Having not assigned any reason, a mere reliance upon Clause 3 would not do the needful. The order of termination is sought to be defended by way of pleadings raised in the counter affidavit that fact regarding criminal case had not been disclosed, deliberately, and therefore, action had been taken.

9. It is well settled law that no amount of pleadings in the counter affidavit can improve upon the order impugned in the petition.

10. In my considered view, the authority ought to have issued a notice requiring petitioner to show cause as to why his services may not be dispensed with for non disclosure of particular criminal case in attestation form. This having not been done, the order in question cannot be sustained in law.

11. It is a case where petitioner had been alredy acquitted in a criminal case. I find further that the order of appellate authority has referred to criminal case which was lodged against the petitioner and other members of the family by a paternal aunt. It was thus clear that it was in connection with an internal family dispute that some criminal case came to be instituted and then crucial witness turned hostile whereas other prosecution witness did not turn up to the witness box. The authorities have sought to justify the order on the ground that consealment of fact was deliberate one and since there was warning given in the attestation form that he needed to furnish correct information and if wrong information had been given, it would be a disqualification for a candidate and the services of the petitioner were, therefore, liable to be terminated, and thus, authority competent has rightly passed the order.

12. Upon reading of the entire order passed by the appellate authority, I find that the question as to whether petitioner was ever issued show cause notice has remained unanswered.

13. In the case of Avtar Singh v. Union of India (supra), Supreme Court has observed that even though there is right to terminate the service of employee who is charged of furnishing false information and so there can be no compulsion for the appointing authority to continue with such employee, but it was observed that "McCarthyism" is antithesis to the constitutional goal which of course is on the bed-rock of reformative theory qua the young offenders in suitable cases. After appreciating many previous authorities of the Court vide paragraph 38.4 to 38.11, the Supreme Court laid down certain guidelines thus:

38.4. In case there is suppression or false information of involvement in a

criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, ***any of the following recourse appropriate to the case may be adopted : -***

38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2. Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3. ***If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available*** *as to antecedents, and may take appropriate decision as to the continuance of the employee.*

38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6. In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case.

38.7. ***In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.***

38.8. ***If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.***

38.9. In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10. ***For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed.*** *If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness.* ***However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.***

38.11. Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him.

(emphasis added)

14. The above guidelines laid down in clauses 38.4.2, 38.4.3, 38.7, 38.8 and 38.11 if all are read together, such discretion is meant to be exercised in tune with principles of natural justice. In order to elicit truth of 'knowledge' directly from the

employee, given an opportunity, he would be explaining his conduct and that will do the needful.

15. Whenever a fact is to be enquired into as to whether a candidate had the knowledge of a criminal case/ proceeding lodged/instituted against him at the time he filled up the application form seeking selection and appointment on post advertised, the knowledge factor becomes important. In order to elicit this *factum* of knowledge of criminal case, it becomes imperative to hold atleast a preliminary fact finding enquiry even while an employee is still on probation, and therefore, such an employee must be put to a notice to explain his conduct in the matter. This is necessary for the simple reason that status of a criminal case varies in nature, for instance there could have been a complaint case of which summons never stood served upon such an alleged accused and he might not be aware of such pending proceeding or there could be a case where even first information report was lodged but named accused was never arrested or interrogated and police might have submitted a final closure report, or there may be a criminal case where a named person was not prime accused and police might not have arrested him so as to compel him to apply for bail and the investigation might be still on and so on. An employee, therefore, if put to notice, will be able to submit his explanation as to the knowledge. A cases where a candidate has been innocent as far as knowledge is concerned, it may be left open for him to continue in service at the discretion of the employer. The case may also be such where a candidate has been named in the first time only for once, to wit, never before, nor subsequently and, therefore, employer can exercise discretion to retain such a candidate in service.

16. Thus, in my considered view if concealment or alleged concealment for want of knowledge of a candidate, in a criminal case becomes a dominant factor to reject his candidature and consequently to terminate him from service, may be an order of termination is an order simpliciter termination, department/ employer must conform to the principles of natural justice in its action. I would still hold that continuance of an employee in service where he had knowledge or no knowledge at the time of filing up a form or signing the attestation form, it will be well within the discretion of employer to continue such an employee in service or not.

17. In view of above, therefore, I consider it appropriate for the authority to give one opportunity to the petitioner to explain his conduct and then to take action in accordance with law.

18. The orders impugned dated 08.04.2015 passed by Commandant and order dated 3.12.2015 passed by Inspector General are accordingly quashed. The respondents are at liberty to issue a show cause notice to the petitioner within a month from today and in the event any such show cause notice is issued to the petitioner, petitioner shall have to submit his reply within two weeks after receipt of notice and thereafter authority shall be proceed to pass final order in accordance with law in the light of the observations made above and in the light of case of Avtar Singh (*supra*).

(2023) 6 ILRA 452
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 13514 of 2022

M/s Modern Service Station ...Petitioner
Versus
I.O.C.L. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Kumar Singh, Sri Ravi Anand Agarwal, Ms. Shreya Gupta

Counsel for the Respondents:
Sri Rakesh Kumar

Civil Law-The Constitution of India,1950-Article 14 & 226- Principles of natural justice should not reflect as a mere empty formality, but proper opportunity of hearing deserves to be given to the delinquent before taking any action against him- the petitioner has specifically taken his defence that on 16.9.2020 the machines have been opened up by the authorised service engineer of OEM and he might have been responsible for tampering with the said machines. It was incumbent upon the respondents to have addressed the said issue duly considered the same and recorded a finding in this regard. Not adverting to the defence raised by the petitioner, the prescribed authority as well as the appellate authority have abdicated the jurisdiction vested in them and passed the impugned orders without application of mind- Not dealing with the issues raised by the petitioner as defence, is also violation of the principles of natural justice. "Fair hearing" and "opportunity of hearing" during the enquiry proceedings would have no meaning in case the enquiry officer does not consider the submissions raised in defence by the person who is proceeded against. (Para 28 & 35)

Petition allowed. (E-15)

List of Cases cited:

1. M/s Chaudhary Filing Point, Kazipur Vs St. of U.P. & ors. passed in M.B Writ No.27043 of 2018

2. (M/s Kamla Kant Automobiles & anr. Vs St. of U.P. & ors.) Writ C No.25127 of 2018

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

1. Heard Ms. Shreya Gupta, learned counsel for the petitioner as well as Sri Rakesh Kumar for the respondents.

2. The petitioner has approached this Court being aggrieved by the order dated 21.9.2020 passed by Area Manager Retail Sales, Mathura - I, Indian Oil Corporation Limited thereby stopping the sales from their dispensing units until further orders. The petitioner has also assailed the order dated 5.10.2021 passed by Divisional Retail Sales Head, Agra Division Office, Marketing Division, Indian Oil Corporation Limited (Marketing Division), Agra thereby terminating the retail outlet dealership of the petitioner.

3. The petitioner being aggrieved by the order of cancellation of his retail outlet dealership had preferred an appeal which has also been rejected by means of impugned order dated 7.4.2022 passed by Executive Director (Retail Sales -N & E)/Appellate Authority, Indian Oil Corporation Limited, Head Office, Mumbai.

4. It has been submitted that the petitioner was appointed as a dealer in

terms of petrol/HSD Pump Dealer Agreement dated 11.4.2021 executed between the petitioner and Indian Oil Corporation. They were further granted a license for carrying on business in the name and style of M/s Modern Service Station situated at Yamunapar, Laxmi Nagar, Mathura. It is stated that since 11.4.2021 the petitioner has been conducting the sales from the outlet in accordance with the terms and conditions of the agreement as well as Marketing Discipline Guidelines and there has never been grievance from any corner or any allegation against the petitioner with regard to their retail dealership.

5. It has further been submitted that the petitioner's retail outlet has two Dispensing Units manufactured by M/s Gilbarco Veeder Root (hereinafter referred to as M/s GVR). One of these two dispensing units is old and the second unit of High Speed Diesel (HSD) was procured from some other retail outlet by the respondent and was installed at the petitioner's retail outlet in 2019. Both the units are being maintained / inspected by engineers from M/s GVR and concerned government authorities and officers of the respondent corporation.

6. It is further submitted that the dispensing units require regular periodic stamping by Weights and Measures Department which were regularly done and the last stamping of the unit was done on 23.3.2019 by Weights and Measures Department and M/s. Gilbarco Veeder Root. Whenever there was any problem in running the two dispensing units the complaints were lodged by the petitioner which were expeditiously looked into by M/s GVR and the said units were lastly inspected on 14.1.2020 by the officers of the respondent-corporation and it was reported that all the seals are intact and no variation was found in the stocks.

7. It is stated that prior to cancelling the stamping of the dispensing unit certain amounts have to be deposited by the petitioner and accordingly the said amounts were deposited by the petitioner on 13.3.2020 and re-stamping was due but owing to COVID 19 conditions and lock-down the said stamping was extended till 30.9.2020.

8. It is stated that as their stamping of the dispensing units was due and the Area Manager, Retail Sales, Mathura-I visited the pump of the petitioner and orally asked them not to dispense the oil as their re-stamping was pending and accordingly on the basis of oral orders, they stopped the sales from 15.9.2020 on-wards. It has further been submitted that on 16.9.2020 the authorized service engineer of M/s Gilbarco Veeder Root by the name of Mr. Girendra, who was authorized representative of the respondent corporation, visited the retail outlet and was handed over the keys of both the dispensing units for the purpose of up-gradation of the software but he noticed certain defects in the mother board and he handed over the report which has been annexed along with the writ petition. According to the said report the seal was broken for the purpose of checking of the machines and for certain repair works but stamping could not be done by him, and he further noted that CPU cards are required to be replaced.

9. It has been submitted that the authorised agent left the machines in the same conditions, without repairing or stamping them and also without closing the dispensing units and the petitioner was

under belief that that he would visit them on the next day i.e. 17.9.2020 to repair the said machines. He had reported that both the machines were defective, and the motherboard was require to be replaced and, therefore, stamping could not be done.

10. On the very next date i.e. 17.9.2020 the petitioner's retail outlet was jointly inspected by a team comprising MS(Retail Sales) Mathura II, RSA-Shri Pradeep Kumar, Service Engineer of Gilbarco Veeder Root and Mr. Gopal Singh, LMO Mathura and Mr. A. S. Kushwaha (respondent No.4). During the said inspection it was found that seal of both the dispensing units was broken and extra soldering with small wire was found on both the motherboards which were removed from the dispensing units, sealed and handed over to Area Manager (Retail Sales). The inspection report dated 17.9.2020 was prepared and was also countersigned by authorized retailer of the petitioner. The said cards were subsequently sent to M/s GVR for their report on the said card. According to the said report extra soldering work was observed in the mother boards and extra wire sealing was also found between the connector and the mother board. It was found that extra soldering work was done and sealing connector of the said wire was found torn and wire broken with intent to manipulate the dispensing unit and deliver fuel from the dispensing units. Pending report from the Indian Oil Corporation the sale of the petitioner was stopped by means of letter dated 21.9.2020 on the ground that certain irregularities have been observed in the petitioner's retail outlet at the time of joint inspection on 17.9.2020. Show cause notice was also issued to the petitioner on 8.10.2020 calling upon them to explain as to why action be not initiated in terms of clause 5.1.4 of the Marketing Discipline Guidelines-2012/Dealership Agreement.

11. The petitioner denied the allegations levelled against him by submitting reply on 12.10.2020 and also informed the respondents about visit of the authorised engineer of O.E.M. i.e. M/s GVR by the name of Mr. Girendra. The sales of the petitioner's retail outlet were stopped pending the inquiry.

12. Petitioner approached this Court by filing writ petition No.23158 of 2020 which was disposed of by this Court by means of order dated 18.12.2020 directing the respondents to conclude the pending inquiry initiated against the petitioner, expeditiously, preferably within a period of four weeks. It is in pursuance of the order passed by this Court that joint inspection of the retail outlet was conducted by the same team who had conducted the inspection previously on 17.9.2020. After receiving the said report on 5.3.2021 a show cause notice was given to the petitioner on 21.3.2021 referring to the report submitted by M/s GVR. The petitioner replied to the show cause notice on 31.6.2021 and after considering the reply of the petitioner by means of order dated 5.10.2021 the dealer agreement dated 11.4.2011 was cancelled in terms of clause 5.1.4 of the Marketing and Discipline Guidelines.

13. The petitioner being aggrieved by the said order had filed an appeal which has also been rejected by means of order dated 7.4.2022. Both the aforesaid orders have been impugned before this Court in the present writ petition.

14. Learned counsel for the petitioner while assailing the order of termination as well as appellate authority has submitted

that both the orders are illegal and arbitrary and have been passed in violation of the principles of natural justice. It is stated that one of the grounds taken by the petitioner in their response to the show cause notice was with regard to visit of the authorized agent of M/s GVR on 16.9.2020. It was stated that the authorized representative had visited the retail outlet to upgrade the software and also to conduct stamping of the dispensing units had broken the seals to access the motherboards. It was submitted that at the time of inspection the machine was lying in the same condition as was left after the authorised agent of M/s GVR had attempted to repair the dispensing units, and consequently it cannot be said that it is the petitioner who can be held responsible for tampering of manipulating the motherboards.

15. It is also stated that it is evident from his report that the authorised agent had checked the CPU seal and found them to be defective and had advised replacement of the said cards. It was stated that tampering if any may have been done by the authorized representative. To decide the said issue a joint inspection was conducted by 17.9.2020, and according to the inspection report prepared on the said date it has been noticed that the seals have been broken . The petitioner in his response had stated that they have been running the dispensing unit for last nine year and there has never been any complaint with regard to their operation of the said outlet.

16. It is also noticed that in paragraph 8 of the of the response they have clearly mentioned about the fact about the visit of the authorized service engineer of M/s GVR Mr. Girendra and also the fact that he had informed the petitioner that he had upgraded the software in both the dispensing units and also that some problems /defect seemed to have occurred in the CPU cards of both the dispensing units, and as such he was unable to complete his job and advised that CPU cards need to be replaced and pending aforesaid working machines were left open. It has further been submitted that it was the normal practice of the respondents that if there is any problem in mother boards they are immediately sent to OEM for testing but in the present case the OEM cards were kept in possession of the respondents for over 2 months before they were sent for testing and, hence, by the said date there was sufficient time for tampering with the said motherboards. There is no explanation forthcoming from the respondents as to why the mother boards were kept with them for over two months before sending them for testing and obtaining the report from the OEM regarding the fact as to whether there was any tampering or soldering.

17. They had further stated that in the inspection report prepared on 17/09/2020 there was no mention of tampering or soldering but the same was mentioned in the report submitted by OEM. The petitioners have denied their involvement in the said tampering if any. They have further stated that the report should have been obtained from the authorized service engineer of the M/s GVR who had opened the dispensing unit on 16.9.2020 prior to proceeding against the petitioner.

18. The response of the petitioner was considered by Executive Director (State of U.P.) Office - II, Noida and the order of termination of the agreement was passed by Divisional Retail Sales Head, Agra Division, Agra. In the said order of termination, he has considered the report

submitted by OEM M/s GVR where it was clearly found that motherboards have been tampered with and certain extra soldering work was done which accordingly may lead to manipulations of these two dispensing units. It has further been stated that merely because the dispensing units were in custody of the petitioner, they have been held to be guilty of tampering with the said dispensing units and the retail outlet dealership has been cancelled.

19. Learned counsel for the petitioner assailing the impugned orders submits that even the reply submitted by them has not been considered while passing the impugned order of termination of the retail outlet. It is submitted that detailed facts have been narrated in the reply with regard to breaking up of the seal by authorized service engineer of OEM M/s. GVR on 16/09/2020 and also the fact that he had inspected the motherboards and had also submitted his report in this regard.

20. It is stated that tampering, if any, could have been done by authorized agent in as much as admittedly he had opened the said machine. The competent authority while terminating the retail outlet dealership has not even considered this aspect of the matter or recorded a finding with regard to the defence taken by the petitioner and, hence, in this regard it is stated that the impugned orders is vitiated on the ground of non-application of mind. It is further submitted that this aspect of the matter was specifically taken in the appeal preferred by the petitioner but still the appellate authority chose to ignore the defence raised by the petitioner and rejected the appeal.

21. Learned counsel for the petitioner submits that the essential facts which have been raised by the petitioner in their defence have been illegally and arbitrarily ignored by the respondents leading to miscarriage of justice and accordingly both the orders impugned are illegal and arbitrary and are liable to be set aside.

22. Learned counsel for the respondent has defended the action of the Indian Oil Corporation. He has submitted that tampering with dispensing units is a serious offence and provision for the same have been clearly laid down in Marketing and Discipline Guidelines. On inspection dated of 17.9.2020 of motherboards it was found that there were additional soldering and wire attached to the said motherboards leading to irrefutable evidence that the said units have been tampered with and in the said situation where the dispensing units are in exclusive custody of the petitioner, it is the petitioner who is responsible, and there is no infirmity in the decision of the respondents to terminate the retail outlet dealership. He has further submitted that due opportunity was given to the petitioner where a show cause notice was him, and a preliminary inquiry was conducted prior to initiating action against the petitioner. It has further been submitted that entire action was based on the report submitted by the inspecting team led by MS (Retail Sales), Mathura-II who had inspected the site and submitted report that motherboards have been tampered with and extra soldering and wire attached to the motherboards which clearly demonstrates that the motherboards have been tampered with for manipulation of the delivery of the oil and, hence, submits that the impugned orders are legal and correct.

23. I have heard learned counsel for the parties and perused the records.

24. It is noticed that an agreement was entered into between the petitioner and the respondents way back on 11.4.2011 where the petitioner was given the retail outlet dealership situated at Yamunapar, Laxmi Nagar, Mathura and they have acted as a dealer for the respondents for the last nearly nine years and there has been no complaint whatsoever till the inspection was conducted on 17.9.2020. In the said inspection certain tampering have been found in mother boards. During inspection the motherboards were taken out and sent for inspection to the OEM which reported that there was extra soldering and wire attachment to the motherboard and it seems that they have been tampered with leading to manipulation in operation of the dispensing units. As a dispensing unit are an exclusive control of the dealer, there is a presumption that is responsible for the said manipulations.

25. Show cause notice was given to the petitioner. The petitioner replied to the said notice stating that that certain testing had been done on 16.5.2010, which is a day prior to the joint inspection where the service engineer of M/s GVR had visited the retail outlet. Before commencing the repair he has informed the petitioner that he has obtained oral permission from the OEM as well as from the authorities of Weights and Measurement Department to inspect the said machines for the purpose of stamping of the cards. He had worked on the said machine for nearly two hours and could not complete the work on the said date and the work was to be continued after replacement of the motherboards. He submitted his report which is annexed along with the writ petition. From the said report it evident that he has found that certain defects in mother boards and was of the opinion that the same require replacement and because of which the job of software up-gradation could not be taken up on the same day. It has further been stated that the machines were kept in the same state as they were left by the authorised agent for the aforesaid purposes. The retail outlet was subjected to inspection on the very next date i.e. 17.9.2020. The inspecting team visited the retail outlet of the petitioner and found tampering in the motherboards where extra soldering and wire were found. A show cause was given to which the petitioner submitted detailed reply culminating in the impugned order of termination.

26. Even in appeal of the petitioner the moot question raised was as to whether the petitioner can be held responsible for tampering with the mother board in peculiar facts and circumstances of the case where the machine was opened by authorised agent of M/s GVR a day prior to the inspection.

27. It is noticed that firstly that this aspect of the matter was duly brought to the notice of the competent authority in the reply to the show cause notice tendered by the petitioner, but the respondents chose not to address the said issue and proceeded to terminate the retail outlet dealership agreement of the petitioner without adverting to the submissions made in the reply. This specific aspect was also raised in the appeal preferred by the petitioner, but the appellate authority also chose to ignore the said vital aspect of the matter while rejecting the appeal preferred by the petitioner. Needless to say that both the authorities have acted in most illegal and arbitrary manner where they have chosen to ignore the grounds raised by the petitioner in his reply.

28. Due opportunity of hearing was necessary to be provided to the petitioner before any action could be taken against him. It is settled proposition of law delineated by Supreme Court in catena of judgments that principles of natural justice should not reflect as a mere empty formality, but proper opportunity of hearing deserves to be given to the delinquent before taking any action against him. In the present case the petitioner has specifically taken his defence that on 16.9.2020 the machines have been opened up by the authorised service engineer of OEM and he might have been responsible for tampering with the said machines. It was incumbent upon the respondents to have addressed the said issue duly considered the same and recorded a finding in this regard. Not adverting to the defence raised by the petitioner, the prescribed authority as well as the appellate authority have abdicated the jurisdiction vested in them and passed the impugned orders without application of mind. It was necessary for the respondents to have obtained response of OEM as well as Service Engineer who had visited the retail outlet on 16.9.2020 before proceedings against the petitioner. This vital piece of evidence was lost when the respondent authorities chose to ignore this aspect of the matter while dealing with the issue relating to termination of dealership of the petitioner.

Not dealing with the issues raised by the petitioner as defence, is also violation of the principles of natural justice. "Fair hearing" and "opportunity of hearing" during the enquiry proceedings would have no meaning in case the enquiry officer does not consider the submissions raised in defence by the person who is proceeded against. Opportunity of hearing would include due consideration of all the defences raised by the person who is proceeded against, and failing to consider the reply would be a clear violation of the principles of natural justice, and such an order would be arbitrary and violative of article 14 of the Constitution of India.

29. The retail outlet dealership of the petitioner has been terminated merely on the basis of the presumption, only considering the report of the OEM which only indicates that the mother board have been tampered with but still it was necessary for the respondents to return a finding that it was the petitioner, who was responsible for tampering with the mother board. Merely the basis of the allegations the agreement could not have been cancelled, in absence of cogent evidence pointing towards the involvement of the petitioner in such tampering and manipulation. Such action should not have been taken merely on the basis of presumption rather there has to be some cogent and reliable evidence with regard to tampering the motherboard by the petitioner so as to take action against the respondents. This evidence could have been made available had the respondent organization during the enquiry examined or recorded the statement of authorized service engineer of M/s GVR who had visited the retail outlet on 16.9.2020 and opened the dispensing unit after breaking open the seal. In absence of vital piece of evidence there is no other material which could link tampering of mother boards with the petitioner.

30. The enquiry officer as well as the appellate authority failed to consider the reply of the petitioner in this regard which leads to the irresistible conclusion that the impugned order has been passed without

application of mind. Even otherwise, this Court is of the considered view after examining the material available on record that there is no evidence which can link tampering of the mother boards to the petitioner, except the fact that the machines were in exclusive custody of the petitioner. We also considered that prior to the inspection the dispensing units had been opened by the authorised service engineer of M/s GVK. No effort was made to record the evidence of the service engineer which could have demonstrated whether he had handled the motherboards or not. In light of the above this court is of the considered view that the findings recorded by the prescribed authority linking the manipulation of motherboard to the petitioner is not borne out from the records and therefore the impugned orders are illegal and arbitrary accordingly set aside.

31. The next question arises is as to whether after setting aside the impugned orders whether the matter should be remitted back to the respondents to reconsider, and proceed after removing the infirmity pointed out by this Court and to revisit the order of termination or natural consequence may be allowed to be followed i.e. restoration of the license to run the outlet.

32. In this regard counsel for the petitioner has submitted that in similar circumstances in the case of ***M/s Chaudhary Filing Point, Kazipur Vs. State of U.P. and others*** passed in M.B Writ No.27043 of 2018 where also the matter relating to tampering of mother board came up before this Court and this Court was of the considered opinion that there was no actionable evidence which can related to tampering being done by the petitioner and according restored the retail outlet dealership of the petitioner therein. Relevant paragraph of the judgment is quoted as under:-

"As seen from the reading of the impugned order, the only reason assigned for being not satisfied with the explanation offered by the petitioner was that there was tampering in the DU and pulsar card contains certain soldering marks. However, what was not considered by the competent authority was that at what point of time this unauthorized tampering/soldering was done in the dispensing unit and how the dealer is manipulating the distribution of fuel. No material, much less credible one has been brought on record by the respondents to disclose the unauthorized access to the equipment by the petitioner. It was specific stand of the petitioner that periodically the Weights and Measurements Department officials inspected the seals and they were found to be intact. Furthermore, what is the impact on tampering/soldering in delivery unit is not disclosed. How the dealer can manipulate delivery of fuel by inserting such unit is not explained. The only objective of a dealer to tamper with dispensing unit is to manipulate delivery of fuel. In this case, the delivery of fuel was found to be accurate prior to checking of unit and after the checking. Furthermore, the defence of the petitioner that it is possible that the supplier himself might have done soldering while repairing for proper functioning of the unit by supplier himself cannot be brushed aside."

33. Similarly, reliance has also been placed on another judgment of this Court passed in Writ C No.25127 of 2018 ***(M/s Kamla Kant Automobiles and another Vs. State of U.P. and others)*** which has held as under:-

"After holding that the order dated 24.7.2017 is bad in law and liable to be quashed, the question arises as to whether the petitioner is entitled to restoration of dealership. There being no violation of any clause of agreement, no proceedings have culminated in accordance with law and after being exonerated of all the allegations levelleld against the petitioner only natural outcome has to be restoration of all benefits which the petitioner was deprived of unauthorizedly."

34. Sri Rakesh Kumar appearing for the respondent-oil corporation, has submitted that once it is noticed that there is defect / infirmity in the proceedings then it would be appropriate to remit the matter back to the competent authority to consider the aspect of the matter which has not been considered by them and pass fresh orders of termination has been passed. In this regard it is noticed that principles of natural justice come to the rescue of a delinquent against whom action is proposed. The import of principles of natural justice is that a person against whom action is taken should be given adequate opportunity of hearing so as to adequately defend itself. In the present case, it is noticed that apart from the fact that the petitioner had submitted a detailed reply but still the respondents failed to consider all the aspect of the matter before terminating the retail outlet dealership agreement.

35. It is further noticed that the evidence which was available when the defect in the proceedings was pointed out by the petitioner would no longer available after such a long lapse of time though it was incumbent upon the respondent - organization to have recorded the statement of the authorized service engineer of OEM during the inquiry. It has been informed that the said authorised service engineer is no longer in employment as per the respondents. In the peculiar facts of the present case, this Court is of the considered view that a matter, at the discretion of the court, can be remitted for fresh consideration only when there is non-adherence of the principles of natural justice, and the infirmities pointed at by the Court of such nature which can be cured by remitting the matter before the prescribed authority. Non recording of vital piece of evidence is not part of the procedure, but related to the merits of the case and once inquiry has been concluded and it is found that the charges are not proved, then it would not be fair to the delinquent to remand the matter for recording further evidence which may have been available but not recorded. Wherever there is violation of principles of natural justice, the rights of the delinquent to defend himself is violated and matter is remitted to the inquiry officer to provide full opportunity to the delinquent. No such right has been recognized or vests in prosecution to be given another chance to proceed afresh and be permitted to record further evidence which was not recorded previously and then to pass a fresh order of penalty against the person proceeded against. Once proceedings have been completed against the delinquent, then principal of double jeopardy would operate against remitting of the matter at the behest of the prosecution and therefore it would not appropriate to remit the matter for taking fresh evidence.

36. In light of the above discussion the order of termination of dealership as well as the appellate order are illegal and arbitrary and, as such, the orders dated 21.9.2020, 5.10.2021 and 7.4.2022 are set aside.

37. The respondents are directed to restore the retail outlet dealership of the petitioner forthwith.

38. The writ petition stands **allowed**.

(2023) 6 ILRA 461
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2023

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Writ-C No. 23238 of 2011

Smt. Sudha Devi ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava, Sri Abhay Raj Yadav

Counsel for the Respondents:
A.S.G.I., Sri Devi Shanker Shukla, S.C., Sri Tarun Verma, Sri Yogendra Kumar Yadav

Civil Law - Selection of Kisan Sewa Kendra Dealer (Retail Outlet) – Guidelines of the Indian Oil Corporation Ltd regarding the allotment of retail outlets – Petitioner filed consent affidavits of co-sharers in Plot No. 370/1 after the submission of the application form. Indian Oil Corporation awarded zero marks to the petitioner for the potentiality of land. *Held*: As per the guidelines of the Indian Oil Corporation regarding the allotment of retail outlets, if the land is owned by the petitioner along with other persons and the share of the petitioner exceeds the requirement set by Indian Oil Corporation, then the petitioner was required to submit a registered agreement with the other co-sharers, showing their consent along with the demarcated part of his share. In instant case, the petitioner did not comply with the above requirements by failing to file the consent of the other co-sharers through a registered agreement at the time of submitting the application form, nor at the time of the interview held on 12.11.2010. Required documents should have been filed by the last date of submitting the application form. Any documents filed later cannot be considered. Therefore, the affidavit of the co-owners regarding consent, filed after the submission of the application, cannot be taken into consideration. Failure to award marks for the potentiality of land (capacity to provide infrastructure and facilities) to the petitioner cannot be considered erroneous. (Para 14, 16)

Dismissed. (E-5)

List of Cases cited:

1. Saurav Mittal Vs Indian Oil Corporation Ltd. & ors. – Writ C No. 54357 of 2013

2. Smt. Sangeeta Gupta Vs U.,O.I. & ors. – 2009 (7) ADJ 534 (DB)

3. Madhu Singh Vs U.O.I. & ors. – 2013 ADJ Online 0398

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

1. Heard Sri Arvind Srivastava, learned counsel for the petitioner, Sri Anant Kumar Tiwari, learned counsel for respondent no.1-Union of India and Sri Devi Shanker Shukla, learned counsel for respondent nos.2, 3 and 4.

2. Present petition has been filed by the petitioner initially challenging the result dated 12.11.2010 regarding selection of Kisan Sewa Kendra Dealer (retail outlet) at Rampuriya Awwal in District-Chitrakoot. Subsequently, petition was amended and order dated 11.04.2011 passed by General

Manager, Indian Oil Corporation Ltd., Lucknow, was also challenged, by which, representation of the petitioner was rejected regarding non-awarding of any marks for capability to provide infrastructure (land) as well as issuance of resident certificate to respondent no.5.

3. Factual matrix of the present case is that Indian Oil Corporation Ltd. (respondent no.2) has issued advertisement dated 18.08.2010, inviting application form for the selection of Kisan Sewa Kendra Dealer at Rampuriya Awwal in District-Chitrakoot. In pursuance of the above advertisement, the petitioner has also submitted, application form alongwith other documents. The petitioner has also offered land for the proposed site in Plot No.370/1 M. In support of proof of availability of land, the petitioner has submitted, Khatauni of Plot No.370/1 as well as copy of sale deed dated 26.12.2007 showing purchase of 1/3rd share in Plot No.370/1. The petitioner also submitted, consent of her husband who was also co-sharer in Plot No.370/1. The Khatauni submitted by the petitioner shows that Plot No.370/1 is also co-shared by other persons including husband of the petitioner.

4. Thereafter, a complaint was received against the petitioner regarding the potentiality of her land. Thereafter, investigation was conducted regarding the potentiality of land of the petitioner. In the investigation report, it was found that the plot submitted by the petitioner was also owned by several persons including husband of the petitioner and consent of other co-sharer was not submitted alongwith the application form but submitted only after completion of interview.

5. Interview for the aforesaid selection was held on 12.11.2010 and result was declared on 12.11.2010 in which following candidates were declared qualified :

(i) Smt. Kiran Tripathi (respondent no.5);
(ii) Deepshikha Mishra and;
(iii) Sudha Devi (petitioner).

6. Result dated 12.11.2010, shows that petitioner was awarded zero marks. Therefore, that result dated 12.11.2010 was challenged by the petitioner. Against that result, petitioner submitted a representation dated 22.11.2010. In that representation petitioner not only challenged the result dated 12.11.2010 but also challenged the resident certificate issued to respondent no.5 on the ground that respondent no.5 is not resident of District-Chitrakoot. The above representation was rejected during pendency of the present petition, by order dated 11.04.2011.

7. Learned counsel for the petitioner submits that plot no.370/1 was initially owned by three co-sharer namely, Sidh Gopal, Sri Jageshwar Prasad and Sri Kesan Prasad. Petitioner has purchased 1/3rd share of Sidh Gopal and constructed a boundary over it and husband of the petitioner Ashok Kumar had purchased area 9.5 biswa out of the share of Sri Jageshwar Prasad and remaining 6 biswa was purchased by Sri Bhupendra and share of Kesan Prasad was purchased by Maya Devi, Raj Shree and Meena. As the petitioner had purchased entire share of Sidh Pal which was clearly demarcated, therefore, there was no need to file consent of other co-sharers. Learned counsel for the petitioner further submits that the impugned order dated 11.04.2011 is erroneous and arbitrary because even otherwise he had filed consent of her

husband who is co-sharer in Plot No.370/1 and, thereafter, consent of other co-sharers were filed immediately after conclusion of interview. It is further submitted that as per the relevant guidelines of Indian Oil Corporation where the share of the petitioner is more than required, then there is no need to submit any consent of other co-sharers.

8. In support of his contention, learned counsel for the petitioner has relied upon the judgment passed in **Writ C No.54357 of 2013 (Saurav Mittal vs Indian Oil Corporation Ltd. and 2 Others).** Learned counsel for the petitioner also submitted that the order dated 04.02.2011 of ADM Mau who restored the resident certificate of respondent no.5 which was previously cancelled by order dated 15.12.2010 is also incorrect because respondent no.5 is not the resident of District-Chitrakoot because after the marriage she shifted Lucknow alongwith her husband.

9. Learned counsel for the petitioner lastly submits that Indian Oil Corporation who has awarded the zero marks to the petitioner for the potentiality of land though he had offered specific portion of the land which was more than required and *halka* Lekhpal also stated in his report that the land of the petitioner was surrounded by a boundary wall.

10. On the other hand, learned counsel for the respondents submit that impugned orders are absolutely correct and the petitioner did not submit consent of other co-sharers, therefore, she is not entitled to award any marks for the potentiality of land and also domicile certificate issued by the SDM is valid as the same was issued on the basis of proper enquiry report.

11. Guidelines of the Indian Oil Corporation Ltd. annexed at page no.11 of the rejoinder affidavit of the petitioner prescribes that if the petitioner is joint owner of any land with other persons then petitioner has to submit registered agreement of other co-sharer alongwith demarcation of her land. Relevant extract of guidelines of Indian Oil Corporation is being quoted below :

"(ख) भूमि का "पक्का प्रस्ताव (Firm offer of land):

यदि आवेदक के पास स्व-स्वामित्व अथवा "पारिवारिक" सदस्यों के सह-स्वामित्व वाली भूमि उपलब्ध न हो, तो उसके पास अन्य व्यक्तियों के स्वामित्व वाली भूमि प्रस्तावित करने का विकल्प भी है। ऐसी परिस्थिति में आवेदक को भू-स्वामी/स्वामियों का पंजीकृत अनुबन्ध प्रस्तुत करना होगा।

नोटः- यदि उपरोक्त आधार पर आवेदक का चयन कर लिया जाता है तथा वह आवेदन में उल्लिखित भूमि लेटर ऑफ इन्टेन्ट की तिथि से दो माह के अन्दर उपलब्ध नहीं करा पाता है तो आईओसी के पास आवेदक को प्रदान किये गये डीलरशिप का आवंटन निरस्त करने का अधिकार होगा। भूमि की उपयुक्तता का निर्णय आईओसी द्वारा लिया जायेगा। ऐसी स्थिति में आवेदक से क्रय की गई/लम्बी लीज पर अर्जित भूमि हेतु ढाँचागत सुविधायें आईओसी द्वारा अपने व्यय पर उपलब्ध कराई जायेंगी। तथापि आवेदक द्वारा प्रस्तावित भूमि को स्वीकार करने को आईओसी किसी प्रकार प्रतिबद्ध नहीं होगा।

प्रस्तावित भूमि हेतु अभिलेखः

(ग) आवेदक को (भू-स्वामित्व सम्बन्धी) निम्न में से कोई एक अभिलेख जो विज्ञापन की तिथि के पश्चात निर्गत/नवीनीकृत किया गया हो, प्रस्तुत करना अनिवार्य हैः (i) खसरा/खतौनी अथवा कोई अन्य समकक्ष राजस्व अभिलेख अथवा भूमि का स्वामित्व प्रमाणित करने हेतु राजस्व अधिकारी द्वारा निर्गत प्रमाण-पत्र। (ii) आवेदक के पक्ष में पंजीकृत सेल डीड/पंजीकृत लीज डीड (आवेदन की तिथि पर न्यूनतम अवधि 19 वर्ष 11माह) अथवा स्वामित्व हस्तान्तरित करने हेतु कोई अन्य स्थानान्तरण डीड/अभिलेख।

(घ) प्रस्तावित भूमि के स्वामित्व हेतु सरकारी/अर्ध-सरकारी, स्वायत्त संस्थायें जैसेः LDA, KDA, DDA, आदि द्वारा निर्गत लीज एग्रीमेन्ट/आवंटन पत्र स्वीकार्य होगें।

(ङ) उपरोक्त बिन्दु (ग) से (ङ) में उल्लिखित अभिलेखों के अतिरिक्त, निम्न अभिलेख, जो लागू होते हों, संलग्न करें:

क्रम सं.	*स्वामित्व की स्थिति*	*भूमि में आवेदक का अंश*	*वांछित आवश्यक अभिलेख (भू-स्वामित्व/ राजस्व अभिलेख के अतिरिक्त)*	*आंकलन स्तर*
1.	*स्वयं*	*सम्पूर्ण*	*कोई नहीं*	*स्वामित्व की भूमि*
2.	*केवल "पारिवारिक" सदस्यों द्वारा*	*कुछ नहीं*	*आवेदक के पक्ष में समस्त स्वामियों का नोटरीकृत शपथ-पत्र*	*स्वामित्व की भूमि*
3.	*स्वयं एवं केवल "पारिवारिक" सदस्यों के साथ संयुक्त*	*अांशिक*	*आवेदक के पक्ष में समस्त सह-स्वामियों का नोटरीकृत शपथ-पत्र*	*स्वामित्व की भूमि*
4.	*स्वयं एवं अन्य के साथ संयुक्त*	*आवेदक का अंश आईओसी द्वारा वांछित अंश से अधिक*	*भूमि का भाग (demarcation) दर्शाते हुए पंजीकृत अनुबन्ध (भूमि का वह भाग जो आवेदक द्वारा डीलरशिप हेतु प्रस्तावित है।*	*स्वामित्व की भूमि*
5.	*स्वयं एवं अन्य के साथ संयुक्त*	*आवेदक का अंश आईओसी द्वारा वांछित भूमि से अधिक*	*भूमि का भाग दर्शाये बिना पंजीकृत अनुबन्ध (भूमि का वह भाग जो आवेदक द्वारा डीलरशिप हेतु प्रस्तावित है)*	*पक्का प्रस्ताव*

12. Secondly, for getting resident certificate, petitioner should be permanent resident or ordinary resident, this has not been mentioned in the guidelines or advertisement.

13. From perusal of record, it appears that in Plot No.370/1 there were three co-sharers namely, Sidh Gopal, Sri Jageshwar Prasad and Sri Kesan Prasad and each was having 1/3rd share and there were no partition in Plot No.370/1 and all the three persons were joint owner of the above land. Petitioner purchased 1/3rd share of Sidh Gopal and her husband also purchased part of the share of another co-sharer Sri Jageshwar Prasad, therefore, petitioner has become co-sharer in Plot No.370/1 with other co-sharer including her husband. But at the time of submitting the application form for retail outlet, petitioner has submitted the consent of her husband and consent of other co-sharer was not submitted at the time of submitting the application form. As per the guidelines of Indian Oil Corporation regarding the allotment of retail outlet which was annexed by the petitioner herself at page 11 of her rejoinder affidavit specifically shows that if any land is owned by the petitioner along with other persons and share of the petitioner was more than required by Indian Oil Corporation then petitioner was required to submit registered agreement with other co-sharer showing their consent alongwith demarcated part of his share but in the present case petitioner has not complied the above direction by not filing consent of other co-sharers through registered agreement along with the application form, and even not at the time of interview which was held on 12.11.2010. The Division Bench of this Court in the case of **Smt. Sangeeta Gupta Vs. Union of India & Others 2009 (7) ADJ 534 (DB)** observed that required document should be filed on the last date of submission of application form. Any document filed subsequently cannot be taken into consideration. Paragraph no.21 of the above judgement is being quoted as below :

"21. From perusal of the facts as narrated above, it is clear that in terms of the advertisement dated 11.10.2014, an application form was submitted by the petitioner for grant of retail outlet dealership. Since certain discrepancies were found in the application form submitted by the petitioner a letter dated 26.5.2016 was written by the respondent No. 3 to the petitioner. A reply dated 4.6.2016 was submitted by the petitioner stating therein that the discrepancies were duly removed. After the aforesaid letter was received in the office of the respondent corporation, the corporation rejected the same vide its order dated 9.7.2016 on the ground that Clause 4 (Vi) (kha) of the guidelines were not fulfilled by the petitioner. It reveals from perusal of the records that while submitting the application form the petitioner has submitted certain papers and documents. Two short comings were pointed out in the application form of the petitioner namely khasra/khatauni number is not mentioned in the lease deed and lease agreement does not contain any sub lease clause. After the aforesaid letter was received by the petitioner he submitted a representation. Along-with representation petitioner appended the correction dated 4.6.2016 making corrections in the lease deed dated 31.10.2014. By the aforesaid corrections the petitioner had sought correction in the lease deed dated 31.10.2014 to the effect that Plot No. 202 was sought to be mentioned and for the first time provision of sub lease in favour of the respondent corporation was also mentioned. The petitioner tried to remove the discrepancies as pointed out by the corporation vide letter dated 26.5.2016. Apart from the original lessor of the land two other persons namely Jaiveer and Havaldar were also co-sharers in the land. The aforesaid fact was not disclosed at any point of time by the petitioner or by Smt. Munni Devi before respondent corporation. ***No consent letters of the aforesaid co-sharers were submitted by the petitioner along-with his application form.*** *Apart from the same corrections, which were made by the petitioner in the correction deed were also not liable to be taken into consideration by the respondent corporation due to the fact that these corrections are not permissible after submission of the application form."*

14. Similarly, Division Bench of this Court in the case of **Madhu Singh Vs. Union of India & Others 2013 ADJ Online 0398** clearly observed that affidavit of co-owners regarding consent filed after the submission of application cannot be taken into consideration. Therefore, awarding of zero marks under category of capability to provide infrastructure and facility is correct. Relevant part of the said judgment is being quoted as below :

"As the land mentioned in the application of the petitioner belongs to the father of the petitioner with certain other third persons and the petitioner has no share in the said land, the case of the petitioner would not fall under any of the Item nos. 1 to 6 mentioned in the Table below sub-clause (e) of Clause 14 of the Brochure. Consequently, the case of the petitioner would fall under Item no. 7 of the said Table. The petitioner was, therefore, required to submit registered agreement with the co-owners of the said land mentioned in her application. No such registered agreement was filed by the petitioner along with her application. Therefore, the award of "zero" marks to the petitioner in the category "capability to provide infrastructure and facility" cannot

be said to suffer from any illegality or infirmity.

There is one more aspect of the matter. As is evident from the narration of the facts above, the petitioner did not file any affidavit of the co-owners of the land mentioned in her application along with her application. It is only after the result of the selection was declared on 18th April, 2012 that the petitioner along with her representation filed certain Affidavits.

As noted above, sub-clause (e) of Clause 10 of the Brochure requires that the Originals of the Affidavits should be submitted along with the application. Sub-clause (h) of Clause 10 imposes clear prohibition on acceptance or consideration of any additional documents after the cut-off date of the application."

15. Judgement of **Saurav Mittal vs Indian Oil Corporation Ltd. (supra)** relied upon by the petitioner is not applicable in the present case because from the fact of the relied judgement, it is clear that the land was purchased from exclusive owner of the land, which he himself demarcated and specified the portion sold to the person concerned but in the present case petitioner had purchased 1/3rd share of Sidh Gopal who was not owner of exclusive part in Plot No.370/1 but he was co-sharer with other two persons namely, Sri Jageshwar Prasad and Sri Kesan Prasad.

16. In view of the above, it is clear that the petitioner filed the consent affidavits of co-sharers in plot no.370/1 after the submission of application form. Therefore, the same were rightly not considered. Therefore, not awarding marks for potentiality of land (capacity to provide infrastructure and facility) to petitioner cannot be said to be erroneous.

17. So far as the issue regarding domicile certificate of respondent no.5 is concerned, by order dated 04.02.2011, the same cannot also be faulted because the same was passed on the basis of available evidence before him regarding ordinary residence of respondent no.5 at her parental house in District-Chitrakoot.

18. In view of the above facts, there is no illegality in the impugned orders dated 12.11.2010, 11.04.2011 and 04.02.2011, therefore, the petition is **dismissed**.

19. No order as to costs.

(2023) 6 ILRA 466
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2023

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Writ-C No. 32728 of 2000

Smt. Ram Pyari Devi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri H.N. Singh, Sri B.N. Singh, Sri Shyamal Narayan

Counsel for the Respondents:
C.S.C., Sri A.K. Singh, Sri G.K. Singh, Harshita Raghuvanshi, Sri R.N. Singh, Sri Sri Nath Dwivedi, Sri Ravi Kant (Sr. Advocate), Sri Gajendra Pratap (Sr. Advocate)

A. Civil Law – Nazul Land – Freehold Right. St. Government issued Government Order dated 1.12.1998. As per Para 10 of

the Government Order dated 1.12.1998, former leaseholders (*पूर्व पट्टा धारक*) were given the right to apply for freehold within three months from the date of receiving the notice. In case they failed to freehold the nazul plot, rent control tenants residing in buildings on nazul land would get the right to apply for freehold. *Issue*: Whether the petitioners come within the definition of *पूर्व पट्टा धारक* as mentioned in Paragraph 10 of the Government Order dated 1.12.1998, despite the fact that the renewal application of the petitioners as well as their ancestor was rejected. *Held:* There is no distinction in the Government Order dated 1.12.1998 between *पूर्व पट्टा धारक* whose renewal application was rejected and those whose renewal application is pending. If former leaseholders are read as only those whose renewal application is still pending and has not been rejected, it would amount to reading words into the enactment.

B. Civil Law – Freehold Rights - Freehold rights under the policy of the Government are granted only for plots that are on lease and have not vested in the Government. No freehold rights can be granted by the Government for a plot that absolutely vests in it, free from all encumbrances. (Para 14)

C. Constitutional Law – Article 226 – Maintainability - Sale deed executed by St. authorities – Held: A sale deed executed by St. authorities in favor of a private respondent is subject to the same scrutiny as any other act of the St. authorities. Judicial review of St. action is permissible even in contractual matters. Action of the St. in executing the said sale deed is to be judged on grounds of jurisdiction, non-arbitrariness, and non-discrimination. It is settled law that the power of a High Court under Article 226 of the Constitution of India is plenary and is not fettered by legal constraints. The power under Article 226 ensures that the law of the land is implicitly obeyed and that various public authorities and tribunals act within the limits of their respective jurisdictions. The remedy provided under Article 226 addresses violations of rights of citizens by the St. or statutory authority and is a remedy in public law. (Para

D. Interpretation - Courts cannot add, substitute, or reject any word in the enactment/legislation. A construction of an enactment that requires the addition or substitution of words, or which results in the rejection of words as meaningless, has to be avoided. It is contrary to all rules of construction to read words into an Act unless absolutely necessary. It is a well-settled principle in law that courts cannot read anything into a statutory provision that is plain and unambiguous. (Para 12)

E. In the present case, petitioners submitted application for freehold of the nazul land. Despite this, no demand notice was issued to them for executing the freehold deed for the residential part of Plot No. 103. Instead, respondent no. 4, the rent control tenant, was given the first right to execute the freehold deed for the plot in dispute through the issuance of an impugned demand notice. During the pendency of the petition, an impugned sale deed was executed in favor of respondent no. 4 by the District Magistrate, Gorakhpur. Respondent no. 4 was the tenant of the petitioners. Therefore, possession of respondent no. 4 will be deemed constructive possession of the petitioners or possession on behalf of the petitioners. Respondent no. 4 cannot claim better rights than the petitioners regarding the freehold of the nazul plot. The demand notice dated 24.7.2000 and the sale deed dated 26.7.2000 executed by the District Magistrate, Gorakhpur, in favor of respondent no. 4 was quashed. Respondent no. 2 was directed to consider the petitioners' application for the residential portion of Plot No. 103, Bungalow No. 07, Gorakhpur, having an area of 50,995 sq. ft., and issue a demand notice to the petitioners to fulfill the

formalities to execute the sale deed for the aforesaid nazul plot.

Allowed. (E-5)

List of Cases cited:

1. Maulavi Hussein Haji Abraham Umarji Vs St. of Guj. & anr., 2004 (6) SCC 672

2. Union of India & anr. Vs Deoki Nandan Aggarwal, 1992 Supp (1) SCC 32

3. Common Cause, A Registered Society Vs U.O.I. & ors., 1999 (6) SCC 667

4. Mohammed Hanif Vs The St. of Assam, 1969 (2) SCC 782

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

1. Heard Sri Shyamal Narayan, the counsel for the petitioners, Sri Ravi Kant Senior Advocate along with Sri Gajendra Pratap, Senior Advocate assisted by Sri Sri Nath Dwivedi, the counsel for respondent no. 4 and Sri Sudhanshu Srivastava, the Additional Chief Standing Counsel for the State-respondent.

2. By way of present writ petition, the writ petitioners have challenged the demand notice dated 24.7.2000 issued by the District Magistrate, Gorakhpur to respondent no. 4 to initiate the proceeding of freehold land of area 43,000 sq. ft. in Nazul Plot No. 103, Mohalla Arazi Chhawani City Gorakhpur. Subsequently, during the pendency of present writ petition, Prayer no. 1A was also added for quashing the sale deed / freehold deed dated 26.7.2000 executed by the District Magistrate, Gorakhpur in favour of respondent no. 4.

3. The factual matrix of the present case is as follows : -

The ancestor of the petitioners - late Madan Lal Tekariwal was granted lease of Bungalow No. 07, Gorakhpur (subsequently which was re-numbered as Plot No. 103) which was having total area 66,795 sq. ft. by way of two lease deeds dated 1.11.1954 and another dated 3.12.1954. As per the terms and conditions of above lease deeds, lessee Sri Madan Lal Tekariwal had to construct residential building to let out the same to government officers. The above lease deed was for a period of 30 years which could be renewed upto a maximum period of 90 days. It was further mentioned in the terms and conditions of lease that the lessee shall let out the building exclusively for the residence of gazetted officer on rent and it shall not be occupied by him. After expiry of period on 30.4.1975, the lessee - Madan Lal Tekariwal also filed an application dated 8.7.1975 before the District Magistrate for renewal of his lease which remained pending till his death. After the death of lessee - Madan Lal Tekariwal, the petitioners being his successors moved an application dated 9.8.1977 for mutation of their name as heirs of late Madan Lal Tekariwal and also prayed that lease may be renewed in their favour. The above application of the petitioners was forwarded by the District Magistrate to In-charge, Nazul Nagar Palika, Gorakhpur for taking further action. The In-charge, Nazul Nagar Palika, Gorakhpur by letter dated 25.10.1977 informed the District Magistrate that the proceeding for re-vesting the land in question has been pending against lessee - Madan Lal Tekariwal, therefore, the names of the petitioners cannot be mutated as the heirs of Madan Lal Tekariwal and notice has been issued to the petitioners for the same, therefore, the question of renewal does not arise. But subsequently, there is no order on

record that any order was passed on the application dated 7.10.1977 of the petitioners by the District Magistrate. The District Magistrate allotted the building constructed over a part of the land in dispute to respondent no. 4 on 27.7.1982 under Act No. 13 of 1972 with the stipulation that respondent no. 4 will pay the rent to lessee - Banwari Lal (petitioner no. 2). It is relevant to mention here that at the time of aforesaid allotment, the respondent no. 4 was an M.L.A. Thereafter, two renewal applications submitted by the petitioners were rejected by orders dated 9.6.1985 and 7.7.1985 on the ground that the petitioners had violated the terms and conditions of lease by making construction thereon without permission and it was further directed by these two orders that the petitioners should remove the illegal constructions within a period of 30 days. In case, they failed to remove the construction, then they will be evicted from the land in dispute including the building situated over it. Thereafter, in the year 1989, proceedings under the Public Premises Act were also initiated against the petitioners for their eviction from the land in dispute which remained pending. Thereafter, the State Government issued Government Order dated 1.12.1998. As per Para 10 of the Government Order dated 1.12.1998, former lease holders (पूर्व पट्टा धारक) were also given right to apply for freehold within three months from the date of receiving the notice, and in case, they failed to freehold the nazul plot, then rent control tenants residing in the building over nazul land, would get the right to apply for freehold. In pursuance of above Government Order, the petitioners had submitted two applications, one for commercial portion of land having area 15,800 sq. ft. and another for residential portion of land having area 50,995 sq. ft. along with treasury challan of required deposit. The State has executed freehold sale deed dated 20.3.1999 in favour of petitioners regarding commercial part of Plot No. 103 having area 15,800 sq. ft. but no action was taken on the application dated 27.1.1999 of the petitioners for freehold of the residential portion of Nazul Plot No. 103. But the District Magistrate, Gorakhpur had issued impugned notice / letter dated 24.7.2000 to respondent no. 4 to deposit required amount for execution of freehold deed in his favour regarding area of 43,000 sq. ft. in Plot No. 103 which was residential portion in the above land. This demand notice was under challenge, in the present writ petition but during the pendency of present writ petition, sale deed / freehold deed dated 26.7.2000 was also executed in favour of respondent no. 4 after taking required deposit from him. Therefore, petitioners, by way of amendment, have also prayed for quashing of sale deed / freehold deed dated 26.7.2000 regarding the land of 43,000 sq. ft. in Plot No. 103.

4. The petitioners have contended that the Government Order dated 1.12.1998 clearly conferred right upon the lease holder whose lease expired to apply and get the freehold deed executed in their favour within three months from the date of receiving the demand notice and his tenant (respondent no. 4) will get right only after the petitioners failed to get the freehold deed executed in their favour but the impugned demand notice was illegally issued to respondent no. 4 who was a tenant of the petitioners and thereafter impugned sale deed was also executed in his favour. It is also submitted by the petitioners that the right of the respondent no. 4 comes after the petitioners, not in preference to petitioners. As respondent no. 4 is

admittedly the tenant in the building constructed by the ancestor of the petitioners and he had been paying rent to them, therefore, impugned demand notice as well as impugned sale deed / freehold deed executed in favour of respondent no. 4 are absolutely illegal. The counsel for the petitioners further relied upon query no. 11 and its answer of Government Order dated 1.12.1998 which specifically provides that if there is rent control tenant in the building over the nazul land then former patta holder is entitled to get the freehold deed executed in his favour within 90 days and, in case, he fails only then tenant will get right to get freehold deed executed in his favour. It is further submitted by the counsel for the petitioners that impugned demand notice as well as impugned sale deed / freehold deed was executed in favour of respondent no. 4 for extraneous consideration because respondent no. 4 was a Cabinet Minister at that time and was himself part of the Nazul Committee which framed the nazul policy in the year 1998. In support of his contention, the counsel for the petitioners also placed before the Court a copy of resolution dated 16.10.1998 of sub-committee of the Council of Minister which framed nazul policy in which the respondent no. 4 being Cabinet Minister was also shown as a Member. The counsel for the petitioners also produced before the Court, copy of freehold application dated 30.1.1999 of the respondent no. 4. This application was submitted by respondent no. 4 in the capacity of rent control tenant and not in any independent capacity.

5. Per contra, the counsel for respondent no. 4 submitted that lease of the petitioner expired on 30.4.1975 and their renewal application was also rejected in the year 1985 and this rejection order was not challenged by the petitioners, therefore, became final and land absolutely vested in the State. Therefore, the petitioners have no right to get sale deed / freehold deed of the land in dispute executed in their favour because he cannot be considered as पूर्व पट्टा धारकas per Government Order dated 1.12.1998. The counsel for respondent no. 4 further submitted that petitioners are unauthorized occupant as per Section 2(g) of U.P. Public Premises Act because their renewal application was already rejected, therefore, being unauthorized occupant, no right can be conferred upon them to get the freehold deed executed in their favour regarding the nazul land in dispute. It was also submitted by the counsel for respondent no. 4 that notice was issued to the petitioners as well as their ancestor for making illegal construction in the land in dispute, therefore, being violator of terms and conditions of lease, equity does not lie in their favour. After expiry of period of lease, State has rejected the renewal application of the petitioners, therefore, entire rights have remitted back to the State and being owner of nazul land, State Government rightly executed freehold deed in favour of respondent no. 4.

6. The learned Standing Counsel contended that the petitioners while filing the present petition, they had concealed the material fact regarding the rejection of their renewal application for the land in dispute. It was also submitted that the opportunity as required in query no. 11 of the Government Order dated 1.12.1998 was given to petitioners in 1976 by giving them notice for eviction from nazul plot for making construction in violation of terms and conditions of lease. Therefore, fresh notice as per Government Order dated 1.12.1998 is not required. It was also submitted by the Standing Counsel that the notices dated 9.6.1985 and 7.7.1985 were

also given to petitioners for rejecting their renewal application for the lease of nazul land and also for their eviction but petitioners had failed to comply the same, therefore, the petitioners are unauthorized occupant. It is also submitted by the Standing Counsel that sale deed cannot be cancelled in writ jurisdiction and the remedy lies before the civil court, therefore, on this ground itself, the writ petition deserves to be dismissed. It was further submitted by the Standing Counsel that the petitioners are neither in *de jure* nor *de facto* possession over the land in dispute and after rejection of the renewal application, land absolutely vested in the State and notice of the same was also given by the State to petitioners in the year 1985 and after the notice dated 19.6.1985, *de jure* possession was taken by the State, therefore, petitioners cannot be treated in possession. Hence, in view of query no. 11 of Government Order dated 1.12.1998, petitioners are not entitled to get the freehold deed executed because they were not in possession and respondent no. 4, being the statutory tenant, has right to get the freehold deed executed in his favour. Therefore, impugned demand notice as well as sale deed in favour of respondent no. 4 are absolutely correct and justified.

7. In reply to the contention of respondent no. 4, the counsel for petitioners submitted that respondent no. 4 himself was co-author of the policy including right of tenant or unauthorized occupants, therefore, impugned orders are nothing but colourable exercise just to grant undue benefit to respondent no. 4 in the garb of Government Order dated 1.12.1998 by misinterpreting the same. It was also submitted that respondent no. 4, who got the right as tenant from petitioners, cannot be conferred right to get the sale deed executed depriving the petitioners, who are admittedly his landlord. This fact cannot be disputed that the entire lease rent for the entire land of Plot No. 103 was deposited by the petitioners till the date of filing application for freehold as per Government Order dated 1.12.1998. But the State Government executed the freehold deed in favour of petitioners only for commercial part of Plot No. 103 and freehold deed of remaining residential part of Plot No. 103 was arbitrary and illegally executed in favour of respondent no. 4 and noting which was the basis of issuing the impugned demand notice in favour of respondent no. 4 itself shows that freehold deed regarding residential part of Plot No. 103 was executed in favour of respondent no. 4 only on the ground that tenant of the petitioners, i.e., respondent no. 4 cannot be evicted because there is a stay order in his favour in the rent control proceeding. It was also submitted by the counsel for petitioners that notice given to the petitioners in the year 1985 cannot be referable to Para 10 of Government Order dated 1.12.1998. Even otherwise, despite the above notice, commercial part of the land of Plot No. 103 was already freehold in favour of the petitioners. It was lastly submitted in his reply by the counsel for petitioners that Government Order dated 1.12.1998 did not make any distinction between former lease holder (पूर्व पट्टा धारक) whose renewal application is pending and whose renewal application has been rejected.

8. After considering the submission of counsel for the parties as well as on perusal of records, sole question arises for determination is whether the petitioners come within the definition of पूर्व पट्टा धारक as mentioned in Paragraph 10 of Government Order dated 1.12.1998 despite the fact that

renewal application of the petitioners as well as their ancestor Madan Lal Tekariwal was rejected. For determination of this question, Paragraph 10 of the Government Order dated 1.12.1998 is being quoted as below : -

"10. पट्टागत नजूल भूमि पर स्थित भवन के रेन्ट कन्ट्रोल के किराएदारों के पक्ष में नजूल भूमि फ्री होल्ड किए जाने हेतु निम्नानुसार व्यवस्था की गई है:-

यदि पट्टे की अवधि समाप्त हो गई हो अथवा किसी उल्लघंन के कारण राज्य सरकार को उक्त भूमि पर पुनः प्रवेश का अधिकार प्राप्त हो गया है तो फ्री होल्ड के लिए पूर्व पट्टाधारकों को अनिवार्य रूप से फ्री होल्ड कराने हेतु 3 माह की समय सीमा निर्धारित करते हुए समयबद्ध नोटिस दिया जाएगा (उसके द्वारा आवेदन किए जाने के समय जो भी सर्किल रेट लागू होगा, उसी के आधार पर फ्री होल्ड मूल्य आंकलित होगा। उदाहरणार्थ यदि इस शासनादेश से 2 माह के भीतर आवेदन करता है तो 30.11.91 के सर्किल रेट लागू होगें)। यदि वह उक्त निर्धारित अवधि में फ्री होल्ड नहीं कराता है तो पट्टा विखंडित करने की कार्यवाही नियमानुसार पूर्ण कर रेन्ट कन्ट्रोल के किरायेदार के पक्ष में फ्री होल्ड की कार्यवाही की जायेगी और वह किरायेदार सम्बन्धित भवन का डिप्रीसिएटेड मूल्य भूस्वामी/पट्टेदार को उपलब्ध करायेगा। किरायेदार के पक्ष में अद्यतन सर्किल रेट पर फ्री होल्ड की कार्यवाही की जायेगी जहाँ एक ही पट्टागत भूखण्ड पर एक से अधिक रेण्ट कन्ट्रोल एक्ट के अन्तर्गत आवंटी अध्यासित है वहाँ उन सभी आवंटियों के द्वारा दिये जा रहे किराये के अनुपात में उन सभी की परस्पर सहमति से सम्बन्धित भूखण्ड के उनके बीच विभाजन सम्बन्धी शपथ पत्र प्राप्त कर ही फ्री होल्ड की कार्यवाही की जायेगी।

इस सम्बन्ध में मुझे यह भी कहने का निर्देश हुआ है कि उपरोक्त संशोधन एवं परिवर्धन को तात्कालिक प्रभाव से लागू करते हुए कार्यवाही की जाय तथा नीति का विस्तृत प्रचार एवं प्रसार किया जाये जिससे इसमें निहित प्राविधान सम्बन्धित पक्ष भली-भांति समझकर इसका लाभ उठा सकें।

फ्री होल्ड की समस्त कार्यवाही मा० उच्च न्यायालय में दायर रिट याचिका संख्या:32605/91 सत्य नारायण कपूर बनाम राज्य सरकार आदि में पारित निर्णय दिनांक 15.10.97 के विरूद्ध उ०प्र० सरकार द्वारा मा० उच्चतम न्यायालय में दायर विशेष अनुज्ञा याचिका संख्या:1557-59/98 में पारित होने वाले अन्तिम निर्णय के अधीन होगी।

ये आदेश वित्त विभाग के अशासकीय संख्याः ई-6-2286/दस-98 दिनांक 28.11.98 में प्राप्त उनकी सहमति से जारी किये जा रहे है।

भवदीय,
अतुल कुमार गुप्ता
सचिव"

9. For determination of above mentioned question, Query No. 11 and answer thereto in Government Order dated 1.12.1998 is also required to be considered and same is also quoted as below : -

"11. जिज्ञासाः मेरे पास पट्टा था परन्तु पट्टावधि समाप्त होने के बाद अब मेरा कब्जा नहीं रहा, किसी अन्य का कब्जा है। क्या मै फ्रीहोल्ड करा सकता हूँ?

समाधानः जी नहीं। पट्टावधि समाप्त होने पर फ्रीहोल्ड की सुविधा तभी प्राप्त होगी जब आपका कब्जा भी हो। परन्तु यदि भूमि पर बने भवन में रेण्ट कण्ट्रोल का किरायेदार है तो आप 90 दिन में फ्रीहोल्ड करा लें अन्यथा यह अवसर किरायेदार को मिल जायेगा।"

10. From the perusal of relevant part of Government Order dated 1.12.1998 which are quoted as above, it is clear that there is no distinction in Government Order dated 1.12.1998 between पूर्व पट्टा धारक whose renewal application was rejected and whose renewal application is pending. In various judgments, the Hon'ble Supreme Court has observed that the Courts cannot add or substitute or reject any word in the enactment / legislation. In ***Maulavi Hussein Haji Abraham Umarji vs. State of Gujarat & Anr. 2004 (6) SCC 672,*** the Supreme Court observed that a construction of an enactment which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It was observed that it was well settled principle in law that court cannot read anything into a statutory provision which is plain and unambiguous. The observations of the Supreme Court in Paragraphs 16 and 17 of the aforesaid judgment are reproduced below : -

*"16. **It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous.** A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent.*

17. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the Legislature enacting it. (See Institute of Chartered Accountants of India v. Price Waterhouse). The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, ***a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided.*** *As observed in Crawford v. Spooner, courts cannot aid the legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See State of Gujarat v. Dilipbhai, Nathjibhai Patel).* ***It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so.*** *(See Stock v. Frank Jones (Tiptan) Ltd. Rules of interpretation do not permit courts to do so, unless the provision as it stands is meaningless or of doubtful meaning.* ***Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.*** *(Per Lord Loreburn L.C. in Vickers Sons and Maxim Ltd. v. Evans quoted in Jumma Masjid v. Kodimaniandra Deviah)."*

(emphasis added)

11. Previously also, the Supreme Court in ***Union of India & Anr. vs. Deoki Nandan Aggarwal 1992 Supp (1) 323*** has observed as follows : -

"14. We are at a loss to understand the reasoning of the learned Judges in reading down the provisions in paragraph 2 in force prior to November 1, 1986 as "more than five years" and as "more than four years" in the same paragraph for the period subsequent to November 1, 1986. ***It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous.*** *The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts.* ***The court cannot add words to a statute or read words into it which are not there.*** *Assuming there is a defect or an omission in the words used by the legislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities.Vide P.K. Unni v. Nirmala Industries, Mangilal v. Suganchand Rathi, Sri Ram Ram Narain Medhi v. State of Bombay, Hira Devi (Smt) v. District Board, Shahjahanpur, Nalinkhya Bysack v. Shyam Sunder Haldar, Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha, G. Narayanaswami v. G. Pannerselvam, N.S. Vardachari v. G. Vasantha Pai, Union of India v. Sankal Chand Himatlal Sheth and CST v. Auriaya Chamber of Commerce, Allahabad. Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme, will not also come under the principle of affirmative action adopted by courts some times in order to avoid discrimination. If we may*

say so, what the High Court has done in this case is a clear and naked usurpation of legislative power."

(emphasis added)

12. Accepting the interpretation of Clause 10 of the Government Order dated 1.12.1998 as pleaded by the respondents would amount to reading words in the enactment, i.e., former lease holders would be read as former lease holders whose renewal application is still pending and has not been rejected. We do not find anything in the Government Order dated 1.12.1998 which could persuade us to add such words in the enactment. There is no ambiguity or vagueness in Clause 10 of the Government Order dated 1.12.1998. Therefore, while interpreting Government Order dated 1.12.1998, distinction cannot be drawn by this Court between पूर्व पट्टा धारक whose renewal application has been rejected and whose application for renewal is pending in absence of any such distinction in Government Order dated 1.12.1998. This is also clear from the above quoted provision of Government Order dated 1.12.1998 that पूर्व पट्टा धारक (Former Lease Holder) will have first right to freehold, therefore, he is entitled to get three months' notice from the District Magistrate and if he fails to complete the formality of freehold, then his rent control tenant will be entitled to get the freehold deed executed in his favour. In the present case, despite application of the petitioners for freehold of the nazul land in dispute, demand notice for the residential part of Plot No. 103, was not issued to him to get the freehold deed executed. On the other hand, the respondent no. 4 who was the rent control tenant was given first right to get the freehold deed executed regarding the plot in dispute by issuing him impugned demand notice and thereafter during the pendency of present petition, impugned sale deed was executed in his favour by the District Magistrate, Gorakhpur.

13. The contention of the counsel for respondent no. 4 is that on expiry of lease of plot in dispute, the same vested in the State absolutely. Therefore, the State Government was well within its power to execute the freehold deed in favour of respondent no. 4 ignoring Government Order dated 1.12.1998, cannot be accepted because action of the State Government should be as per the Government Policy regarding nazul plot, i.e., Government Order dated 1.12.1998. This fact is undisputed that respondent no. 4 was the tenant of petitioners, therefore, possession of respondent no. 4 will be deemed to be constructive possession of petitioners or possession on behalf of petitioners. The respondent no. 4 cannot get better right than the petitioners regarding freehold of nazul plot. On the one hand, the State Government itself executed freehold deed / sale deed of part of the land in Plot No. 103 and denied the same regarding other part by issuing demand notice to rent control tenant contrary to Government Order dated 1.12.1998 and thereafter executed sale deed dated 26.7.2000 for remaining part of Plot No. 103 which is in dispute. This fact also shows arbitrariness on the part of the State Government.

14. The argument of the counsel for respondent no. 4 also suffers from a fallacy and is self-defeating. Freehold rights, under the policy of the Government are granted only on plots which are on lease and which have not vested in the Government. No freehold rights can be granted by the Government in a plot which absolutely vests in it free from all encumbrances. Thus, even if the argument of respondent no. 4 is accepted, the freehold deed

executed in his favour is illegal and contrary to law.

15. The argument of the counsel for the respondents that the petition under Article 226 of the Constitution of India is not maintainable as it involves adjudication of the validity of the sale deed dated 26.7.2000 and this Court under Article 226 of the Constitution of India cannot quash a sale deed is also not acceptable. The sale deed has been executed by the State authorities in favour of respondent no. 4 and is subject to the same scrutiny as any other act of the State authorities would be. Judicial review of state action is permissible even in contractual matters. Normally, a writ court does not exercise its prerogative jurisdiction under Article 226, in cases, where the validity of sale deeds executed by private parties are concerned in as much as adjudging the validity of the said sale deed would require oral and documentary evidence and assessment of evidence for which writ proceedings may not be the appropriate remedy. But in the present case, the sale deed, as noted earlier, has been executed by the State and the action of the State in executing the said sale deed is to be judged on grounds of jurisdiction and the principle of non-arbitrariness and non-discrimination. The issue regarding the validity of the sale deed, in the present case, does not raise any question of private law but raises questions of public law. No disputed questions of fact are involved and no evidence regarding execution of the sale deed is required in the case to adjudicate the validity of the said sale deed. The validity of sale deed is dependent on the validity of the demand notice issued in favour of respondent no. 4 and on the decision of this Court regarding the freehold rights of the petitioners in the land which right is claimed against the State. It is settled law that the power of a High Court under Article 226 of the Constitution of India are plenary powers and are not fatal by any legal constrains. (Reference may be made to ***Common Cause, A Registered Society vs. Union of India & Ors. 1999 (6) SCC 667)***. The power under Article 226 is to ensure that the law of the land is implicitly obeyed and that various public authorities and tribunals are kept within the limits of their respective jurisdiction. The remedy provided under Article 226 is a remedy against the violation of the rights of a citizen by the State or statutory authority and it is a remedy in public law. (Reference may be made to ***Mohammed Hanif vs. The State of Assam 1969 (2) SCC 782).*** In the present case, the petitioners have approached the court for enforcement of their rights against the State and raise issues relating to the powers and jurisdiction of the State authorities. In view of the aforesaid, the petition is maintainable and the argument of the counsel for the petitioners on that ground also stands rejected. In view of the above, demand notice dated 24.7.2000 executed by the District Magistrate, Gorakhpur as well as sale deed dated 26.7.2000 executed by the District Magistrate, Gorakhpur in favour of respondent no. 4 are, hereby, quashed and respondent no. 2 is directed to consider the application of the petitioners for residential portion of Plot No. 103 Bungalow No. 07, Gorakhpur having area of 50,995 sq. ft. and issue demand notice to the petitioners to fulfill the formalities to execute the sale deed for the aforesaid nazul plot and thereafter on completion of formalities of aforesaid demand notice, sale deed of the aforesaid nazul plot be executed in favour of petitioners.

16. With the aforesaid directions, the writ petition is ***disposed of.***

(2023) 6 ILRA 476
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Writ-C No. 36038 of 2022

Rajendra Bihari Lal ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anuj Srivastava, Sri Amit Negi, Sri Gopal Swaroop Chaturvedi (Sr. Advocate)

Counsel for the Respondents:
A.S.G.I., Sri Gopal Verma

Civil Law - Passport Act, 1967 - Section 6 - Refusal of passports - Criminal case pending As per the legislative mandate of Clauses (e), (f), and (g) of sub-Section (2) of Section 6 of the Passport Act, 1967, the passport authority shall refuse to issue a passport or travelling document for visiting any foreign country on the ground mentioned in Clauses (a) to (i). Opening words of sub-Section (2) of Section 6 are that *"subject to the other provisions of this Act."* therefore, the passport or travelling document may be issued by the passport authority if an applicant obtains permission from the concerned court where the criminal case is pending, in terms of Notification No. GSR 570(E).-I, dated 25.08.1993, issued by the Government. It is mandatory for an applicant to obtain permission from the court where the applicant is facing trial. (Para 11)

Dismissed. (E-5)

List of Cases cited:

1. Vangala Kasturi Rangacharyulu Vs Central Bureau of Investigation, Criminal Appeal No(s). 1342 of 2017, dated 27.09.2021

2. Abbas Hatimbhai Kagalwala Vs The State of Mah. & anr.., Writ Petition No. 384 of 2019, dated 23.08.2022

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Anish Kumar Gupta, J.)

1. Heard Shri Gopal Swaroop Chaturvedi, learned Senior Advocate assisted by Shri Amit Negi, learned counsel for the petitioner and Sri S.P. Singh, learned Additional Solicitor General of India assisted by Sri Gopal Verma, learned counsel for the respondent.

2. Briefly stated facts of the present case are that the petitioner has filed an application for renewal of his passport. Since no order was passed on his renewal application, therefore, the petitioner filed a Writ - C No. - 22637 of 2020 (Rajendra Bihari Lal Vs. Union Of India and another) which was disposed of by order dated 16.12.2020 directing the concerned Passport Authority to pass an order or in the event, order has already been passed then same be communicated. Thereafter, the respondent no.2 passed the impugned orders dated 06.06.2022 and 29.06.2022. By the impugned order dated 29.06.2022, the respondent no.2 has declined to issue passport to the petitioner on the ground of adverse police report based on several criminal cases registered against the petitioner but granted liberty to submit "no objection" of the concerned court to issue passport.

3. It has also been admitted before us by learned counsel for the petitioner that

after filing of the present writ petition seven more criminal cases have been registered against the petitioner.

4. Learned Additional Solicitor General states on instructions that at present 18 criminal cases are registered against the petitioner.

5. Learned counsel for the petitioner has heavily relied upon a judgment of Hon'ble Supreme Court in **Criminal Appeal No(s). 1342 of 2017 (Vangala Kasturi Rangacharyulu Vs. Central Bureau of Investigation) decided on 27.09.2021** and a judgment of Bombay High Court in **Writ Petition No.384 of 2019 (Abbas Hatimbhai Kagalwala Vs. The State of Maharashtra and Anr.) decided on 23.08.2022.**

6. We have carefully perused the judgment of Hon'ble Supreme Court in Criminal Appeal No(s). 1342 of 2017 (Vangala Kasturi Rangacharyulu Vs. Central Bureau of Investigation) decided on 27.09.2021 and we find that the appellant before Hon'ble Supreme Court was convicted in a Criminal Case and his appeal before the Hon'ble Supreme Court was pending in which an I.A. No.52346 of 2021 was filed seeking permission/direction for issuance of passport.

7. The judgment of Hon'ble Supreme Court in **Vangala Kasturi Rangacharyulu (supra)** passed on an I.A. No.52346 of 2021 is reproduced below :

"UPON hearing the counsel the Court made the following

O R D E R

IA 52346/2021 in Crl.A. No. 1343/2017

***The applicant was convicted** for offences punishable under Sections 120-B,420, 468, 471, 477 A of the Indian Penal Code read with Section 13 (2) read with Section 13 (1) of the Prevention of Corruption Act, 1988. **The appeal filed by him was dismissed by the High Court.** However, the sentence was reduced to a period of one year.*

The application for exemption from surrendering filed by the applicant was allowed. Leave was granted in the criminal appeal filed by the applicant on 12.07.2017. The appeal is pending consideration.

*In the meanwhile, **the applicant has filed this application for a direction to the respondent to give no objection for renewal of his passport** which expired on 12.11.2017. The applicant has contended that the application filed by him for renewal of passport was not considered. In spite of his repeated efforts, including filing of an application under the Right to Information Act, he was not informed the reason for non renewal of his passport. It is averred in the application filed for direction that the application was orally informed that the renewal of the passport was not being done due to the pendency of the criminal appeal in this Court.*

*Mr. J.K.Sud, learned Additional Solicitor General appearing for the respondent oppose the application and submitted that renewal of passport can be only after application obtains permission from the concerned trial court. **He referred to Section 6.2 of the Passport Act, 1967 and argued that the passport** authority has the power to refuse issuance of the passport in view of the pendency of the criminal appeal filed by him. **He submitted that sub-Section 6.2 (e) and (f) of the Passport Act, 1967 would be applicable to** this case and the applicant is not entitled to seek renewal*

passport without obtaining permission from the trial court.

Section 6.2 of the Passports Act, 1967 reads as follows:

x x x x x x x x x x

(2) Subject to the other provisions of this Act, the passport authority shall refuse to issue a passport or travel document for visiting any foreign country under clause (c) of sub-section (2) of section 5 on any one or more of the following grounds, and on no other ground, namely: -

(a) that the applicant is not a citizen of India.,

(b) that the applicant may, or is likely to, engage outside India in activities prejudicial to the sovereignty and integrity of India.,

(c) that the departure of the applicant from India may, or is likely to, be detrimental to the security of India;

(d) that the presence of the applicant outside India may, or is likely to, prejudice the friendly relations of India with any foreign country;

(e) that the applicant has, at any time during the period of five years immediately preceding the date of his application, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years;

(f) that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India;

(g) that a warrant or summons for the appearance, or a warrant for the arrest, of the applicant has been issued by a court under any law for the time being in force or that an order prohibiting the departure from India of the applicant has been made by any such court;

(h) that the applicant has been repatriated and has not reimbursed the expenditure incurred in connection with such repatriation;

(i) that in the opinion of the Central Government the issue of a passport or travel document to the applicant will not be in the public interest.

The refusal of a passport can be only in case where an applicant is convicted during the period of 5 years immediately proceeding the date of application for an offence involving moral turpitude and sentence for imprisonment for not less than two years.

Section 6.2 (f) relates to a situation where the applicant is facing trial in a criminal court.

Admittedly, at present, ***the conviction of the appellant stands still the disposal of the criminal appeal.*** *The sentence which he has to undergo is for a period of one year.* ***The passport authority cannot refuse the renewal of the passport on the ground of pendency of the criminal appeal.***

The passport authority is directed to renew the passport of the applicant without raising the objection relating to the pendency of the criminal appeal in this Court. Subject to the other conditions being fulfilled, the Interlocutory Application stands disposed of."

(emphasis supplied by us)

8. The judgment of Bombay High Court in **Abbas Hatimbhai Kagalwala (supra)** heavily relied by learned counsel for the petitioner is reproduced below :

"1. The Petitioner had applied for renewal of the Passport. Said application is not being entertained for the reason that the Petitioner should obtain a permission from the Court where a

criminal case is pending against the Petitioner.

2. Learned Counsel for the Petitioner submits that for renewal of the Passport, permission from the Court where ***a criminal case is pending against the Petitioner, is not necessary. If a criminal case is pending, then the only limitation would be, the Petitioner can not travel abroad without the permission from the Court where a criminal case is pending against the Petitioner.*** *He relies upon order passed by the Apex Court in Criminal Appeal No.1342/2017 dated 27.9.2021.*

3. Learned Counsel for the Union relies upon Notification dated 25.8.1993 and Section 6.2 (f) of the Passport Act, 1967, to conclude that the Petitioner has to obtain a permission of the Court where criminal case is pending against the Petitioner for the purpose of issuance of the Passport. It will be a case of issuance of the Passport and not renewal of the Passport.

4. It is the case of the Petitioner that validity of the Passport came to an end in the year 2017. The Petitioner applied for renewal and said application is pending for more than 4 years. It is also a fact that a criminal case is pending against the Petitioner u/s 420, 465, 467 r/w 120-B of the Indian Penal Code.

5. ***In view of the fact that petitioner is already issued a Passport earlier and the Petitioner would be seeking renewal of the Passport and the said application is pending with the Respondent,*** *so also, considering the Order passed by the Apex Court in* ***Criminal Appeal No.1342/2017*** *(supra) we pass the following order.*

Order

*i) The Respondent shall process the application of the petitioner for renewal of Passport without insisting for permission of the Court, where a criminal case is pending against the Petitioner****. If the Petitioner is travelling abroad, then the Petitioner would be required to seek permission from the Court where criminal case is pending.***

ii) Decision shall be taken as observed above, within 2 months.

iii) The impugned communication is quashed and set aside.

iv) If as per procedure on-line application is required to be made, the same shall be made by the Petitioner.

6. The petition is disposed of.

7. No costs."

(emphasis supplied by us)

9. The judgment of Hon'ble Supreme Court in the case of **Vangala Kasturi Rangacharyulu (supra)** is of no help to the petitioner on facts of the present case inasmuch as some criminal cases against the petitioner are pending before the trial court while in some criminal cases investigation is in process. In the aforesaid judgment Hon'ble Supreme Court observed that Section 6(2) (f) of the Passport Act, 1967 relates to a situation where the applicant is facing trial in a Criminal Court. In the present set of facts the petitioner is facing trial in a Criminal Court. Thus the judgment of Hon'ble Supreme Court in the case of **Vangala Kasturi Rangacharyulu (supra)** is of no help to the petitioner.

10. So far as observations in the judgment of Bombay High Court in **Abbas Hatimbhai Kagalwala (supra)** directing to process passport renewal application without insisting for permission of the court where a criminal case is pending, is concerned we do not agree as it is in conflict with Section 6(2)(e)/(f)/(g) and Section 22 of the Passport Act, 1967 and

the Notification No.GSR 570(E).-I, dated 25.08.1993. In the aforesaid case the Bombay High Court has relied upon the judgment of the Apex Court in **Vangala Kasturi Rangacharyulu (supra),** which was passed by the Apex Court on I.A. No.52346 of 2021 filed in the Criminal Appeal pending before it, seeking permission/direction for issuance of passport. For ready reference Clauses (e), (f) and (g) of sub Section (2) of Section 6 of the Passport Act, 1967, are reproduced below :

"(2) Subject to the other provisions of this Act, the passport authority shall refuse to issue a passport or travel document for visiting any foreign country under clause (c) of sub-section (2) of section 5 on any one or more of the following grounds, and on no other ground, namely: -

(a)....

(b)....

(c)....

(d)....

(e) that the applicant has, at any time during the period of five years immediately preceding the date of his application, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years;

(f) that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India;

(g) that a warrant or summons for the appearance, or a warrant for the arrest, of the applicant has been issued by a court under any law for the time being in force or that an order prohibiting the departure from India of the applicant has been made by any such court;"

11. Thus, as per legislative mandate of Clauses (e), (f) and (g) of sub Section (2) of Section 6 of the Passport Act, 1967, the passport authority shall refuse to issue a passport or travelling document for visiting any foreign country on the ground mentioned in Clauses (a) to (i). The opening words of sub Section (2) of Section 6 are that "subject to the other provisions of this Act". Therefore, the passport or travelling document may be issued by the passport authority if an applicant obtains permission from the concerned court where the criminal case is pending, in terms of Section 22 read with Notification No.GSR 570(E).-I, dated 25.08.1993 issued by the Government in exercise of powers conferred under Clause (a) of the Section 22 of the Passport Act, 1967. It is settled law that a writ of mandamus can not be issued in conflict with the statutory provisions. Consequently writ of mandamus can not be issued in favour of the petitioner and against the Passport Authority, in conflict with the aforequoted Clauses (e), (f) and (g) of sub Section (2) of Section 6 of the Passport Act, 1967. If Clauses (e), (f) and (g) of sub Section (2) of Section 6 of the Passport Act, 1967 are differently interpreted then it may render redundant the said provisions on one hand and on the other hand it may adversely effect completion of investigation and conclusion of trial in a criminal case. Thus to enable the passport authority to lift the statutory mandate of refusal contained in Section 6(2) of the Passport Act, 1967 to issue a passport or a travel document, it is mandatory for an applicant to obtain permission from the Court where the applicant is facing trial, in terms of Section 22 read with the Notification No.GSR 570(E).-I, dated 25.08.1993.

12. We also find that the impugned order is appealable under Section 11 of The Passport Act, 1967, therefore, the petitioner may avail the remedy of Appeal. He may also apply for permission before the concerned Court under Section 22 of the The Passport Act, 1967 read with Notification No.GSR 570(E).-I, dated 25.08.1993.

13. With the aforesaid observations, the writ petition is **dismissed** leaving it open for the petitioner to avail alternative remedy of appeal. If the petitioner files an appeal before the Appellate Authority under Section 11 of The Passport Act, 1967 within three weeks from today alongwith a certified copy of this order, the appeal of the petitioner shall be entertained by the Appellate Authority without raising any objection as to the limitation.

14. It is made clear that we have not expressed any opinion on merits of the case of the petitioner.

(2023) 6 ILRA 481
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2020

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ-C No. 36353 of 2019
Connected With
Writ-C No. 36276 of 2019
and
Writ-C No. 40800 of 2019
and
Writ-C No. 36362 of 2019

Sri Raju ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Narayan Dutt Shukla, Sri Ramesh Chandra Singh (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Tariq Maqbool Khan

A. Civil Law - U.P. Revenue Code, 2006 - Section 67 & 67A - Section 67A of the U.P. Revenue Code, 2006, provides that in case a house exists over land referred to in Section 63 of the Code, having been built prior to November 29, 2012, the housing site can be settled with its owner on such terms and conditions as may be specified. *Held* - 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. In the instant case, Petitioners in their applications u/s 67A, nowhere have stated that no agricultural labourers or village artisans belonging to the scheduled caste or scheduled tribe are residing in village, which was necessarily required to be pleaded by them. (Para 14, 15)

B. U.P. Revenue Code, 2006- Sections 67 & 67A - Impugned order passed in proceedings u/s 67 of the U.P. Revenue Code, 2006, for eviction of the petitioners. Petitioners pleaded that they are agricultural labourers and since they are occupants of land, they were entitled to the benefit of Section 67A of the U.P. Revenue Code, 2006. *Held:* Land from where the petitioners have been ordered to be evicted is recorded as 'Banjar'. It has not been earmarked as an abadi site and is therefore, not land referred to under Section 63 of the Code. Therefore, the petitioners are not eligible for the benefit of Section 67A. Also none of the petitioners belongs to the scheduled caste or scheduled tribe. (Para 11, 16)

Dismissed. (E-5)

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

1. Heard Shri Ramesh Chandra Singh, Senior Advocate for the petitioners in these writ petitions and Shri Tariq Maqbool Khan for the Gaon Sabha.

2. These writ petitions arise out of proceedings under Section 67 of the U.P. Revenue Code, 2006, for eviction of the petitioners from separate areas of plot no. 188 situated in village Pachrukhiya, Tehsil Padrauna, District Kushinagar, which is recorded in the revenue records as 'Banjar'. Separate orders have been passed for eviction of the petitioners and on their consequential appeals, dismissing them. However, since the submissions made are common, the petitions are being decided by a common order.

3. It would be relevant to note that proceedings for eviction of the petitioners appear to have been instituted, consequent to directions issued by the High Court in a Public Interest Litigation.

4. In all the petitions, the contention of learned counsel is that petitioners are agricultural labourers and since they are occupants of land which is not reserved for a public purpose and is not governed by the provisions of Section 132 of the U.P. Zamindari Abolition and Land Reforms Act or Section 77 of the U.P. Revenue Code, 2006, they were entitled to the benefit of Section 67A of the U.P. Revenue Code, 2006. Therefore, the orders of their eviction should not have been passed because they had filed applications seeking this benefit, which proceedings are still pending. It is also contended that property demanded that the proceedings under Section 67A should have been consolidated and heard together with the eviction proceedings under Section 67 of the Code, which was not done. The orders impugned are, therefore, vitiated and liable to be set-aside.

5. In so far as the submission that the proceedings for eviction under Section 67 should have been heard and decided along with the proceedings under Section 67A filed by the petitioners, learned counsel, on a pointed query by the Court, admits that no application for consolidation of the afore-noted two cases were ever filed by any of the petitioners.

6. In these four petitions, only two of the petitioners, namely Smt. Nagina in Writ Petition No. 36276 of 2019 and Smt. Sunita, in Writ Petition No. 36362 of 2019, claim to belong to the backward class. The other two do not claim to belong either to the scheduled caste or the backward class.

7. The issue in the writ petition is whether the petitioners are entitled to the benefit of Section 67A of the U.P. Revenue Code, 2006, which provides that in case a house exists over land referred to in Section 63 of the Code, having been built prior to November 29, 2012, the housing site can be settled with its owner on such terms and conditions as may be specified.

8. The benefit of Section 67 is liable to be granted as regards land referred to in Section 63 of the Code. Section 63 speaks of land, which may be allotted for abadi site and empowers the Sub Divisional Officer, on his own motion or on the resolution of the Land Management Committee, to earmark land for abadi site. The second requirement for a person to be entitled to the benefit of Section 67A is that he should be a person referred to in sub-section 1 of Section 64.

9. Section 64 sub-section 1 talks of the orders of preference to be observed

while making allotment of land referred to in Section 63, namely land which has been earmarked for abadi sites.

10. Section 64 of the Code reads as follows.

"64. Allotment of abadi sites.- *(1) The following order of preference shall be observed in making allotment of land referred to Section 63 :-*

(a) an agricultural labourer or a village artisan residing in the [Gram Panchayat] and belonging to a scheduled caste or scheduled tribe or other Backward Classes or a person of general category living below poverty line as determined by the State Government.

(b) any other agricultural labourer or a village artisan residing in the [Gram Panchayat].

(c) any other person residing in the [Gram Panchayat] and belonging to a scheduled caste or scheduled tribe or other Backward Classes or a person of general category living below poverty line as determined by the State Government:

Provided that preference will be given to widow and physically handicapped person within same category.

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

(1) "other backward class" means the backward class of citizens specified scheduled-I of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 (U.P. Act, No. 4 of 1994);

(2) "person of general category living below poverty line" means such persons as may be determined from time to time by the State Government.

(2) In making an allotment under this section, preference shall be given to a person who either holds no house or has insufficient accommodation considering the requirement of his family.

(3) Every land allotted under this section shall be held by the allottee on such terms and conditions as may be prescribed:

[Provided that if the allottee is a married man and his wife is alive, she shall be co-allottee of equal share in the land so allotted.]"

11. It is not disputed that land from where the petitioners have been ordered to be evicted, is recorded as 'Banjar'. It has not been earmarked as an abadi site till date and is therefore, not land referred to under Section 63 of the Code.

12. Section 64 extracted above, shows the order of preference to be followed up while making allotment of an abadi site. Highest in this order of preference are agricultural labourers or village artisans belonging to the scheduled caste or scheduled tribes followed by other backward classes and, thereafter, by persons of general category living below the poverty line.

13. None of the petitioners belongs to the scheduled caste or scheduled tribe as already noted herein above. Two of them claim to belong to the backward class while two appear to be from the general category.

14. Careful perusal of the applications under Section 67A, which are stated to have been filed by the petitioners, reveals that nowhere in these applications have the applicants stated that no agricultural labourers or village artisan belonging to the scheduled caste or scheduled tribe are residing in village Pachrukhiya. This was necessarily required to be pleaded by them.

15. 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.

16. 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.

17. Although, reference has also been made in the writ petition as also the applications under Section 67A to provisions of the U.P. Zamindari Abolition and Land Reforms Act, such reference or reliance, in my considered opinion, is not tenable because on date, as also on the date the applications under Section 67A have been filed by the petitioners, the said Act, namely U.P. Zamindari Abolition and Land Reforms Act stood repealed.

18. In view of the foregoing, these writ petitions lack force and are accordingly dismissed.

(2023) 6 ILRA 484

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ-C No. 39191 of 2022

V-Mart Retail Ltd., Gurgaon ...Petitioner
Versus
L.I.C. Housing Finance Ltd., Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jitendra Prasad

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

Civil Law - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Section 14. *Issue:* Whether a secured creditor, in exercise of its power under the Act, could take actual physical possession of the secured asset in possession of a lessee? *Held:* The Apex Court in *Harshad Govardhan Sondagar* categorized leases into three classes: i *Lease created before the property was mortgaged:* It was held that, in such cases, the lessee will have the right to enjoy the leased property in accordance with the terms and conditions of the lease, irrespective of whether the subsequent mortgagee of the immovable property had knowledge of such lease or not. ii *Lease created after the execution of the mortgage deed:* In cases where the mortgage deed does not prohibit the mortgagor from making a lease of the mortgaged property, and so long as the lease satisfies the requirements of sub-section (2) of Section 65-A of the Transfer of Property Act, it would be valid and binding on the secured creditor. iii *Lease created after service of notice under Section 13(2)*: Such a lease would be void

in view of Section 13(13) of the Act and not binding on the secured creditor. Supreme Court also held that the provisions of the Act do not abridge the rights of the lessees falling under categories (i) and (ii), nor result in termination of the lease. However, this would not be true for cases falling under category (iii). In cases where the secured asset is in possession of a lawful tenant, the secured creditor will have the right to receive any money due, or which may become due (including rent), from the lessee of the borrower after the expiry of sixty days of notice under Section 13(2) of the Act. Possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act (*Paras 9, 11*).

Allowed. (E-5)

List of Cases cited:

1. Harshad Govardhan Sondagar Vs International Assets Reconstruction Comp. Limited & ors., (2014) 6 SCC 1.

2. Vishal N. Kalsaria vs. Bank of India & ors., (2016) 3 SCC 762.

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

1. The instant petition has been filed praying for a writ of mandamus commanding the respondents to consider the representation of the petitioner dated 24.11.2020 and not dispossess the petitioner from Property No.3/67, Rui Ki Mandi, Shahganj, Agra or interfere in the running of business by the petitioner in the said premises.

2. The facts necessary for disposal of the petition are that the petitioner is a company incorporated under the Companies Act. It is running its retail business from the aforesaid premises in pursuance of a Memorandum of Understanding (MOU) dated 10.5.2016 between it and respondents no.4 to 8, the owners of the premises (hereinafter for short 'the lessors'). According to the MOU, the petitioner was let out ground floor and first floor of the building admeasuring 11300 square feet. The lessors were to hand over possession of the premises to the petitioner on or before 25.05.2016. The petitioner was given right to vacate the demised premises after serving a three months' notice on the lessors. On the other hand, the lessors were given right of forfeiture of tenancy only when there was continuous default of three months or more in payment of rent and the petitioner fails to pay it within one month of receipt of notice of demand. Subsequently, registered lease agreement dated 15.03.2017 was also executed between the parties. The lease agreement mentions the date of commencement of the lease as 1st July, 2016. The rent for the carpet area of 11000 square feet was approximately Rs.29 per month per square feet payable before 10th of every calendar month. The monthly lease rent was liable to enhancement after regular intervals. According to the petitioner, in terms of the Memorandum of Understanding and the registered lease deed, it occupied the demised premises and is carrying on its retail business therefrom.

3. On 20.02.2020, the petitioner received a notice from the second respondent i.e. LIC Housing Finance Ltd. from which it came to know that the demised property was equitably mortgaged by the lessors in its favour. On 23.11.2020, the second respondent fixed a possession notice on the demised premises in

purported exercise of its powers under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act'). The petitioner on 24.11.2020 filed a detailed objection before the second respondent mentioning therein about the MOU dated 10.5.2016 and registered lease deed dated 15.6.2017 and requested the second respondent to immediately stop proceedings for taking actual physical possession of the leased property. The petitioner also made a prayer that in case the property is auctioned, the auction purchaser be informed that he would step into the shoes of the lessors/borrowers, but shall not be entitled to actual physical possession as the property was in possession of a lawful tenant. However, the second respondent did not take notice of the said objection and threatened to take possession of the leased property and consequently, the instant petition.

4. The second respondent has filed a counter affidavit in which the stand taken is that the private respondents (lessors) had taken a loan of Rs.2,35,00,000/- on 28.2.2017 from it and had equitably mortgaged the property in question in favour of the second respondent by deposit of title deeds. The date on which equitable mortgage was allegedly created, has not been disclosed in the counter affidavit. The date of issuance of notice under Section 13 (2) of the Act is 5.12.2019. The date of issuing possession notice is 23.11.2020. It is admitted to the second respondent that it had filed an application under Section 14 of the Act for delivery of actual physical possession of the aforesaid property and the said application is pending.

5. It is clear from the stand taken by the second respondent that it proposes to take actual physical possession of the property in question in exercise of its rights under the Act.

6. The private respondents (lessors/borrowers) were sent notices by registered post. It is clear from the track consignment report of Indian Post that the notices were delivered to them, but none had appeared on their behalf. Service on the aforesaid respondents was held to be sufficient by order dated 13.4.2023.

7. Learned counsel for the petitioner submits that the petitioner being a lawful lessee of the aforesaid premises and the lease having been created in its favour before the sanction of loan and creation of equitable mortgage, the second respondent is not entitled to take actual physical possession of the demised premises. At best, only symbolic possession could be taken and in which event, it would step into the shoes of the borrowers and would only be entitled to claim rent from the petitioner. In support of his submission, learned counsel for the petitioner has placed reliance on the judgements of the Supreme Court in **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and others, and Vishal N. Kalsaria Vs. Bank of India and others.**

8. Sri Pranjal Mehrotra, learned counsel appearing on behalf of the second respondent submitted that since the registered lease deed was executed on 15.03.2017, after the sanction of loan on 28.02.2017 and, therefore, the petitioner is not entitled to benefit of the aforesaid judgements. He further submitted that even if it is held that the petitioner is not liable to be evicted, it be clarified that the secured

creditor (the second respondent) would be entitled to realise rent from the petitioner.

9. In **Harshad Govardhan Sondagar (supra),** the Supreme Court had considered the issue as to whether a secured creditor in exercise of its power under the Act could take actual physical possession of the secured asset in possession of lessee. The Supreme Court, after considering the entire scheme of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the provisions of the Transfer of Property Act, 1882 categorised the leases into three classes as follows:-

(i) lease created before the property was mortgaged- it was held that in a such case, the lessee will have right to enjoy the leased property in accordance with the terms and conditions of the lease, irrespective of whether the subsequent mortgagee of the immovable property had knowledge of such lease or not.

(ii) lease created after the execution of mortgage deed- in case the mortgage deed does not prohibit the mortgagor from making a lease of the mortgaged property and so long as the lease satisfies the requirement of sub-section (2) of Section 65-A of the Transfer of Property Act, it would be valid and binding on the secured creditor.

(iii) lease created after service of notice under Section 13 (2)- such a lease would be void in view of Section 13 (13) of the Act and not binding on the secured creditor.

10. The Supreme Court also held that the provisions of the Act do not abridge the right of the lessees falling under category (i) and (ii) nor results in termination of the lease. However, this would not be true for cases falling under category (iii). Relevant part of the Law Report is extracted below:-

"One of the measures mentioned in clause (a) in sub- section (4) of Section 13 of the SARFAESI Act is to take possession of the secured assets of the borrower including the right to transfer by way of lease. Where, however, the lawful possession of the secured asset is not with the borrower, but with the lessee under a valid lease, the secured creditor cannot take over possession of the secured asset until the lawful possession of the lessee gets determined. There is, however, no mention in sub- section (4) of Section 13 of the SARFAESI Act that a lease made by the borrower in favour of a lessee will stand determined on the secured creditor deciding to take any of the measures mentioned in Section 13 of the said Act. Sub- section (13) of Section 13o f the SARFAESI Act, however, provides that after receipt of notice referred to in sub- section (2) of Section 13 of the SARFAESI Act, no borrower shall lease any of his secured assets referred to in the notice, without the prior written consent of the secured creditor. This provision in sub-section (13) of Section 13 of the SARFAESI Act and the provisions of the Transfer of Property Act enabling the borrower or the mortgagor to make a lease are inconsistent with each other. Hence, sub- section (13) of Section 13 of the SARFAESI Act will override the provisions of Section 65A of the Transfer of Property Act by virtue of Section 35 of the SARFAESI Act, and a lease of a secured asset made by the borrower after he receives the notice under sub- section (2) of Section 13 from the secured creditor intending to enforce that secured asset will not be a valid lease."

11. The next issue considered in the judgment was whether the Chief

Metropolitan Magistrate or District Magistrate is empowered to deliver actual physical possession of the secured asset to the secured creditor under Section 14 of the Act even in cases where the secured asset is in possession of a lawful tenant. In such cases, it has been held that the secured creditor will have right to receive any money due or which may become due, including rent from the lessee of the borrower after expiry of sixty days of notice under Section 13 (2) of the Act. In order to protect his possession, the lessee would be entitled to place material before the Chief Metropolitan Magistrate or the District Magistrate and satisfy him that there was a valid lease created before the mortgage or after the mortgage, in accordance with the requirements of Section 65-A of the Transfer of Property Act and the lease has not been determined in accordance with Section 111 of the Transfer of Property Act and in which event, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, cannot pass an order for delivering possession of the secured asset to the secured creditor. The relevant observations in the judgment are as follows:-

"Hence, possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act and the Chief Metropolitan Magistrate or the District Magistrate, therefore, does not have any power under Section 14 of the SARFAESI Act to take possession of the secured asset from such a lessee and hand over the same to the secured creditor."

12. The law laid down in **Harshad Govardhan Sondagar** was followed by the Supreme Court in **Vishal N. Kalsaria Vs. Bank of India and others** and it has been further clarified as follows:-

"It is a settled position of law that once tenancy is created, a tenant can be evicted only after following the due process of law, as prescribed under the provisions of the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provisions of the SARFAESI Act as that would amount to stultifying the statutory rights of protection given to the tenant. A non obstante clause (Section 35 of the SARFAESI Act) cannot be used to bulldoze the statutory rights vested on the tenants under the Rent Control Act. The expression "any other law for the time being in force' as appearing in Section 35 of the SARFAESI Act cannot mean to extend to each and every law enacted by the Central and State legislatures. It can only extend to the laws operating in the same field."

13. In the instant case, although it is argued that the registered lease deed was executed on 15.03.2017, after sanction of the loan, but it is not disputed that it was preceded by a memorandum of understanding dated 10.5.2016 under which the petitioner became entitled to occupy the premises as lessee on or before 25.5.2016 and the registered lease agreement specifically recites that the tenancy commenced from 1st July, 2016. The possession of the petitioner as lessee since the aforesaid date is not in dispute. Therefore, we are of the opinion that the case of the petitioner would be covered under category (i) and the possession of the petitioner could not be disturbed by the second respondent under the provisions of the Act unless the lease is validly determined as per contract of tenancy or the statutory provisions. At the same time, the

second respondent having already served notice under Section 13 (2) and sixty days period had expired since then, it had become entitled to realise rent from the petitioner, in enforcement of its rights as a secured creditor.

14. In the facts obtaining above, we are of the opinion that no purpose would be served in relegating the petitioner to agitate its claim before the District Magistrate or Chief Metropolitan Magistrate. It will only lead to procrastination of the litigation.

15. Accordingly, we dispose of the instant petition restraining the second respondent from taking actual physical possession of the property in question from the petitioner until the lease is determined in accordance with law. The petitioner will, however, be liable to pay rent from now onwards to the second respondent and the said amount will be appropriated by it towards adjustment of the outstanding liability of the borrowers, in respect of the loan taken by them.

(2023) 6 ILRA 489
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2023

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ-C No. 54341 of 2010
Writ-C No. 55314 of 2011
Writ-C No. 56451 of 2011
Writ-C No. 7490 of 2012
Writ-C No. 20719 of 20193
Writ-C No. 11159 of 20193
Writ-C No. 11157 of 20193

Committee of Management, D.P. Public School, Gautambudh Nagar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ravi Agrawal, Sri P.K. Chaurasia

Counsel for the Respondents:
C.S.C., Sri Ramendra Pratap Singh, Sri Suresh Singh, Sri Manish Goyal (Sr. Adv.)

Civil Law- Code of Civil Procedure-1908-Section 114, Order 47 Rule 1- It is well settled that error apparent on the face of the record should not be an error which has to be fished out and searched-The power of review can be exercised for correction of a mistake but not to substitute a view-that though it can be argued by the counsel for the review applicant that some material such as Master plan, the nature of the project, the land use of the acquired land were not taken into consideration by the Court in the original judgment (under review), however, consideration of the said arguments would require us to appreciate the material on record which was allegedly ignored by the Court in the original order and the said exercise of re-hearing being impermissible within the scope of review-No good ground to exercise the power of review in the instant case-The judgment and order of this Court under review having attained finality between the parties, in case of any mistake on the part of the Court in ignoring the pleadings on record and arriving at a different conclusion by considering the other material on record, only remedy before the review applicant was to approach the Apex Court placing the alleged wrong in the judgment under review-(Para 31, 32 & 39)

Review application dismissed. (E-15)

List of Cases cited:

1. Sahara India Commercial Corporation Limited & ors. Vs St. of U. P. & ors. (2017) 11 SCC 339

2. Col. Avtar Singh Sekhon Vs U.O.I. & ors. 1980 (Supp) SCC 562

3. Sow Chandra Kante & anr. Vs Sheikh Habib (1975) 1 SCC 674

4. Parsion Devi Vs Sumitri Dev (1997) 8 SCC 715

5. Thungabhadra Industries Ltd. Vs Govt. of A.P AIR 1964 SC 1372

6. Lily Thomas Vs U.O.I. (2000) 6 SCC 224

7. Hari Vishnu Kamath Vs Ahmad Ishaque AIR 1955 SC 233

8. Kamlesh Verma Vs Mayawati & ors. (2013) 8 SCC 320

9. Union of India Vs Sandur Manganese and Iron Ores Limited & ors. (2013) 8 SCC 337

10. Shanti Conductors Pvt. Ltd. Vs Assam St. Electricity Board & ors. (2020) 2 SCC 677

11. S. Murali Sundaram Vs Jothibai Kannan & ors. 2023 SCC OnLine SC 185

12. Perry Kansagra Vs Smriti Madan Kansagra (2019) 20 SCC 753

13. Pancham Lal Pandey Vs Neeraj Kumar Mishra & ors. 2023 0 Supreme(SC) 123

14. Board of Control for Cricket in India Vs Netaji Cricket Club & ors. (2005) 4 SCC 741

15. Rajendra Singh Vs Lt. Governor, Andaman & Nicobar Islands & ors. (2005) 13 SCC 289

16. Krishna Nand Shukla Vs Director of Higher Education, Allahabad & ors. (2019) 14 SCC 365

17. Radhey Shyam (Dead) Through Lrs. & ors. Vs St. of U.P. & ors. 2011 (5) SCC 553

18. Nand Kishore Gupta and other Vs St. of U.P. & ors. (2010) 10 SCC 282

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

In Re: Civil Misc. (Review) Application No. 76758 of 2017 filed in Writ-C No. 11157 of 2013

In Re: Civil Misc. (Review) Application No. 76755 of 2017 filed in Writ-C No. 11159 of 2013

In Re: Civil Misc. (Review) Application No. 76750 of 2017 filed in Writ-C No. 20719 of 2013

In Re: Civil Misc. (Review) Application No. 76733 of 2017 filed in Writ-C No. 7490 of 2012

In Re: Civil Misc. (Review) Application No. 76728 of 2017 filed in Writ-C No. 56451 of 2011

In Re: Civil Misc. (Review) Application No. 76739 of 2017 filed in Writ-C No. 55314 of 2011

In Re: Civil Misc. (Review) Application No. 76745 of 2017 filed in Writ-C No. 54341 of 2010

1. Heard Sri Manish Goyal learned Senior Counsel assisted by Sri Praveen Kumar, Sri Kamaljeet Singh and Sri Suresh Singh learned counsels appearing for the respondent authority, Sri P.K. Chaurasia and Ms. Sarita Shukla learned counsels for the opposite parties/writ petitioners on the review applications related to the acquisition of the land of Village Mirzapur.

2. This bunch of review petitions is directed against the judgment and order dated 22.12.2016 passed by this Court in allowing seven writ petitions challenging acquisition notifications under the Land Acquisition Act, 1894, with the direction to the State to determine and pay compensation to the petitioners in accordance with the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "the Act, 2013"), treating the

date of acquisition notification as 22.12.2016, same as the date of the judgment. The claim for compensation for constructions standing over the lands in question on the date of preliminary notification was also directed to be computed.

3. The aforesaid directions had been issued while holding that the notifications under Sections 4 and 6 of the Land Acquisition Act, 1894 were bad as the decision of the State Government for invoking power under Section 17(1) and 17(4) of the Land Acquisition Act, 1894, for invocation of the urgency clause, was without any material for invoking such power. On the statement of the counsels for the writ petitioners, therein while noticing that no award had been made by the Special Land Acquisition Officer with reference to the notifications under challenge, placing reliance on the judgment of the Apex Court in **Sahara India Commercial Corporation Limited and others vs. State of Uttar Pradesh and others** [Civil Appeal No. 11501 of 2011] decided on 30.11.2016, it was concluded that since the notifications for acquisition were held bad, the tenure holders were entitled for compensation under the Act, 2013.

4. Before going into the rival contentions of the counsels for the parties to examine the merits of the review petition, we would like to discuss the law pertaining to concept and scope of review so as to assess as to whether review is permissible in the facts and circumstances of the instant case.

Section 114 of the Code of Civil Procedure confers power of review on the Courts; it may be reproduced as under:-

"Section 114. Review. *- Subject as aforesaid, any person considering himself aggrieved-*

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

Order 47 Rule 1(1) of the Code of Civil Procedure, 1908 provides application for review of judgment which reads as under:-

"Order XLVII Rule 1(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 of 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."

5. It is settled by a catena of decisions that review of an earlier order cannot be done unless the Court is satisfied that

material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. 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. The power of review can be exercised for correction of a mistake but not to substitute a view. The mere possibility of two views on the subject is not a ground for review. 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. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.

In **Col. Avtar Singh Sekhon vs. Union of India and others,** it was held that a review is not a routine procedure. While relying on the previous decision in **Sow Chandra Kante and another vs. Sheikh Habib,** it was noted therein that:-

"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."

In **Parsion Devi vs. Sumitri Devi** while considering the ambit and scope of Order 47 Rule 1 CPC, referring to the earlier decision of the Apex Court in **Thungabhadra Industries Ltd. vs. Govt. of A.P.,** it was noted in paragraphs '7' to '9' 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 CPC. In Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh (1965 (5) SCR 174 at 186) this Court opined:

'11. What, however, we are not 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 occation that 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 distinct which is real, though it might not always be capable of exposition between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent." A review is by no means an appeal in disguise whereby an erroneous decision is reheard corrected. but lies only for patent error.'

8. Again, in Smt. Meera Bhanjia Vs. Smt. Nirmala Kumari Choudhury (1995 (1) SCC 170) while quoting with approval a passage from Abhiram Taleshwar Sharma Vs. Abhiram Pishak Sharma & Ors. (1979 (4) SCC 389), this Court once again held that review proceedings are not by way of an appeal and have to strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

9. Under Order 47 Rule 1 CPC 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 review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order

47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has limited purpose and cannot be allowed to be "an appeal in disguise."

In **Lily Thomas vs. Union of India,** it was observed in paragraphs '56' and '58' that:-

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake and 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 an appeal in disguise. The mere possibility of two views on the subject is not a ground for review.....xxxxxxxxxxxxxx.....

58. .....xxxxxxxx..... The words 'any-other sufficient reason appearing in Order XLVII Rule 1 CPC' 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 Moron Mar Baseless Catholics and Anr. v. Most Rev. Mar Poulose Athanasius and Ors. AIR 1954 SC 526. 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. Nagappa and Anr. this Court held that such error is an error which is a patent error and not a mere wrong decision."

The decision of the Apex Court in **Hari Vishnu Kamath vs. Ahmad Ishaque** was noted in paragraph '58' of the aforesaid decision [**Lily Thomas** (supra)] to note that:-

"58. ……..xxxxxx……..23. .....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 art error apparent on the face of the record?.....xxxx……."

All the above noted decisions have been taken note of by the Apex Court in **Kamlesh Verma vs. Mayawati and others** to hold in paragraphs '17', '18' and '19' as under:-

"17. In a review petition, it is not open to the Court to reappreciate the evidence and reach a different conclusion, even if that is possible. Conclusion arrived at on appreciation of evidence 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. This Court, in Kerala State Electricity Board vs. Hitech Electrothermics & Hydropower Ltd. & Ors., (2005) 6 SCC 651, held as under:

"10. .....In a review petition it is not open to this Court to reappreciate 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 14 amount to converting a review petition into an appeal in disguise."

18. Review is not re-hearing of an original matter. The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. A repetition of old and overruled argument is not enough to re-open concluded adjudications. This Court, in Jain Studios Ltd. vs. Shin Satellite Public Co. Ltd., (2006) 5 SCC 501, held as under:

"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 negatived. 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."

19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction."

The principles of review have been summarized therein, in paragraph '20' as under:-

"20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1 When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record; (iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in Chhajju Ram vs. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors., (1955) 1 SCR 520, 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 vs. Sandur Manganese & Iron Ores Ltd. & Ors., JT 2013 (8) SC 275.

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."

6. The same view has been reiterated by the Apex Court in a reported decision in **Union of India vs. Sandur Manganese and Iron Ores Limited and others** and it was stated therein that the error contemplated in the judgment under review must be one which is apparent on the face of the record.

It is settled that in review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction. In the review jurisdiction, the Court shall interfere only when there is a glaring omission or patent mistake or when a grave error has crept in the impugned judgment. The review applicant cannot be permitted to reargue the very same point.

7. In **Shanti Conductors Private Limited vs. Assam State Electricity Board and others,** the same view has been reiterated.

Referring to the decision of the Apex Court in **Parsion Devi** (supra), it was observed therein that the scope of review is limited and under the guise of review, the petitioner cannot be permitted to reagitate and reargue the questions, which have already been addressed and decided.

8. In **S. Murali Sundaram vs. Jothibai Kannan and others,** the Apex Court while considering the above noted decisions in **Shanti Conductors Private Limited** (supra) and **Perry Kansagra vs. Smriti Madan Kansagra** has held that an error which is required to be detected by a process of reasoning can hardly be said to be an error on the face of the record. The observation of the Apex Court in **Perry Kansagra** (supra) has been noted that while exercising the review jurisdiction in an application under Order 47 Rule 1 read with Section 114 CPC, the Review Court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law.

After considering a catena of decisions on exercise of power of review and principles relating to exercise of review jurisdiction under Order 47 Rule 1 CPC, the Apex Court has noted the principles

summed up in **Perry Kansagra** (supra) as under:-

"(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any longdrawn process of reasoning on the points where there may conceivably by two opinions.

(iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate.

(v) An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit."

We may further note the decisions relied by the learned counsels for the parties to support their rival submissions.

9. The counsels for the opposite parties/writ petitioners have relied upon the decision of the Apex Court in **Pancham Lal Pandey vs. Neeraj Kumar Mishra and others** to agitate that the power of review is not to scrutinize the correctness of the decisions rendered rather to correct the error, if any, which is visible on the face of the order/record without going into as to whether there is a possibility of another opinion different from the one expressed.

10. Learned Senior Counsel appearing for the review applicant relied on three decisions to support his submissions that in the facts and circumstances of the instant case, review is permissible.

11. The decision of the Apex Court in **Board of Control for Cricket in India vs. Netaji Cricket Club and others** has been placed before us to submit that under Order 47 Rule 1 of the Code, the application for review is maintainable not only upon the discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for "any other sufficient reason". The mistake on the part of the Court may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a Court or even an Advocate. An application for review may be necessitated by way of invoking the doctrine *"actus curiae neminem gravabit".*

It was argued that the rule of limitation on the power of review is not universal. The observation of the Apex Court in **Lily Thomas** (supra) in paragraph '52', as noted in para 92 of the aforesaid judgment in **BCCI** (supra) has been placed before us to assert that if the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice nothing would preclude the Court from rectifying the error.

Relevant paragraph '52' in **Lily Thomas** (supra) extracted in **BCCI** (supra) is noted hereinunder:-

"52. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement". It cannot be denied that the review is the creation of a statute. This Court in Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji, AIR 1970 SC 1273 held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice nothing would preclude the Court from rectifying the error."

(emphasis supplied)

12. Reliance has further been placed upon the decision of the Apex Court in **Rajendra Singh vs. Lt. Governor, Andaman & Nicobar Islands and others** to argue that the law is well-settled that the power of judicial review of its own order inheres in every Court of plenary jurisdiction which extends to correct all errors to prevent miscarriage of justice. The Court should not hesitate to review their own earlier order when there exists an error on the face of the record and the interest of the justice so demands in appropriate cases. It was argued that in the facts of the said case, the Apex Court had noted that the High Court in original judgment had erred in overlooking the documents relied on by the parties. The review jurisdiction, thus, was held to be available in the facts of that case as the original judgment was found to be a clear case of an error apparent on the face of the record and non-consideration of relevant documents. It was, thus, vehemently urged that in a case where several vital issues were raised and documents placed, the High Court fell in error in not considering the same, the review jurisdiction would have to be invoked to correct the error. It was noted by the Apex Court therein that the original judgment which did not deal with and decide many important issues which on proper consideration may justify the claim of the appellant therein, was liable to be reviewed in exercise of the inherent power of the High Court to prevent miscarriage of justice.

13. Third decision of the Apex Court relied by the learned counsel for the appellant is **Krishna Nand Shukla vs. Director of Higher Education, Allahabad and others** to urgue that the Apex Court has taken exception to the order of the High Court in rejecting the review application by a non-speaking order. The order of dismissal of the review application, thus, has been set aside and the matter was remitted to the High Court to decide the same afresh on the basis of the pleadings on record. While doing so, the Apex Court had gone into the merits of the claim of the parties to reach at the conclusion that the High Court has erred in overlooking the facts of the appellant's case and pleadings made therein. The error committed by the High Court in deciding the writ petition was though brought to the notice of the Court by filing a detailed review application but the same was dismissed by a non-speaking order without adverting to the specific grounds raised in the review

application. It was held therein that the judgment of the High Court without referring to the pleadings in the writ petition, i.e. pleadings in the counter affidavit and rejoinder affidavit, cannot be upheld.

14. Having noted the legal principles laid down by the Apex Court on the scope and ambit of review jurisdiction under Section 114 readwith Order 47 Rule 1 CPC, we are proceeding to note the arguments of the learned counsels for the parties to analyse the same in the facts of the instant case.

15. Placing the judgment under review, learned Senior Counsel for the review applicant would submit that only few facts of the case were noted and discussed by the Court therein to arrive at the conclusion that no facts existed before the State Government for invoking the powers under Sections 17(1) and 17(4) of the Land Acquisition Act, 1894. The invocation of urgency provision could not be justified by the State and, as such, the notifications under Section 4 and 6 of the Land Acquisition Act were held to be bad. The only factors which were taken into consideration by the Court to reach at the aforesaid conclusion are being noted hereinunder:-

(i) The communication between Development Authority, the State and the District Magistrate recording satisfaction with the requirement of dispensation of opportunity of hearing and exercise of powers under Section 17;

(ii) An office note dated 5.5.2010 giving justification for invocation of urgency.

It was argued that the recital of facts in the above noted documents were noted by the Court to arrive at the conclusion that only reasons assigned for dispensing with the opportunity of hearing to the farmers as per the office note dated 5.5.2010 were:- (i) that there was likelihood of encroachment of the land which was proposed to be acquired; (ii) that opportunity of hearing may delay the execution; (iii) that there was recommendation of the District Magistrate for exercise of powers under Section 17 of the Act.

16. Noticing the above, the Court had reached at the conclusion that the above noted three reasons were legally not sustainable for invoking the urgency as:- (i) The petitioners were in possession of the land holding the question of any encroachment/occupation did not arise; (ii) The report submitted by the District Magistrate/Development Authority did not reflect upon any such fact; (iii) Opportunity of hearing as contemplated under Section 5 provides for a period of 30 days in the matter of filing of objection. The objection so filed could always be decided by the Authority concerned within a reasonable time and if the authority itself is unable to decide the objection, it was not open for the State to contend that such opportunity of hearing should not be afforded as it will delay the acquisition.

The opinion drawn by this Court was that the very purpose of Section 5 of the Land Acquisition Act would be frustrated if for the lapse on the part of the authorities, in not deciding the objection within the reasonable time, compliance of Section 5 of the Act could be avoided. The District Magistrate in his letter dated 5.3.2010 (noted in the decision) did not disclose any reason for invocation of the urgency clause and merely stated that he

was satisfied with the proposal for invocation of the power under Section 17.

17. Having stated the above, the Court in the original judgment has proceeded to note the observations of the Apex Court in the case of **Radhey Shyam (Dead) Through Lrs. and others vs. State of U.P. and others** in paragraphs '55' to '59' to arrive at the final conclusion of the acquisition notifications being bad for the reason that there was no justification for invocation of urgency clause.

18. Placing the above recital in the original judgment, it was argued by the learned Senior counsel for the review applicant that none of the factual aspects of the matter brought on record by means of the counter affidavit had been looked into. The judgment did not deal with and decide the important and vital issues in the case. The mistakes in the original judgment pointed out by the learned counsel for the review applicant are:-

(i) the nature of the project, the purpose of acquisition and the Master Plan had been completely ignored while relying on the decision of the Apex Court in **Radhey Shyam** (supra) to hold that invocation of urgency clause under Section 17(4) of the Land Acquisition Act in the instant case, where the land was proposed to be acquired for the purpose of Planned Development in favour of the Development Authority, was unwarranted.

(ii) The recital in the counter affidavit that the Industrial Development Area was divided into various sites for the use as set out in the Master Plan and the land use within the Industrial Development Area was not merely Industrial but included Residential, Commercial, Industrial, Institutional, Greens, Amenities and such other uses as mentioned in the Development Plan, had been completed ignored.

(iii) In the counter affidavit, it was submitted that the request for acquisition of the land was made by the Authority for planned development in the area of Village Mirzapur, in terms of the Master Plan. In the justification for urgency made for the acquisition, it was stated that the lands adjoining Village Mirzapur had either been acquired in the past or the proceeding for acquisition of adjoining land was in process. In order to maintain the continuity of infrastructural services, there was urgency to acquire the plots in question. The land of which the acquisition was proposed under the notification in question, would, interalia, be utilized for infrastructure like roads, sewage, electrification, education, medical facilities, trade and commerce, residence.

(iv) The statement in the counter affidavit justifying the invocation of urgency was that when a large chunk of land was being acquired, it will involve number of farmers going through the normal procedure (without invocation of urgency clause) and it would take years and years to invite, hear and dispose of the objections, verbal or written followed by Court cases, which in turn would further be very time consuming. On account of the delay, the very purpose of acquisition of the land would be defeated and frustrated. It was stated that if the land was not immediately made available, it would possibly affect the industrial/infrastructural growth of the State. Encroachment may also adversely affect the concept of planned development.

(v) Further statement about the proposed use of the land in particular under the notifications in question was that the said land would be used for residential

plots scheme launched in the year 2009 (first phase). On the publication of the scheme there was overwhelming response of the people in the locality and, as such, it was decided to increase the number of plots by acquiring more area. It was also pointed out that under the said scheme, 17% plots out of the total available plots were reserved for farmers of the villages of District Gautam Budh Nagar. The land which fall under the notified area of Yamuna Expressway Industrial Development Authority had either been acquired or directly purchased by the Authority. The land acquisition, in the above circumstances was urgently required.

(vi) All the above materials indicating urgency were placed before the State Government upon which it had recorded subjective satisfaction for arriving at a conclusion of invocation of urgency provision dispensing with the enquiry under Section 5A of the Act, 1896.

(vii) It was also brought on record that under the impugned notifications, 55.2023 hectares of the lands were acquired, out of which possession of 36.7810 hectares had been taken and transferred to the Development Authority on different dates. As many as 218 persons were affected by the notifications in question and 110 persons had received compensation under the Agreement Rules, 1997.

(viii) On the acquired land, roads, drainage works, sewerage works, supply of drinking water, electrification, parks, etc. are to be developed by the Authority during the course of development. The village development, sewerage, drainage, road, water supply, electrification of the village in question would also be undertaken. Out of the estimated cost of Rs. 4546.53 lacs, Rs. 3475.94 lacs had already been spent on road, sewerage, drainage, village development, electricity etc. in the area.

(ix) Under the scheme of the Development Authority, 7% of developed plots would be allotted to the original affected tenure holders of the village, allotment of which was under process.

(x) The lands of Village Mirzapur had been acquired through different notifications and for different uses like the Yamuna Expressway Project, land for area under Master Plan road, area under Master Plan green, Abadi and Abadi settlement. Out of the total acquired area under the notification in question, Sector 18, Sector 20, Sector 22A & Sector 22D, Sector 19 are being developed, land use for which was residential, which included Green area, Sector road and area under township plots, including area under residential plots.

(xi) The acquisition of land of Village Mirzapur for Yamuna Express Way project has been upheld by the Apex Court in **Nand Kishore Gupta and other vs. State of U.P. and others,** wherein the Apex Court had observed that creation of the five zones for Industry, Residence, Amusement etc., would be complementary to the creation of the Expressway. It was observed that the creation of land parcels would give impetus to the industrial development of the State creating more jobs and helping the economy and thereby helping the general people. There can be no doubt that the implementation of the Project would result in coming into existence of five developed parcels/centers in the State for the use of the citizens., which would result in planned development of otherwise industrially backward area. The creation of these parcels will certainly help the maximum utilization of the Expressway and the existence of an Expressway for the fast moving traffic would help the industrial culture created in

the five parcels. It was, thus, held therein that both will be complementary to each other and can be viewed as part of an integral scheme. It was, thus, held therein that Yamuna Expressway Project, which comprises of Yamuna Expressway as well as parcels of land for development for industry, residence, amusement etc., was complementary to the creation of the Expressway. The scheme being of mixed use around the Expressway cannot be viewed in isolation. The development of area along with the Expressway would be complementary to each other.

(xii) Placing the Master Plan before us, it was submitted that the land in Village Mirzapur lies in the midst of the scheme and Yamuna Expressway is cutting across the said village.

19. Placing the above statements from the counter affidavit filed in one of the writ petitions pertaining to the acquisition in question of Village Mirzapur, it was argued by the learned Senior Counsel for the appellant that none of the above noted pleadings of the respondents had been noted nor dealt with by this Court in the exercise of power of judicial review in the matter of invocation of urgency clause, which is limited to the decision making process and not to the decision itself. The conclusion drawn by the Court in the original judgment (under review) that no facts existed before the State Government for invocation of the power under Sections 17(1) and 17(4) was in ignorance of the above noted material on record. It is a clear case of non-consideration of the relevant documents and the decision rendered in ignorance of the material on record which on proper consideration may justify the claim of the review applicant. There exists, thus, an error apparent on the face of the record and the interest of justice demands to correct the said error. The decision has resulted in causing immeasurable loss and injury to the review applicant.

20. It was vehemently urged that the judgment rendered by the High Court in exercise of power under Article 226 of the Constitution attains finality and no appeal as a matter of right is permissible. The appeal to the Supreme Court is maintainable only on the leave of the Court. The remedy of review under Section 114 of the Code of Civil Procedure is a substantive remedy and the High Court having inherent power of review being the Court of plenary jurisdiction may exercise this power to prevent miscarriage of justice, in the facts and circumstances of the instant case.

21. The language of Section 114 CPC has been placed before us to argue that review is permissible in both eventuality (i) where an appeal against the decree and order is allowed by the Code but no appeal has been preferred; and (ii) where no appeal is allowed by the Code.

It was argued that Section 114 CPC empowers a Court to review its own order if the conditions precedent laid down therein are satisfied. The substantive provision of law does not prescribe any limitation on the power of the Court except those which are expressly provided in Section 114 in terms whereof it is empowered to make such order as it thinks fit [Reference was made to the decision of **BCCI** (supra)].

It was argued that in the instant case, as no appeal can be preferred as a matter of right nor any such appeal has been preferred by the review applicant and the appeal, if any, preferred to the Apex Court would be entertainable only on the

question of law that too with the leave of the Court. The substantive power of review under Section 114 CPC, thus, may be exercised in the interest of justice, to correct the mistake of the Court which caused irreparable injury to the review applicant. It was submitted that it is a case of substantive review to correct the error apparent on the face of the record for ensuring the ends of justice and not of subjective review where the Court may form a different opinion on the same subject. If the judgment does not discuss any fact or ignore the material on record, the review applicant cannot be left remediless as the remedy of appeal, in the instant matter, is not available as a matter of right.

It was argued that the Court in the original judgment though noted the arguments made by the Counsel for the Development Authority and the State that the land was gradually being acquired by the State on proposal submitted by the Development Authority for planned development including the construction of residential colonies and that from the material on record, it cannot be said that there was no urgency so as to invoke the provisions Section 17 of the Land Acquisition Act. It was argued and also noted by the Court that the Development Authority had made huge investment for the development of the area running into hundreds of lacs and, in case, the notifications were set aside by the Court public money would go waste. However, the above noted arguments were not dealt with by the Court and only a passing remark was made while dealing with the same in holding that no fact existed before the State Government for invoking the urgency clause.

22. It is submitted that for a large area of the total acquired land, the award was made by consent under the Agreement Rules, 1997 and for the remaining, the award under Section 11(1) was made. Tenure holders had accepted the award and did not challenge the determination. The issues relating to the acquisition for a major chunk of land under notification had been settled. The investment made by the Development Authority for development of the area during the interregnum and the details brought on record of the counter affidavit had been completely ignored. Vesting was complete with the possession memo dated 3.11.2010 and out of total 4 notifications of acquisition of lands in Village Mirzapur, only notification dated 13.5.2010 under Section 4 and declaration dated 28.7.2010 under Section 6 for an area of 55.2023 hectares in Village Mirzapur, was subjected to challenge.

23. The contention, thus, is that the exception taken by the Court to the subjective satisfaction recorded by the State Government for invocation of urgency was a result of overlooking the relevant material such as Master plan, nature of the project, purpose of acquisition, challenges in providing opportunity of hearing to the tenure holders of a large chunk of land and the urgent need of the land for phased development of the Industrial Area within the jurisdiction of the Development Authority. The subjective satisfaction recorded by the State Government could have been reviewed only upon taking the wholesome view on consideration of the entire material on record.

24. Lastly, it was argued that the fact recorded in the original judgment under review that no award had been made by the Special land acquisition officer with reference to the notifications under challenge was incorrect information supplied to the Court, which had resulted in

issuing direction to pay compensation to the tenure holders by redetermining the same on the basis of the provisions of the Act, 2013.

25. It was submitted that in the instant case, that out of total 55.2023 hectares of acquired land under the notification in question, possession of 36.7810 hectares had been given to the authority, out of which, the award under Section 11(2) for an area of 18.6990 hectares was made on 13.3.2012 and for an area of 3.9044 hectares on 13.12.2013; for an area of 0.5250 hectares on 31.12.2013. The award under Section 11(1) for an area of 13.6525 hectares was made on 31.12.2013. As the possession of only an area of 36.7810 hectares was taken and, as such, award under Sections 11(1) and 11(2) of the Act, 1894 was made only for the said area. The said facts were brought on record by means of the supplementary counter affidavit dated 15.12.2016 filed by the Authority. It was categorically stated therein that the possession of 18.4213 hectares of land was not taken by the State and, as such, was not handed over to the Development Authority. There was, thus, no question of making award for the said area, the land of the petitioners herein is also included in the aforesaid area of 18.4213 hectares. The result is that most of the affected tenure holders had received compensation and award under Section 11(1) of the Act, 1894 was required to be made only for a small area.

It was, thus, argued that once the issues relating to acquisition had been settled in the larger public interest, interference by this Court in ignorance of correct and complete facts already on record had resulted in unsettling the otherwise settled possession. The development of the area is being badly affected because of the judgment under review.

26. In the end, it was submitted that by the Government Orders dated 29th August, 2014 and 4.11.2015 issued by the State Government, to balance the equities, considering the grievances of the tenure holders pressed through their representatives viz-a-viz the affected allottees due to the interference made by this Court, it was decided that 64.7% of additional compensation would be paid to the affected tenure holders “as no litigation bonus”. It was further decided that “no litigation bonus” would also be paid to the farmers on withdrawal of 80% of the writ petitions relating to the acquisition proposals wherein the land is to be utilized for infrastructural project such as road, sewer, electrification, water supply and electronic manufacturing cluster etc. The submission, thus, is that grievance, if any, of the tenure holders in the matter of determination of compensation was also addressed by the State Government by providing additional compensation to the affected farmers.

27. With the above submissions, it was submitted by the learned Senior Counsel for the review applicant that this is a fit case for invocation of power of review inherent in this Court to make correction of its mistake. The review applications are, thus, deserve to be allowed.

28. In rebuttal, it was urged by the learned counsels appearing for the opposite parties/review applicants/writ petitioners that the State, decision of which has been found to be bad in invocation of urgency clause by this Court, has not filed the review, the review application has been

filed only by the Development Authority. Moreover, under the garb of review, the applicant is trying to challenge the correctness of the decision of this Court. The power of review is limited and it has to be exercised within the framework of Section 114 readwith Order 47 Rule 1 CPC. The correctness of the decision cannot be seen and only an error apparent on the face of the record could be corrected in the exercise of power of review. In the facts of the instant case, this Court has reached at a definite conclusion that no fact existed before the State Government to invoke the urgency clause and the reasons found on the record justifying invocation of urgency were held to be legally not sustainable. In the facts and circumstances of the case, exercise of power of review would require appreciation of evidence on record to find out the mistake in the judgment which is wholly within the domain of the appellate court and review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error. The mere possibility of two views on the subject cannot be a ground for review. The power of review can be exercised only for correction of mistake and not to substitute a view. It is wholly unjustified to re-write a judgment by which the controversy has been decided.

Analysis

29. Having noted the legal principles pertaining to exercise of power of review, the facts and circumstances of the instant case and the original judgment (under review), we may record, at the outset, that the review application has been filed only by the beneficiary namely the Yamuna Expressway Industrial Development Authority. The acquisition of the land in question was made by the State Government taking decision for invoking the provisions of Section 17(1) of the Land Acquisition Act, 1894, on the proposal submitted by the Development Authority. The communications between the Development Authority and the State Government had been noted by the Court in the judgment under review to further go through the record produced by the State Government to justify its decision by recording satisfaction for invocation of urgency. The reasoning given in the report of the District Magistrate and placed before the State Government as extracted in the note prepared by the concerned Secretariat had been recorded and dealt with by the Court to arrive at the conclusion that they were legally unsustainable for invoking the urgency provisions. The law relating to the justification for invocation of urgency clause as propounded by the Apex Court in **Radhey Shyam** (supra) has been considered and finally the Court reached at a conclusion that no facts existed before the State Government for invoking the powers under Section 17(1) read with Section 17(4) of the Land Acquisition Act, 1894. Resultantly, the acquisition notifications were held bad.

30. When we consider the view taken by the Court in the judgment under review on appreciation of the material placed before it, in light of the material on record of the counter affidavit and supplementary counter affidavit noted above, at the first blush, though it seemed to us that the original judgment having been rendered in ignorance of the above placed material on record is liable to be reviewed by invoking the inherent power of substantive review of this Court but on a deeper scrutiny, we are of the considered view that exercise of such a power would result in exceeding the

limited power of review, inasmuch as, for exercise of power of review, we would be required to re-appreciate the evidence on record to arrive at a decision whether a mistake has been committed by the Court in the original judgment.

31. It is not a case where it can be said that the material considered by the Court in the judgment under review (original judgment) were extraneous to the case or irrelevant to the controversy. It is not a case where it can be said that even after appreciation of the material, allegedly ignored by the Court in the judgment (under review), the view taken by the Court in the judgment (under review) is not a possible view. Mere possibility of another view on the subject, as is well settled, cannot be a ground for review. It is well settled that error apparent on the face of the record should not be an error which has to be fished out and searched. To review the original judgment, we would be required to go through the entire material placed before us from the counter affidavit (noted above) to reach at the conclusion as to whether there is an error in the decision, to arrive at a finding that there was no justification of invocation of urgency clause. The error pointed out cannot be said to be error apparent in the decision made in clear ignorance or disregard of provisions of law. An allegedly wrong decision, cannot be corrected in exercise of power of review. The review is permissible only when one view was possible. If the view adopted by the Court in the original judgment is a possible view with reference to what record states, it is difficult to hold existence of an error apparent on the face of the record (Reference **Kamlesh Verma** (supra).

32. It is settled that a rehearing of the matter is impermissible in law within the scope of review. A repetition of old and overruled argument cannot be considered to reopen concluded adjudication. The review is not maintainable when the same relief sought at the time of argument has been negatived. In the case of **Perry Kansagra** (supra), the Apex Court has observed that while exercising the review jurisdiction in an application under Order 47 Rule 1 read with Section 114 CPC, the review Court does not sit in appeal over its own order. The power of review can be exercised for correction of a mistake but not to substitute a view. Such power can be exercised within the limits of the statute dealing with the exercise of power. It is wholly justified to re-write a judgment by which the controversy has been finally decided on the ground that the decision was erroneous on merit. The error on the face of the record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on the points where there may conceivably be two opinions.

33. In **Shanti Conductors Private Limited** (supra), it was observed and held that scope of review under Order 47 Rule 1 CPC readwith Section 114 CPC is limited and under the guise of review, the applicant/petitioner cannot be permitted to re-agitate and re-argue questions which have already been addressed and decided. It is further observed that 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 fact of the record. In **Rajendra Kumar and others vs. Rambhai and others,** dealing with the maintainability of the review application, it was observed by the Apex Court that the limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining the

review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will led to failure of justice. In absence of any such error, finality attached to the judgment/order cannot be disturbed.

34. There is one more aspect of the matter. This review application filed by the Development Authority is being argued by the learned Senior Advocate who has now been entrusted to appear for the respondent-Development Authority. It seems that most of the material so assiduously placed before us from the pleadings on record and the perspective brought before us in the matter of invocation of urgency, had not been brought to the attention of the Court passing the original judgment. The arguments of the then Counsel noted in the original judgment though had been placed before us to assert that the points urged were not dealt with but it cannot be found that assiduous arguments placed before us from the material on record were placed before the Court passing the original judgment and ignored. There cannot obviously be any such statement in the review application as the same had been filed through a different counsel. Moreover, the controversy cannot be said to admit of only one out of two or more views canvassed on the point.

35. In light of the above discussion in view of settled legal position on limitation on the power of review, we are further required to go through the decisions relied by the learned Senior Counsel for the review applicant.

36. Heavy reliance has been placed on the decision of the Apex Court in **BCCI** (supra), as noted above, to argue that an application for review may be necessitated by way of invoking the doctrine *"actus curiae neminem gravabit",* to correct the mistake on the part of the Court. The words "sufficient reason" in Order 47 Rule 1 CPC are wide enough to include a misconception of fact or law by a Court. Having gone through the said decision, we find that in that case, challenge before the Apex Court was to the interim order passed by the Division Bench of the High Court on the review application noticing that they had been misled by the undertaking given on behalf of the respondent therein, it was noted by the Division Bench that undertaking across the Bar given by the counsel appearing on behalf of the Board had not been given effect to in its letter and spirit.

It was argued by the learned counsel for the respondent-Board therein that the undertaking given by the learned counsel for the appellant Board before the Division Bench was in consonance with the contention raised in the memo of appeal itself which had been duly recorded and the said undertaking having not been violated, the application for review was not maintainable.

In those facts and circumstances of that case, it was noted by the Apex Court that indisputably an undertaking had been given by a learned counsel appearing on behalf of the Board and in the interim order passed by the High Court in the review matter, the Bench before whom such undertaking had been given had expressed an opinion that it was misled. It was, thus, noted that the Apex Court having regard to the understanding of such undertaking by the Division Bench of the High Court, it did not intend to deal with the effect and purport thereof, as it was of the opinion that

the Division Bench of the High Court itself was competent therefor.

In light of the above facts, it was observed by the Apex Court therein that a mistake on the part of the Court which would include a mistake in the nature of the undertaking may also call for a review of the order. And an application for review would also be maintainable if there exists sufficient reason therefor. It was, however, noted that what would constitute sufficient reason would depend on the facts and circumstances of the case.

In light of the above, we find that the narration of law relating to exercise of power of review in **BCCI** (supra) in paragraph nos. '89' & '90' upon which heavy reliance has been placed by the learned Senior Counsel for the review-applicant, had been made in the facts and circumstances of the said case. No such fact or circumstances could be found in the instant case. The view in **BCCI** (supra) having been expressed in the facts and circumstances of the given case is of no benefit to the review-applicant herein.

37. Another decision in **Rajendra Singh** (supra) relied by the learned Senior Counsel for the review-applicant pertains to a dispute relating to regularization of services of the appellant therein and denial of the award of Senior scale and Selection grade. On the appeal preferred by the respondent before the High Court, the order of the Tribunal directing for giving seniority to the appellant therein and granting senior scale as also all other consequential service benefits, had been set aside. The review application filed by the appellant therein was also rejected by another Division Bench of the High Court.

In these circumstances, the appellant had approached the Apex Court and it was noted therein that the High Court had committed an error of law by overlooking the documents relied by the appellant pertaining to fulfillment of conditions for grant of Senior scale and Selection grade particularly the documents showing bias on the part of the members of the Screening Committee and the discrimination and harassment to which the appellant had been subjected to. The letter regarding the service benefit including the seniority to which the lecturers were entitled to after the regularization of their services from the initial date of their adhoc appointment had been overlooked. The letter of UGC regarding the relaxation of refresher course was also ignored.

In light of the above facts and circumstances, it was held by the Apex court that a careful perusal of the judgment under review indicated that it did not deal with and decide many important issues which were raised in the ground of Special Leave Petition/appeal as also as the ground of review. The High Court was not justified in ignoring the material on record which on proper consideration may justify the claim of the appellant. The High Court was not correct and overlooking the documents relied on by the parties.

It was, thus, held that the judgment under review was a clear case of error apparent on the face of the record and non-consideration of the relevant documents and the High Court being a Court of plenary jurisdiction had inherent power to prevent miscarriage of justice by exercise of power of judicial review of its own order. It was observed the review power extends to correct all errors to prevent miscarriage of justice and the Court should not hesitate to review to their own earlier order when there exists an error on the face of the record and the interest of justice so demands in appropriate cases.

Having noted the facts of **Rajendra Singh** (supra), we find that the observation made therein was with regard to the scope of review in the facts and circumstances of the said case and is not of any benefit to the review applicant herein, in the facts of the instant case.

38. The last decision relied by the learned Senior Counsel for the review applicant is **Krishna Nand Shukla** (supra), wherein the appellant's case was to seek writ of mandamus commanding the respondents therein to pay salary on month to month basis as Lecturer Military Science and not to interfere in its functioning as such. The appellant started getting salary under the interim order passed by the Court, a counter affidavit was filed by the contested respondents wherein the claim of the appellant was refuted and it was mentioned that the claim of the appellant had already been rejected by an order passed subsequent to the filing of the writ petition. It was pleaded that although the appellant therein claimed his appointment as adhoc lecturer in Military Science on 2.8.1991 but the post for Military Science was created only on 9.2.1996. The State had no liability to pay salary in view of the provisions of the U.P. State University Act, 1973. It was also pleaded that the petitioner therein was not appointed following the due procedure. The writ petition was dismissed by the Division Bench of the High Court referring to the paragraphs of the counter affidavit and rejoinder. A review application was filed which was dismissed by the High Court by a non-speaking order. The Apex court had taken exception to the act of the High Court in rejecting the review application by passing an order which was non-speaking, wherein the grounds taken in the review application were not dealt with. It was noted by the Apex Court that the appellant therein had taken a categorical stand that the paragraphs of the counter affidavit and that of the rejoinder, which were referred to and relied on by the High Court for dismissing the writ petition were not present in the counter affidavit filed to the writ petition of the appellant and the rejoinder affidavit filed by the appellant. The copy of the counter affidavit was brought on record of the Special Leave Petition and it was noted by the Apex Court that there was no such paragraphs which were noted in the order under review. The statement from the paragraphs of the rejoinder which was noted by the High Court was different.

The review application in the said case, was filed before the High Court on a liberty granted by the Apex Court in the Special Leave Petition. In the said circumstances, rejection of the review application by the High Court by a non-speaking order was held to be bad. The said judgment having been passed in the facts and circumstances of that case noticing that the judgment and order under review was passed in ignorance of the pleadings on record, cannot come to the rescue of the review applicant herein.

39. For the above discussion, we are of the considered opinion that though it can be argued by the counsel for the review applicant that some material such as Master plan, the nature of the project, the land use of the acquired land were not taken into consideration by the Court in the original judgment (under review), however, consideration of the said arguments would require us to appreciate the material on record which was allegedly ignored by the Court in the original order and the said exercise of re-hearing being impermissible within the scope of review, we do not find

any good ground to exercise the power of review conferred upon us, in the facts and circumstances of the instant case. The judgment and order of this Court under review having attained finality between the parties, in case of any mistake on the part of the Court in ignoring the pleadings on record and arriving at a different conclusion by considering the other material on record, only remedy before the review applicant was to approach the Apex Court placing the alleged wrong in the judgment under review.

In view of the above, the review applications are **dismissed** being beyond the scope of review under Order 47 Rule 1 readwith Section 114 of the Code of Civil Procedure.

(2023) 6 ILRA 509
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 57858 of 2016

Basistha Muni Mishra ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
A.S.G.I., Sri S.K. Kakkar, Sri S.K. Shukla, Sri Satish Chaturvedi, Sri Satish Kishore Kakkar, Sri Sunit Kakkar

Service Law-There is no dispute about the proposition to the effect that criminal trial and the departmental proceedings against a delinquent employee can run simultaneously, however in case charges under consideration of a court exercising criminal jurisdiction and the charges on which departmental proceedings against a delinquent employee are held, are identical, the effect of honorable acquittal of the delinquent employee would be a relevant factor and cannot be ignored-Once service rules specifically take care of commencement, pendency, culmination and the conclusion of the departmental proceedings vis-a-vis criminal prosecution, the general principle that criminal trial and departmental proceedings can run simultaneously cannot be strictly applied atleast against the petitioner, otherwise it would be a case where the general conceptions would override specific service rules which is not permissible-Petitioner entitled to entire arrears of salary and consequential benefits. (Para 45, 47, 48 & 51)

Partly allowed. (E-15)

List of Cases cases;

1. H.P. Electricity Board Vs Mahesh Dayyia: 2017 (2) ESC 289

2. 2002 SCC Online Cal 25 (Lakshman Kumar Mondal Vs UCO Bank & ors., 24.01.2002;

3. 2006 (5) SCC 446 (G.M. Tank Vs St. of Gujrat & ors.)

4. 2019 SCC Online All 5794 (Anand Ram Nagar Vs Banaras St. Bank Ltd. & ors.)

5. (2017) 1 SCC 768 (Himachal Pradesh St. Electricity Board Ltd. Vs Mahesh Dahiya)

6. Union of India & ors. Vs Dalbir Singh: (2021) 11 SCC 321

7. St. of Karn. & anr.Vs Umesh: (2022) 6 SCC 563

8. St. Bank of India & ors. Vs R.B. Sharma: (2004) 7 SCC 27

9. Management of Bharat Heavy Electricals Limited Vs M. Mani: (2018) 1 SCC 285

10. West Bokaro Colliery (TISCO Ltd.) Vs Ram Pravesh Singh: (2008) 3 SCC 729

11. Deputy General Manager (Appellate Authority) & ors. Vs Ajai Kumar Srivastava: (2021) 2 SCC 612

12. Gopal Narain Shukla Vs AGM SBI (Writ Petition No.7737 of 2005) decided on 24.02.2020

13. Priti Chauhan Vs St. of U.P. & ors.: 2008 (9) ADJ 388

14. Mayank Agarwal Vs Bareilly Kshestriya Gramin Bank & ors.: 2013 (3) ADJ 143 (DB)

15. ECIL v. B. Karunakars: (1993) 4 SCC 727

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. This writ petition has been filed challenging the award dated 19.07.2016 passed by Industrial Tribunal-cum-Labour Court, Kanpur in Industrial Dispute No.49 of 2006, between Bashishtha Muni Mishra and the Deputy General Manager, State Bank of India. Further orders under challenge are dated 26.10.2004 and 19.01.2005 respectively passed by the Assistant General Manager and Deputy General Manager. By the said orders, the petitioner was respectively dismissed from service and his departmental appeal was dismissed. Further prayer has been made to issue a direction for reinstatement of the petitioner in service with all consequential benefits including arrears of salary from the date of order of suspension.

2. The facts as culled out from the writ petition are that the petitioner was appointed as a Messenger-cum-Water Boy in the respondent bank on 17.02.1979 and was later on promoted as Daftary. Lastly, he was posted at Johnstonganj Branch, Allahabad. It is pleaded that services of the petitioner were governed by Memorandum of Settlement dated 19.10.1966 containing the provisions of disciplinary action and procedure therefor. On 12.03.1999, a new Saving Bank Account No.01190022061 was allowed to be opened in the branch concerned in the name of one Smt. Prema Devi by accepting the reference of one Smt. Maina Devi, the depositor of Saving Bank Account No.58901. The account was opened after completion of necessary formalities and due verification by the bank authorities. On 13.03.1999, Smt. Prema Devi, the depositor of newly opened Account No.01190022061, deposited a cheque dated 16.07.1999 of Rs.67,050/- issued by the Life Insurance Corporation of India in her favour which was collected by the bank through legal officer clearing and crediting the same in the account against which a withdrawal of Rs.65,000/- was done by Smt. Prema Devi on 18.08.1999 which was allowed by the concerned official of the bank. Later on, it stood revealed that cheque in question belonged to some other Prema Devi and Smt. Prema Devi whose Saving Account No. 01190022061 was allowed to be opened was not a genuine lady and her incorrect particulars were given. Concerning the said issue, the Branch Manager of Life Insurance Corporation of India, City Branch, Allahabad informed the Police Station, Kotwali, Allahabad and pursuant thereto, a first information report was registered as Case Crime No.394 of 1999, under Section 419/420 IPC. After completion of investigation, a charge sheet was submitted by the investigating agency before the court on the basis whereof, Criminal Case No.1744 of 2000 was registered against the petitioner and one Rajendra Kumar Dwivedi, within a period of less than six months from the date of registration of first information report. It is further pleaded that the petitioner was

arrested by the police on 15.02.2000 but was subsequently bailed out. He was suspended by the bank and, ultimately, acquitted by the Chief Judicial Magistrate, Allahabad under the judgment and order dated 15.10.2009 which has attained finality.

3. In so far as the departmental proceedings are concerned, it is pleaded that the departmental charge sheet was issued to the petitioner on 18.02.2002, the inquiry was cursorily concluded in terms of an inquiry report dated 26.09.2002 in which charges no. 1 and 3 were found to be proved and charge no.2 as partly proved. It is further pleaded that based upon the inquiry report, the Disciplinary Authority took a provisional decision of dismissal of the petitioner on 22.09.2004 under paragraph 6(a) of the Memorandum of Settlement dated 10.04.2002 and called upon the petitioner to show cause against the said penalty. Further pleading is to the effect that prior to issuance of provisional order dated 22.09.2004, no copy of the inquiry report was supplied to the petitioner nor was he provided any opportunity to object the same.

4. It is further pleaded that the petitioner was dismissed from service under the impugned order dated 26.10.2004 against which he preferred an appeal before the appellate court which was also dismissed on 19.01.2005, whereafter the petitioner agitated a dispute under the provisions of Industrial Disputes Act and, ultimately, the matter was referred to the Central Government, Industrial Tribunal-cum-Labour Court, Kanpur, under Section 10(2-A) (i) (d) of the Act, 1947 for adjudication of the dispute as to whether the termination of the petitioner from service on 22.09.2004 was just and according to law and if not, as to what relief the petitioner was entitled to. It is pleaded that during the course of proceedings before the Tribunal, written arguments dated 25.03.2010 were filed on behalf of the petitioner annexing therewith certain authorities as well as the judgment of acquittal passed by the court concerned in the criminal case. It is further pleaded that the Tribunal has, by the impugned award dated 19.07.2016, answered the reference against the petitioner holding that he is not entitled to any relief.

5. The award has been challenged on various grounds which shall be dealt with while dealing with rival contentions after the pleadings exchanged between the parties are referred to.

6. A counter affidavit has been filed on behalf of respondents no.4 to 6 taking a standing that the services of the petitioner were terminated as per the circular dated 26.10.2004 and no bipartite settlement would come in the way of disciplinary action. It has further been pleaded that in case criminal trial does not end within one year of its commencement and charge sheet against an employee is pending, concurrent departmental inquiry can be revived and brought to a conclusion. It is further submitted that the inquiry was conducted under the order dated 26.11.2001 passed by this Court and that on merits, the punishment was perfectly justified and, therefore, none of the orders impugned should be interfered with.

7. The petitioner has filed a rejoinder affidavit reiterating the stand taken in the writ petition and reliance has been placed on a judgment of the Supreme Court in the case of ***H.P. Electricity Board Vs. Mahesh Dayyia: 2017 (2) ESC 289*** in support of

the contention that after receipt of the inquiry report, its copy must have been made available to the delinquent employee and it is only after receiving objections from the employee concerned, mind could have been applied by the Disciplinary Authority, however, in the present case, the said procedure has not been followed.

8. I have heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Siddharth Khare, learned counsel for the petitioner, Sri Arvind Kumar Goswami, learned counsel for respondent No. 1, Union of India, learned Standing Counsel for respondent Nos 2 and 3 and Sri S.K. Kakkar along with Sri Sumit Kakkar, learned counsel representing the respondent Nos. 4 to 6.

9. Sri Ashok Khare, learned Senior Counsel has argued that the services of the petitioner were governed by Bipartite Settlement dated 19.10.1966. He has referred to Chapter XIX of the said Settlement by placing much emphasis on Clauses 19.3 and 19.4 of the same which are quoted herein below:-

"19.3 (a) When in the opinion of the management an employee has committed an offence, unless he be otherwise prosecuted, the bank may take steps to prosecute him or get him prosecuted and in such a case he may also be suspended.

(b) If he be convicted, he may be dismissed with effect form the date of his conviction or be given any lesser form of punishment as mentioned in Clause 19.6 below.

(c) If he be acquitted, it shall be open to the management to proceed against him under the provisions set out below is Clauses 19.11 and 19.12 infra relating to discharges,. However, in the event of the management deciding after enquiry not to continue him in service, he shall be liable only for termination of service with three months' pay and allowances in lieu of notice. And he shall be deemed to have been on duty during the period of suspension provided that if he be acquitted by being given the benefit of doubt he may be paid such portion of such pay and allowances as the management may deem proper, and the period of his absence shall not be treated as a period spent on duty unless the management so direct.

(d) If he prefers an appeal revision application against his conviction and is acquitted, in case he had already been dealt with as above and he applies to the management for reconsideration of his case, the management shall review his case and may either reinstate him or proceed against him under the provisions set below in Clauses 19.11 and 19.12 infra relating to discharge, and the provision set out above as to pay, allowances and the period of suspension will apply, the period up-to-date for which full pay and allowances have not been drawn being treated as one of suspension. In the event of the management deciding, after enquiry not to continue him in service, the employee shall be liable only for termination with three months' pay and allowances in lieu of notice, as directed above.

19.4 If after steps have been taken to prosecute an employee or to get him prosecuted, for an offence, he is not put on trial within a year of the commission of the offence, the management may then deal with him as if he had committed an act of "gross misconduct" or of "minor misconduct", as defined below; provided that if the authority which was to start prosecution proceedings re3fuses to do so or come to the conclusion that there is no

case for prosecution it shall be open to the management to proceed against the employee under the provisions set out below in Clauses 19.11 and 19.12 infra relating to discharge, but he shall be deemed to have been on duty during the period of suspension, if any, and shall be entitled to the full wages and allowances and to all other privileges for such period.

In the event of the management deciding, after enquiry, not to continue him in service, he shall be liable only for termination with three months' pay and allowances in lieu of notice as provided in Clause 19.3 supraf within the pendency of the proceedings thus instituted he is put on trial such proceedings shall be stayed pending the completion of the trial, after which the provisions mentioned in Clause 19.3 above shall apply."

10. Based upon the aforesaid clauses, the contention of Sri Khare is that since a first information report was lodged against the petitioner in the year 1999 and a charge sheet pursuant to the FIR was submitted by the investigating agency within a period of six months from the date of registration of FIR, the departmental proceedings were liable to be stayed. Sri Khare submits that the departmental charge sheet was filed on 18.02.2002 and since the criminal trial was pending on the date of initiation of departmental proceedings, the same should have been stayed awaiting the decision of the court exercising criminal jurisdiction. Sri Khare further submits that as per Clause 19.3(a) when in the opinion of the management an employee has committed an offence, unless he be otherwise prosecuted, the petitioner may take steps to prosecute him and as per the clause (c), if the employee is acquitted, it shall be open to the management to proceed against him under the provisions set out in Clauses 19.11 and 19.12 which deal with taking of disciplinary action. Sri Khare further submits that as per clause 19.4, if after steps have been taken to prosecute the employee or to get him prosecuted, for an offence, he is not put on trial within a year from the commission of offence, the management may then deal with him as if he had committed an act of "gross misconduct" or of "minor misconduct" provided that if the authority which was to start prosecution proceedings refuses to do so or comes to the conclusion that there is no case for prosecution, it shall be open for the management to proceed against the employee under the provisions contained in Clauses 19.11 and 19.12.

11. Sri Khare has further argued that in the event of the management deciding after inquiry not to continue the employee in service, he shall be liable to only for termination with three months' pay and allowances in lieu of notice as per Clause 19.3 and if during pendency of the proceedings thus instituted, he is put on trial, such proceedings shall be stayed pending completion of the trial whereafter the provisions mentioned in clause 19.03 shall apply.

12. Sri Khare has vehemently argued that the prohibition under clause 19.4/ clause 4 is couched in a negative language that if after steps have been taken to prosecute an employee, he is not put on trial within a year of the commission of offence, then the management may deal with him as if he had committed an act of gross misconduct. The clear intent of the said negative prohibition is that in case steps have been taken for criminal prosecution for an employee, then the management is obliged to await for a period of one year before commencing

disciplinary proceedings. In case the trial commences within this period of one year, then the management is obliged to await the conclusion of the criminal trial. Even in case the disciplinary proceedings are commenced on account of non-commencement of criminal trial within the period of one year from the date of the commission of offence, even then, in case the criminal trial commences thereafter during the pendency of the disciplinary proceedings, disciplinary proceedings have to await till the conclusion of the criminal trial.

13. Sri Khare has further argued that the charge levelled against the petitioner in the departmental enquiry was the same as was the subject matter of the FIR/ criminal trial. In the said criminal proceedings, the petitioner stood acquitted by judgment dated 15.10.2009 (Annexure No.5, page 60 to the writ petition). A perusal of the aforesaid judgment would demonstrate that such acquittal was a honorable acquittal on the ground that there did not exist any evidence in support of the charge levelled against the petitioner. On account of such acquittal, the Labour Court while passing the award dated 19.07.2016 clearly erred in upholding the dismissal from service.

14. On merits of the termination order, Sri Khare has referred to the order dated 22.09.2004 passed by the Assistant General Manager, i.e. the Disciplinary Authority, pursuant to the inquiry report and submission is that the Disciplinary Authority had already made its mind to dismiss the petitioner from service without even complying with the mandatory provisions of law to the effect that whenever an inquiry report is submitted by the inquiry officer, first of all the stand of the employee has to be called for and it is only after considering the same, final opinion can be formed after applying mind. Sri Khare has referred to paragraph 3 of the order dated 22.09.2004, which reads as follows:-

"3. I have gone through the facts and circumstances of the case in its entirety. After applying my mind independently. I am of the view that ends of justice would be met if Shri Bashista Muni Mishra, Duftari (under suspension), be dismissed from the bank's service without notice in terms of para 6(a) of Memorandum of Settlement dated 10.04.2002 entered between Bank and All India SBI Staff Federation. I also order that the period spent by Sri Mishra as suspended will be treated as such and no salary and allowances except the subsistence allowance already paid, will be payable to him. I order accordingly."

15. Sri Khare submits that the enquiry report submitted by the enquiry officer was not immediately supplied to the petitioner for filing objection. Instead, the Assistant General Manager/ Disciplinary Authority proceeded to record findings of guilt and also decided the punishment to be imposed upon the petitioner. It was along with the provisional order dated 22.09.2004 that a copy of the enquiry report was supplied to the petitioner. The procedure so adopted does not comply with the requirement of law. The guilt of the petitioner as indicated in the enquiry report was accepted by the disciplinary authority without supplying the copy of the enquiry report to the petitioner and without affording an opportunity to him to object against the same.

16. In support of his contention, Sri Khare has placed reliance upon the following authorities:-

(i) 2002 SCC Online Cal 25 (Lakshman Kumar Mondal Vs. UCO Bank and others), 24.01.2002;

(ii) 2006 (5) SCC 446 (G.M. Tank Vs. State of Gujrat and others);

(iii) 2019 SCC Online All. 4460 (Sanjay Kishore Vs. State of U.P. and others; and

(iv) 2019 SCC Online All 5794 (Anand Ram Nagar Vs. Banaras State Bank Limited and others);

(v) (2017) 1 SCC 768 (Himachal Pradesh State Electricity Board Ltd. Vs. Mahesh Dahiya).

17. On the contrary, Sri S.K. Kakkar along with Sri Sumit Kakkar, learned counsel for the respondent-bank have vehemently opposed the writ petition and it has been argued that the contention of the petitioner that services were governed by Memorandum of Settlement dated 19.10.1966 is incorrect as the proceedings were held and action was taken against the petitioner in terms of Memorandum of Settlement dated 10.04.2002, a copy whereof has been filed as Annexure No.2 to the writ petition. Sri Kakkar has further argued that the bank did not proceed with criminal prosecution, rather the FIR was lodged by the Branch Manager of Life Insurance Corporation of India and, therefore, the argument advanced with reference to the criminal trial and its effect, has no force. Sri Kakkar has further argued that in so far as the continuance of departmental proceedings is concerned, the same were conducted and completed in furtherance of the order dated 26.11.2001 passed by the High Court and, therefore, the submission of the petitioner that the departmental proceedings could not be held or were liable to be stayed would be contrary to the order passed by the High Court and the Department could not have committed the contempt of the same.

18. On merits of the impugned termination order as well as departmental proceedings, Sri Kakkar has submitted that the order dated 22.09.2004 passed by the Disciplinary Authority was only a tentative order which is apparent from paragraph no.4 of the same, which reads as under:-

"4. However, before taking a final decision in the matter, I give him an opportunity to make submissions, if any, against above order within 07 days of its receipt, failing which it would be deemed that he has nothing to submit in this regard and final order will be passed without any further reference to him.

19. Sri Kakkar, therefore, submits that the petitioner was provided full opportunity to make his submission prior to taking final decision in the matter by the Disciplinary Authority. He has also referred to the final order dated 26.10.2004 with reference to paragraph no.5 of the same where words **"I, therefore, confirm my tentative order dated 22.09.2004"** have been used. He submits that the charges were proved against the petitioner by recording pure findings of fact which cannot be and should not be disturbed in writ jurisdiction.

20. Sri Kakkar has also argued that the departmental proceedings, even otherwise, cannot be stayed on account of pendency of the criminal trial and both the said proceedings can run simultaneously. He has also placed reliance on following authorities in support of his submissions:-

(i) Union of India and others Vs. Dalbir Singh: (2021) 11 SCC 321;

(ii) State of Karnataka and another Vs. Umesh: (2022) 6 SCC 563;

(iii) State Bank of India and others Vs. R.B. Sharma: (2004) 7 SCC 27;

(iv) Management of Bharat Heavy Electricals Limited Vs. M. Mani: (2018) 1 SCC 285;

(v) West Bokaro Colliery (TISCO Ltd.) Vs. Ram Pravesh Singh: (2008) 3 SCC 729;

(vi) Deputy General Manager (Appellate Authority) and others Vs. Ajai Kumar Srivastava: (2021) 2 SCC 612;

(vii) Gopal Narain Shukla Vs. AGM SBI (Writ Petition No.7737 of 2005) decided on 24.02.2020;

(viii) Priti Chauhan Vs. State of U.P. and others: 2008 (9) ADJ 388;

(ix) Mayank Agarwal Vs. Bareilly Kshestriya Gramin Bank and others: 2013 (3) ADJ 143 (DB).

21. Sri Kakkar has also argued that the Tribunal has recorded a finding in paragraph no.13 of the order impugned that it had framed a preliminary issue on 07.02.2013 to the effect whether the domestic inquiry conducted by the management was just and fair. By order dated 12.08.2015, the Tribunal held that the inquiry conducted by the bank is just and fair and on the same day, authorized representative for the worker moved an application stating that he had no issue with regard to inquiry upto the extent of procedure but the finding of inquiry officer is not tenable in the eyes of law. Therefore, Sri Kakkar has submitted that from the aforesaid finding it is clear that the worker had admitted fairness of the inquiry procedure adopted in the domestic inquiry and has only challenged the findings of the inquiry officer.

22. In this regard, Sri Khare has referred to the order dated 12.08.2015 which has been considered by the Tribunal in the order impugned and has submitted that merely because the authorized representative, by means of an application dated 12.08.2015 submitted that the employee had no issue in regard to the inquiry upto the extent of procedure, the same would not clothe the authorities to act contrary to the established procedure, particularly, when the entire departmental proceedings were co-related to the same charges on which criminal trial was being held and, therefore, any application or statement or argument made on behalf of the authorized representative could not be treated as fatal to the case of the petitioner.

23. I have heard the learned counsel for the parties and perused the record.

24. There is no dispute about the fact that Branch Manager of Life Insurance Corporation of India lodged a first information report on 10.12.1999 and the petitioner was charge sheeted in the criminal proceedings. The submission of Sri Kakkar to the effect that since the FIR was not lodged by the bank and therefore the case would not fall under Clause 19.3 or 19.4 has been replied to by Sri Khare by referring to language used in Clause 19.3(a) of the Memorandum of Settlement of 1966 which uses the words **"unless he be otherwise prosecuted"** and, therefore, Sri Khare submits that it is immaterial as to who had lodged the first information report, rather what is important is as to whether the prosecution launched against a delinquent employee would have material bearing on the departmental proceedings as per the various clauses of Settlement which contains a provision for departmental proceedings pending criminal trial.

25. In the present case, I find that when the punishment order was passed in

the year 2004, the criminal trial against the petitioner was pending. However, when the matter was decided by the Tribunal in the year 2016 under the order impugned, the petitioner had already been acquitted under the judgment dated 15.10.2009. Sri Khare has vehemently argued that written submissions were filed by the petitioner on 25.03.2010 which contained reference of the said acquittal and copy of the judgment dated 15.10.2009 was annexed along with the written submissions, however there is absolutely no consideration of the same in the order of the Tribunal.

26. As regards the contention of Sri Kakkar that the services were not governed by the Memorandum of Settlement of 1966 but by a subsequent Memorandum of Settlement dated 10.04.2002, Sri Khare submits that Clauses 19.3 and 19.4 are parimateria with the terms of the settlement contained in the subsequent Memorandum dated 10.04.2002. For a ready reference, the provisions relating to disciplinary action and procedure therefor, as contained in Memorandum of Settlement dated 10.04.2002, are reproduced herein below:-

Disciplinary Action and Procedure therefor

1. A person against whom disciplinary action is proposed or likely to be taken shall in the first instance, be informed of the particulars of the charge against him and he shall have a proper opportunity to give his explanation as to such particulars. Final-orders shall be passed after due consideration of all the relevant facts and circumstances. With this object in view, the following shall apply.

2. By the expression "offence" shall be meant any offence involving moral turpitude for which an employee is liable to conviction and sentence under any provision of Law.

3. (a) When in the opinion of the management an employee has committed an offence, unless he be otherwise prosecuted, the bank may take steps to prosecute him or get him prosecuted and in such a case he may also be suspended.

(b) If he be convicted, he may be dismissed with effect from the date of his conviction. He be given any lesser form of punishment as mentioned in Clause 6 below.

(c) If he be acquitted, it shall be open to the management to proceed against him under the provisions set out below in Clauses 11 and 12 infra relating to discharges. However, in the event of the management deciding after enquiry not to continue him in service, he shall be liable only for termination of service with three months pay and allowances in lieu of notice. And he shall be deemed to have been on duty during the period of suspension, if any, and shall be entitled to the full pay and allowances minus such subsistence allowance as he has drawn and to all other privileges for the period of suspension provided that if he be acquitted by being given the benefit of doubt he may be paid such portion of such and allowances as the management may deem proper, pay and the period of his absence shall not be treated as a period spent on duty unless the management so directs.

(d) If he prefers an appeal or revision application against his conviction and is acquitted, in case he had already been dealt with as above and he applies to the management for reconsideration of his case. the management shall review his case and may either reinstate him or proceed against against him under the provisions set out below in Clauses 11 and 12 infra relating to discharge, and the provision set

out above as to pay, allowances and the period of suspension will apply, the period up-to-date for which full pay and allowances have not been drawn being treated as one of suspension. In the event of the management deciding, after enquiry not to continue him in service, the employee shall be liable only for termination with three months pay and allowance in lieu of notice, as directed above.

4. If after steps have been taken to prosecute an employee or to get him prosecuted, for an offence, he is not put on trial within a year of the commission of the offence, the management may then deal with him as if he had committed an act of "gross misconduct or of minor misconduct", as defined below: provided that if the authority which was to start prosecution proceedings refuses to do so or comes to the conclusion that there is no case for prosecution it shall be open to the management to proceed against the employee under the provisions set out below in Clauses 11 and 12 infra relating to discharge, but he shall be deemed to have been on duty during the period of suspension, if any, and shall be entitled to the full wages and allowances and to all other privileges for such period. In the event of the management deciding, after enquiry, not to continue him in service, he shall be liable only for termination with three months pay and allowances in lieu of notice as provided in Clause 3 above. If within the pendency of the proceedings thus instituted he is put on trial such proceedings shall be stayed pending the completion of the trial, after which the provisions mentioned in Clause 3 above shall apply."

27. I have perused the order of the Tribunal and I find that concluding paragraphs 28, 29, 30, 31, 32, 33, 34 and 35 of the same discuss only one aspect of the matter that is the date of termination order has been shown as 22.09.2004 in the order of reference whereas the petitioner was dismissed from services by order dated 26.10.2004 which has not been challenged by the petitioner and, therefore, the reference appears to be contrary to the factual position. On this score, it was held by the Tribunal that the petitioner is not entitled for any relief.

28. Though the aforesaid observations are quite surprising in nature considering the fact that there might be some discrepancy regarding the date of termination order i.e. 22.09.2004 or 26.10.2004, once the entire matter had travelled right from first stage till the last stage, the Tribunal should not have indulged into finding out discrepancy in the date of termination order and making it a ground for denying relief to the petitioner. Therefore, the observations made in paragraphs 28 to 35 of the Tribunal's order, being hopelessly contrary to the real controversy involved in the matter, are clearly unsustainable and are denounced as such.

29. In so far as the merit part is concerned, I do not find any discussion in the order of the Tribunal regarding the effect of provisions of Clauses 19.3 and 19.4 of the Memorandum of Settlement dated 19.10.1966 or even identical terms contained in the subsequent Memorandum dated 10.04.2002. The Tribunal has not at all discussed as to when the criminal trial commenced and what would be its effect on the departmental proceedings. In so far as the order dated 08.11.2001 passed in Writ Petition No.33817 of 2001 is concerned, although the said order has not been placed by any of the parties to this

petition for perusal of the Court, I find that the said writ petition was filed in the year 2001 and was disposed of then and there and at that time even the charge sheet concerning the departmental proceedings was not served upon the petitioner and in the said background, a general direction might have been issued for conducting inquiry. Even if the High Court permitted holding of inquiry at the stage when the petitioner was under suspension, the same, in the opinion of the Court, would not nullify the effect of specific terms and Clauses of the Memorandum of Settlement of 1966 and/or 2004 inasmuch as the validity of the inquiry proceedings has to be examined in the light of specific stipulations contained in the said Settlements.

30. The Tribunal has not even considered the effect of honorable acquittal of the petitioner from the identical criminal charges. The judgment is completely silent about the same. This is an apparent perversity on the part of the Tribunal inasmuch filing of the written submissions on 25.03.2010 has not been disputed by the respondents in the counter affidavit and only this much has been stated in paragraph no.27 of the counter affidavit that written argument (wrongly mentioned as written statement) was filed on wrong and incorrect facts.

31. Now coming the authorities relied upon by the learned counsel for the petitioner, this Court in **Lakshman Kumar Mondal (supra)** has dealt with the aforesaid Clause 19.4 of the Bipartite Settlement and held that the object of such clause is aimed at ensuring a fair trial and save double jeopardize. It has, in fact, aimed at protecting interest of delinquent, in consonance with the principle culminated in **Capt. M. Paul Anthony Vs. Bharat Gold Mines Limited: AIR 1999 SC 1416.** The Supreme Court in the case of G.M. Tank (supra), in paragraph nos. 22, 23 and 24, has held as under:-

22. In Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. the question before this Court was as to whether the departmental proceedings and the proceedings in a criminal case launched on the basis of the same set of facts can be continued simultaneously. In para 34, this Court held as under: (SCC p. 695)

"34. There is yet another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal case as also the departmental proceedings were based on identical set of facts, namely, 'the raid conducted at the appellant's residence and recovery of incriminating articles therefrom'. The findings recorded by the enquiry officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by police officers and panch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by the enquiry officer and the enquiry officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the Court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the 'raid and recovery' at the

residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex parte departmental proceedings to stand."

23. In R.P. Kapur v. Union of India and another: AIR 1964 SC 787 (V 51 C 101) a Constitution Bench of Supreme Court observed:

"If the trial of the criminal charge results in conviction, disciplinary proceedings are bound to follow against the public servant so convicted. Even in case of acquittal proceedings may follow, where the acquittal is other than honourable." (emphasis supplied)

24. In Corporation of the City of Nagpur, Civil Lines, Nagpur and another v. Ramchandras and others: (1981) 2 SCC 714 the same question arose before the Apex Court and in para 6 it was held as under:

"6. The other question that remains is if the respondents are acquitted in the criminal case whether or not the departmental inquiry pending against the respondents would have to continue. This is a matter which is to be decided by the department after considering the nature of the findings given by the criminal court. Normally where the accused is acquitted honourably and completely exonerated of the charges it would not be expedient to continue a departmental inquiry on the very same charges or grounds or evidence, but the fact remains, however, that merely because the accused is acquitted, the power of the authority concerned to continue the departmental inquiry is not taken away nor is its direction [discretion] in any way fettered." (emphasis supplied)

32. Similar view has been reiterated in **Sanjay Kishore (supra)** and **Anand Ram Nagar (supra).**

33. Regarding non grant of opportunity to the delinquent employee to reply against the inquiry report, reliance has been placed upon the judgment in the case of **Himachal Pradesh State Electricity Board Ltd. (supra)** where the Apex Court held that before making up mind to punish the delinquent employee on the basis of inquiry report, a copy of the same must be served upon him so as to enable him to submit a reply and it is only after consideration of reply that final order inflicting punishment can be passed.

34. The Constitution Bench in **ECIL v. B. Karunakars: (1993) 4 SCC 727,** after elaborately considering the principles of natural justice in the context of the disciplinary inquiry laid down the following in paras 29, 30(iv) and (v):

"29. Hence it has to be held 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 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.

30.... (iv) In the view that we have taken viz. that the right to make representation to the disciplinary authority against the findings recorded in the enquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to

deny the said right, it is only appropriate that the law laid down in Mohd. Ramzan cases should apply to employees in all establishments whether Government or non-government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the enquiry officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.

(v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice."

35. In the present case, I find that the charges against the petitioner forming basis of departmental proceedings were as follows:-

"1. Sri Mishra took special interest in opening of account of so-called Smt. Prema Devi. He took into confidence the account holder Smt. Maina Devi, SB A/c. No.5890 by telling to her that Smt. Prema Devi is his relative and despite her refusal, by taking advantage of his influence and very low literacy of Smt. Maina Devi, he managed to obtain her signatures at the place of introduction in account opening form of Prema Devi despite her saying that she does not know so called Prema Devi.

2. He facilitated the payment of amount of Rs.65000/- as a single transaction from the account of so called Prema Devi by recommending to Sri U.N. Kapoor, Manager (PB) and subsequently Sri Mishra made efforts to obtain relative voucher from Sri Kamal Narain Bhalla, Record-keeper which was declined by Sri Bhalla.

3. He connived with another person Sri Rajendra Kr. Dwivedi, an

employee of RMS and perpetrated this fraud.

36. Out of the aforesaid three charges, charges no.1 and 3 were found to be proved and charge no.2 as partly proved.

37. In so far as the criminal prosecution launched on the basis of FIR is concerned, the allegation was identical and rather more grave concerning the aforesaid transaction in relation to Maina Devi/Prema Devi. There is no dispute that the court exercising criminal jurisdiction acquitted the petitioner under the judgment dated 26.09.2010 and the judgment was honorable and clear acquittal and not on the basis of giving benefit of doubt to the petitioner. Even the inquiry officer has referred to the submission of charge sheet in the criminal case against the petitioner as well as his confinement in jail. Therefore, this Court is of the view that both the departmental proceedings and criminal trial were being held in relation to same/identical charges and, therefore, the law referred to herein above regarding effect of acquittal on the departmental proceedings in favour of the delinquent employee supports the case of the petitioner.

38. Now considering the law relied upon by the learned counsel for the respondent-bank, the Supreme Court in the case of **Union of India and others (supra)** held that power of judicial review by a court in service matters 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. It was held that judicial review is not an appeal from a decision but a review of the manner in which the decision is made and the court is to examine as to whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. It was further held that burden of proof in the departmental proceedings is not of beyond reasonable doubt as is the principle in the criminal trial but probabilities of the misconduct.

39. In the case of **State of Karnataka and another (supra)** the Supreme Court elaborately discussed the co-relation in between the criminal trial and the departmental proceedings and relying upon various authorities, identical view was taken.

40. In **State Bank of India (supra)** the Supreme Court held that there can be no straight jacket formula as to in which case the departmental proceedings are to be stayed and there may be cases where the trial of the case gets prolonged by the dilatory method adopted by the delinquent officials and he cannot be permitted to on the one hand, prolong criminal case and at the same time, contend that the departmental proceedings should be stayed on the ground that the criminal case is pending. It was further held that the departmental proceedings and proceedings in a criminal case can run simultaneously as there is no bar in their being conducted simultaneously, though separately.

41. In **Management of Bharat Heavy Electricals Ltd. (supra),** the Supreme Court held that in a case where the inquiry has been held independently of the criminal proceedings, acquittal in criminal court is of no avail and even if a person stood acquitted by the criminal court, domestic inquiry can still be held.

42. In **West Bokaro Colliry (TISCO Ltd) (supra),** the Supreme Court was examining a case where the workman had

made a statement before the Labour Court that he did not want to challenge the legality, fairness and propriety of the domestic inquiry and was also dealing with the same aspect as to whether the criminal trial and departmental proceedings should run simultaneously and also held that acquittal in a criminal case would not operate as a bar for drawing up of disciplinary proceedings.

43. In **Deputy General Manager (Appellate Authority) (supra),** the Supreme Court held that power of judicial review of the constitutional courts is an evaluation of the decision making process and not the merits of the decision itself and the said scope cannot be extended to the examination of correctness or reasonableness of a decision of the authority as a matter of fact. The Supreme Court also held that once the findings of inquiry officer were affirmed by the disciplinary authority, they were not liable to be interfered with and the High Court had committed an error with the order of dismissal.

44. In **Gopal Narain Shukla (supra)** as well as in **Priti Chauhan (supra) and Mayank Agrawal (supra)** reference of almost all the aforesaid authorities was made and it was held that the departmental proceedings and criminal trial can run simultaneously.

45. Though there is no dispute about the proposition to the effect that criminal trial and the departmental proceedings against a delinquent employee can run simultaneously, however a careful scrutiny of the aforesaid authorities of the Apex Court would make it clear that in case charges under consideration of a court exercising criminal jurisdiction and the charges on which departmental proceedings against a delinquent employee are held, are identical, the effect of honorable acquittal of the delinquent employee would be a relevant factor and cannot be ignored.

46. In the present case, as observed herein above, the charges in both the proceedings were identical and, in fact, charges in the criminal trial were more grave and specific in relation to same transaction(s), therefore, honorable acquittal of the petitioner was certainly a decisive factor in the departmental proceedings.

47. In the present case, the effect of Bipartite Settlement of 1966 and/or Memorandum of Settlement dated 10.04.2002 cannot be ignored and the submission of the learned counsel for the petitioner that once considering the specific Clauses 19.3 and 19.4 of the Settlement of 1966 and identical clauses of Settlement dated 10.04.2002, the departmental proceedings were bound to be stayed awaiting judgment of the criminal case, the order of acquittal would certainly prevail upon the punishment inflicted upon the petitioner. As noted above, the Labour Court has not even touched the judgment of acquittal and its effect or even the aforesaid clauses of Bipartite Settlement though first information report has been referred to in the impugned order. In paragraph 24 of the impugned order, it has been recorded by the Labour Court that after giving anxious consideration on the report of enquiry officer on charge no.3, tribunal is unable to concur with the findings of the enquiry officer mainly for the reasons that the said charge has been proved only on the basis of the statements recorded by the police during the course of investigation. It is further held that it is settled legal position

that statements recorded by the police authorities during the course of investigation cannot be made basis for proving the charge in domestic inquiry against the charged employee unless witnesses are examined before the enquiry officer. In paragraph 25 of the order, it was observed that the charge no.3 is not proved as the statements of the witnesses recorded before police authorities is of no help to prove the charge no.3 against the worker.

48. In view of the above, once service rules (herein the Memorandum of Settlement) specifically take care of commencement, pendency, culmination and the conclusion of the departmental proceedings vis-a-vis criminal prosecution, the general principle that criminal trial and departmental proceedings can run simultaneously cannot be strictly applied atleast against the petitioner, otherwise it would be a case where the general conceptions would override specific service rules which, in the opinion of the Court, is not permissible.

49. In view of the above discussion, I find that the departmental authorities should not have commenced the departmental proceedings against the petitioner as the charge sheet in the criminal case had been submitted within a period of one year and even if, by any stretch of imagination, it is held that the departmental proceedings could commence, they were bound to be stayed awaiting decision of the criminal trial. The same having not been done and the effect of judgment of acquittal as well as the clause 19.3 and 19.4 of the Settlement of 1966 and identical clauses of settlement having not been given any consideration, the order impugned does not sustain and is liable to be quashed.

50. Accordingly, the writ petition succeeds and is **partly allowed.** The impugned award dated 19.07.2016 passed by the Industrial Tribunal-cum-Labour Court, Kanpur, contained in Annexure No.19 to the writ petition, as well as the orders 26.10.2004 and 19.01.2005 respectively passed by the Assistant General Manager and the Deputy General Manager, as contained in Annexures 9 and 11 to the writ petition, are hereby quashed.

51. Since the petitioner, even on the date of filing of petition had attained the age of superannuation, relief of his reinstatement in service cannot be granted. Considering the simultaneous effect of all the proceedings as well as age of the petitioner at the time of passing of the award, it is provided that the petitioner shall be entitled to entire arrears of salary and consequential benefits with effect from the date of termination of his services till the date of his superannuation but without any interest.

52. The petitioner shall also be paid his post retiral benefits along with 6% simple interest from the date of his retirement till date of actual payment computed accordingly within a period of **three months** from the date a certified copy of this order is produced before the respondent-bank.

53. No order as to costs.

(2023) 6 ILRA 524
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2023

BEFORE

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

Writ-Tax No. 561 of 2023

Deepak Kumar Yadav ...Petitioner
Versus
Principal Commissioner of Income Tax, Allahabad & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ashish Bansal

Counsel for the Respondents:
Sri Gaurav Mahajan

A. Tax Law – Income Tax Act, 1961 – Sections 148, 148A(d) & 246-A – Finance Act, 2021 – Show cause notice u/s 148-A(b) – Scheme for Re-assessment of tax – Amendment made in Ss. 147 and 148 – Requirement of 'reasons to believe' for initiating re-assessment proceedings hitherto occurring in the Act stands substituted with the availability of information with the Assessing Officer that income of assessee has escaped assessment – Effect – Jurisdiction of assessing authority – Scope of decision u/s 148-A(d) explained – Held, the order passed by the Assessing Officer u/s 148A(d) of the Act regarding existence of information suggesting that income chargeable to tax has escaped assessment would otherwise remain subject to reassessment order passed under section 148 of the Act – Any observations of the assessing authority while passing order under section 148A(d) with regard to merits of assessment of income would remain subject to the order to be ultimately passed in reassessment proceedings u/s 148. (Para 8 and 24)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Larsen & Turbo Ltd. Vs St. of Jharkhand; (2017) 13 SCC 780. Paragraph nos.26, 27 and 32

2. Red Chilli International Sales Vs Income Tax Officer, [2023] 146 taxmann.com 224 (SC),

3. Anshul Jain Vs Pr. CIT, [2022] 143 taxmann.com 37

4. Anshul Jain Vs Pr. CIT, [2022] 143 taxmann.com 38

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

&

Hon'ble Shiv Shanker Prasad, J.)

1. Petitioner is an individual who is engaged in the business of trading of Arecanut (Supari), Chopped Betal Nut and Sweet Betal Nut in the name of his proprietary concern namely "S.K.L. Enterprises". He alleges that his Books of Account and other records are subject to audit under Section 44AB of the Income Tax Act, 1961 (hereinafter referred to as the 'Act of 1961'). He further claims to be filing his return year after year and has been assessed to tax accordingly. For the Assessment Year 2019-20, the petitioner filed his return under Section 139(1) of the Act on 26.08.2019 disclosing total income of Rs. 6,81,630/-. The turnover during the year from his proprietary concern aggregated to Rs. 5,87,26,116/- and aggregate purchases are of Rs. 5,81,61,860/-. He further asserts that he has been assessed under Section 143(1) of the Act on the basis of return submitted by him on 26.08.2019 and no notice has been issued to him under Section 143(2) of the Act.

2. It transpires that the jurisdictional authority i.e. respondent no. 2 issued a notice to petitioner dated 16.03.2023, under Section 148A(b) of the Act, 1961 accompanying the information with the assessing officer to suggest that income chargeable to tax has escaped assessment. The substance of the information accompanying the notice is extracted hereinafter:-

"1(A) Information was received by DDIT (Inv.), Unit-III, Nagpur from DGGI and GST authorities in the case of M/s Kuhoje K Achumi of availing and utilization of fraudulent ITC on the basis of

fake tax invoices without receipt of goods. The said entity did not exist at the declared principal place of business. On the basis of the above information, the Investigation Unit-III, Nagpur took up investigation and inferred that M/s Kuhoje K Achumi has facilitated and is involved in both availing of fake invoices without actual supply of goods and in turn in issuing fake invoices to others without actual supply of goods. Aforesaid facts imply that the parties which have claimed to have availed purchases from M/s Kuhoje K Achumi have only indulged in availing of purchase invoices without any actual movement of goods and by doing so, they have artificially inflated their purchase expenses and reduced their taxable income. You are reported as one of such suspicious purchasers and the purchase value in your case for F.Y. 2018-19 relevant to A.Y. 2019-20 is Rs. 96,43,750/- from M/s Kuhoje K Achumi.

(B) Similarly, Information was received by DDIT (Inv.), Unit-III, Nagpur from CBDT, in the case of M/s Om Traders (Prop. Jasbir Singh Chatwal) of availing fraudulent ITC. On the basis of the above information, the Investigation Unit-III, Nagpur took up investigation and it is found that M/s Om Traders (Prop. Jasbir Singh Chatwal) has indulged in availing fake tax invoices which implies that there is no actual movement of goods to M/s Om Traders. Further, M/s Om Traders has made sales to number of entities. Since M/s Om Traders is indulged in fictitious purchases, therefore, the sales are also fictitious as he has no goods to make sale to other entities. Therefore, the entities who have claimed to have availed purchases from M/s Om Traders (Prop. Jasbir Singh Chatwal) has merely inflated their purchase expenses by availing invoices from M/s Om Traders (Prop. Jasbir Singh Chatwal) without actual movement of goods. You are reported as one of such suspicious purchasers and the purchase value in your case from F.Y. 2018-19 relevant to A.Y. 2019-20 is Rs. 83,25,000/- from M/s Om Traders (Prop. Jasbir Singh Chatwal).

(C) In addition there is third party information which is as under:-

Information Code	**Information Description**	**Source**	**Count**	**Amount Description**	**Amount (Rs.)**
SFT-003(w)	Cash withdrawals (including though bearers cheque) in current account	PUNJAB NATIONAL BANK	1	Aggregate gross amount received from person in cash	23,85,000
TCS-206CL	TCS statement-sale of motor vehicle accedin g Rs. 10 Lakhs (section 206C)	GREENLANDS (AM) CORPORATION	1	Total value of transaction	16,00,000

SFT-003(D)	Cash deposits (including though SFT-003(D) bearers cueque) in current account	PUNJAB NATIONAL BANK	1	Aggregate gross amount received from person in cash	4,70,40,000
Total:					**5,10,25,000**

3. Petitioner was accordingly given an opportunity under Section 148A(b) of the Act to show cause as to why a notice under Section 148 of the Act be not issued to him on the basis of information which suggests that income chargeable to tax of Rs. 96,43,750/- + Rs. 83,25,000/- + Rs. 5,10,25,000/- aggregate Rs. 6,89,93,750/- has escaped assessment for the Assessment Year 2019-20.

4. In response to the above notice the petitioner has filed a detailed objection before the respondent no. 2 on 24.04.2023 denying the allegations made in the notice. A request has also been made for providing the information relied upon for invoking such proceedings as well as to provide opportunity of cross-examination of the said suppliers.

5. The jurisdictional authority has proceeded to pass an order on 29.3.2023 under Section 148(d) of the Act rejecting the petitioner's objection to the notice on the ground that information exists to suggest that transactions referred to in the notice are fictitious and without actual supply of goods. Consequently, petitioner's purchases are treated as fictitious for the Financial Year 2018-19 amounting to Rs. 1,79,68,750/-. This amount has been treated as having escaped assessment for the year 2019-20 for the purposes of initiating proceeding under Section 148 of the Act. Petitioner's request for cross-examination of suppliers and furnishing of material has been declined considering the time-barring nature of the matter. A consequential notice has also been issued to petitioner on 29.03.2023, under Section 148 of the Act. Aggrieved by the order under Section 148A(d) of the Act, dated 29.03.2023 as well as notice of the same date i.e. 29.3.2023 issued under Section 148 of the Act, the petitioner has approached this Court.

6. Sri Ashish Bansal for the petitioner submits that the authority concerned has not examined the petitioner's reply to the notice, on merits, and the order impugned has been passed in a routine and mechanical manner. Learned counsel further submits that object of issuing notice under Section 148A of the Act would stand frustrated, if the authority does not examine the reply of the assessee in response to the show cause notice referred to in Clause (b) and passes an order without conducting any enquiry. It is urged that the manner in which the order has been passed renders the object of issuing notice under Section 148A of the Act nugatory. In support of such contention, counsel for the petitioner has placed reliance upon an order passed by the

Supreme Court of India in Red Chilli International Sales Vs. Income-tax Officer reported in [2023] 146 taxmann.com 224 (SC). He further places reliance upon an order passed by the Bombay High Court in Writ Petition No. 2836 of 2022, decided on 13.03.2023.

7. Per-contra, Sri Gaurav Mahajan appearing for the revenue submits that the object of issuing notice under Section 148A of the Act is limited to ascertainment of information which suggests that income has escaped assessment and issues such as sufficiency or otherwise of material justifying reopening of assessment or adjudication on the correctness of information are ordinarily not warranted at this stage, in exercise of extraordinary writ jurisdiction. The limited enquiry contemplated at this stage is to ascertain existence of information which suggests that income has escaped assessment. It is submitted that in the facts of this case such information does exist on record. It is also argued that petitioner would be at liberty to raise all factual issues/objections at the appropriate stage of the proceedings, and as no prejudice otherwise is caused to him, this Court would not be justified in embarking upon the correctness or otherwise of the information available with the Assessing Officer while taking decision under Section 148A(d) of the Act.

8. The scheme for re-assessment of tax under the Act of 1961 has undergone a change with effect from April 1, 2021 vide Finance Act, 2021. The requirement of 'reasons to believe' for initiating re-assessment proceedings hitherto occurring in the Act stands substituted with the availability of information with the Assessing Officer that income of assessee has escaped assessment. Amended sections 147 and 148 of the Income Tax Act, 1961 as well as section 148A introduced in the Act of 1961 vide Finance Act 2021 are reproduced hereinafter:-

"147. Income escaping assessment. - If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year).

Explanation. - For the purposes of assessment or reassessment or recomputation under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, irrespective of the fact that the provisions of section 148A have not been complied with.]

148. Issue of notice where income has escaped assessment. - Before making the assessment, reassessment or recomputation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of section 148A, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such

other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:

Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice.

Provided further that no such approval shall be required where the Assessing Officer, with the prior approval of the specified authority, has passed an order under clause (d) of section 148A to the effect that it is a fit case to issue a notice under this section.

Explanation 1. - For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,-

(i) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;

(ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or

(iii) any information received under an agreement referred to in section 90 or section 90A of the Act; or

(iv) any information made available to the Assessing Officer under the scheme notified under section 135A; or

(v) any information which requires action in consequence of the order of a Tribunal or a Court.

Explanation 2. - For the purposes of this section, where,-

(i) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A, on or after the 1st day of April, 2021, in the case of the assessee; or

(ii) a survey is conducted under section 133A, other than under sub-section (2A) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or

(iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or under section 132A in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee,

the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.

Explanation 3. - For the purposes of this section, specified authority means

the specified authority referred to in section 151.]

148A. **Conducting inquiry, providing opportunity before issue of notice under section 148.-** The Assessing Officer shall, before issuing any notice under section 148,-

(a) conduct any enquiry, if require, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;

(b) provide an opportunity of being heard to the assessee, by service upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a);

(c) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);

(d) decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires:

Provided that the provisions of this section shall not apply in a case where, -

(a) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or

(b) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, [relate to, the assessee; or

(d) the Assessing Officer has received any information under the scheme notified under section 135A pertaining to income chargeable to tax escaping assessment for any assessment year in the case of the assessee.]

Explanation. - For the purpose of this section, specified authority means the specified authority referred to in section 151."

9. Reading of Section 148A reveals that the assessing authority shall, before issuing any notice under section 148 conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment. On receipt of such information the assessing officer is required to provide an opportunity of being heard to the assessee, in the manner specified, as to

why a notice under Section 148 of the Act should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted as per clause (a), if any. The assessing authority is then required to consider the reply of the assessee, if any, in response to the show cause notice referred to in Clause (b). It is thereafter that the assessing authority has to decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under Section 148 by passing an order in the manner specified. The proviso exempts the category of cases which are not covered by Section 148A. The proviso to section 148A has no applicability in the facts of the present case and, therefore, it does not require any examination.

10. The statutory scheme is, therefore, clear that the assessing authority on receipt of information which suggests that the income chargeable to tax has escaped assessment may conduct any enquiry in the matter, if required, and then provide an opportunity of being heard to the assessee by serving upon him a notice under clause (b). On receipt of reply of assessee to the notice referred to in clause (b) the assessing officer on the basis of material available on record including the reply of assessee decide whether or not it is a fit case to issue a notice under Section 148.

11. The scheme for reassessment of escaped income introduced vide Finance Act, 2021 provides for an opportunity to the assessee before issuance of notice under section 148 of the Act of 1961. After such notice to the assessee and consideration of reply of assessee in response to the notice the assessing authority has to decide on the basis of material available on record by passing an order under section 148A(d) whether a notice under section 148 is fit to be issued in the case. The consideration at the stage of passing order under section 148A(d) is thus limited to ascertainment of information with the Assessing Officer that income of assessee has escaped assessment to tax. Final determination on the question whether income of assessee has actually escaped assessment is then to be made after notice under section 148, by passing an order of assessment or reassessment under section 147, subject to the provisions of section 148 to 153 of the Act of 1961.

12. The Act of 1961 does not contemplate any detailed adjudication on the merits of information available with the Assessing Officer at the stage of passing order under section 148A(d) of the Act of 1961. In our considered view there is a specific purpose for not introducing any further enquiry or adjudication in the statute, on the correctness or otherwise of the information, at this stage. The reason for it is obvious. Under the scheme of the Act a detailed procedure has been provided under Section 148 for issuance of notice whereafter the assessing authority has to determine, in the manner specified, whether income has escaped assessment and the defence of assessee, on all permissible grounds, remains open to be pressed at such stage. The ultimate determination made by the assessing authority under Section 147 for reassessment is otherwise subject to appeal under Section 246-A of the Act. Merits of the information referable to Section 148A thus remains subject to the reassessment proceedings initiated vide notice under Section 148 of the Act. It is for this reason that issues which require determination at the stage of reassessment proceedings and in respect of which

departmental remedy is otherwise available are not required to be determined at the stage of decision by the assessing authority under Section 149A(d). The scope of decision under Section 148A(d) is limited to the existence or otherwise of information which suggests that income chargeable to tax has escaped assessment.

13. In the facts of the present case, it transpires that petitioner in his return has shown various purchases of arecanut (supari) from M/s Kuhoje K Achumi and M/s Om Traders. The order under clause (d) of Section 148A records that investigating wing of DGGI and GST have informed the Income Tax Authorities that M/s Kuhoje K Achumi and M/s Om Traders are found availing and utilizing fraudulent ITC on the basis of fake tax invoices without receipt of goods. It has also been found that the said entity (the seller) does not exist at all at the declared principal place of business. It is from such doubtful units that the petitioner claims to have made purchases amounting to Rs. 1,79,68,750/-. Though the petitioner has alleged that his Books of Account truly reflects these transactions and that goods have been received by way of e-challan, etc., but such defence on merits of the information is not expected to be authoritatively determined by the assessing authority at the stage of decision under section 148A(d). The forum for determining correctness or otherwise of the information on the basis of defence setup by the assessee would be the assessment proceedings under Section 148 of the Act. On the basis of materials which are referred to in the order of the assessing authority under clause (d) of Section 148A, it cannot be doubted that information did exist with the authorities suggesting that the income chargeable to tax has escaped assessment. The formation of opinion by the authority concerned under section 148A(d), therefore, cannot be questioned on the basis of detailed defence setup by the assessee on the merits of the information, including opportunity of cross-examining the seller or by demanding the documents relating to such information.

14. It is only to the extent of availability or otherwise of information suggesting that income has escaped assessment that the scope of enquiry rests under Section 148A(d). The correctness or otherwise of information is an aspect to be gone into later by the assessing authority at the stage of proceedings under Section 148 of the Act for reassessment. Any other interpretation, in our view, is not countenanced in the scheme of the Act of 1961.

15. The information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment has been defined in Explanation 1 to the second proviso to section 148 of the Act which is already extracted above. There is no challenge to the information contained in the notice under section 148A(b) of the Act on the ground that the information available with the Assessing Officer is not referable to Explanation 1 to the second proviso to section 148 of the Act. The Finance Act, 2021 is otherwise not under challenge. We are, therefore, of the considered opinion that the challenge to the information, by the assessee, on the defence setup in reply to show cause notice merits no further consideration at the stage of decision under section 148A(d) of the Act.

16. The term ‘information’ for the purposes of reopening of assessment has

been examined in Larsen & Turbo Ltd. vs. State of Jharkhand, (2017) 13 SCC 780. Paragraph nos.26, 27 and 32 of the report are apposite for the present purposes and are reproduced hereinafter:-

"26. It is also pertinent to understand the meaning of the word "information" in its true sense. According to Oxford Dictionary, "information" means facts told, heard or discovered about somebody/something. The Law Lexicon describes the term "information" as the act or process of informing, communication or reception of knowledge. The expression "information" means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/or having a bearing on the assessment. We agree that a mere change of opinion or having second thought about it by the competent authority on the same set of facts and materials on the record does not constitute "information" for the purposes of the State Act. But the word "information" used in the aforesaid section is of the widest amplitude and should not be construed narrowly. It comprehends not only variety of factors including information from external sources of any kind but also the discovery of new facts or information available in the record of assessment not previously noticed or investigated. Suppose a mistake in the original order of assessment is not discovered by the assessing officer, on further scrutiny, if it came to the notice of another assessor or even by a subordinate or a superior officer, it would be considered as information disclosed to the incumbent officer. If the mistake itself is not extraneous to the record and the informant gathered the information from the record, the immediate source of information to the officer in such circumstances is in one sense extraneous to the record. It will be information in his possession within the meaning of Section 19 of the State Act. In such cases of obvious mistakes apparent on the face of the record of assessment, that record itself can be a source of information, if that information leads to a discovery or belief that there has been an escape of assessment or under-assessment or wrong assessment.

27. There are a catena of judgments of this Court holding that assessment proceedings can be reopened if the audit objection points out the factual information already available in the records and that it was overlooked or not taken into consideration. Similarly, if audit points out some information or facts available outside the record or any arithmetical mistake, assessment can be reopened.

32. The expression "information" means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/or after bearing on the assessment. We are of the clear view that on the basis of information received and if the assessing officer is satisfied that reasonable ground exists to believe, then in that case the power of the assessing authority extends to reopening of assessment, if for any reason, the whole or any part of the turnover of the business of the dealer has escaped assessment or has been under-assessed and the assessment in such a case would be valid even if the materials, on the basis of which the earlier assessing authority passed the order and the successor assessing authority proceeded, were same. The question still is as to whether in the present case, the assessing authority was satisfied or not."

17. In the facts of the present case the assessing authority has received

information from DDIT (investigation), Unit III, Nagpur from DGGI and GST authorities as well as from CBDT that the sellers of the assessee were availing fraudulent ITC on the basis of investigation made by the concerned agencies. Such information would be information referable to clause (i) of Explanation 1 to second proviso to section 148 of the Act. We have already observed that there is no challenge to the notice by the assessee on the ground that information disclosed vide notice under section 148A(b) is not covered by the information specified in Explanation 1 to the second proviso to section 148 of the Act of 1961.

18. Learned counsel for the petitioner has placed reliance upon the judgment of Supreme Court in Red Chilli International Sales vs. Income Tax Officer, [2023] 146 taxmann.com 224 (SC), wherein the Court held as under:-

"Delay condoned.

We with the petitioner that the impugned judgment rejecting the writ petition on the ground of alternative remedy does not take into consideration several judgments of this Court, on the jurisdiction of High Court, as writ petitions have been entertained to be examined whether the jurisdiction preconditions for issue of notice under Section 148 of the Income Tax Act, 1961 is satisfied. The provisions of reopening under the Income Tax Act, 1961 have undergone an amendment by the Finance Act, 2021, and consequently the matter would require a deeper and in-depth consideration keeping in view the earlier case law. Accordingly, we set aside the observations made by the High Court in the impugned judgment observing that the writ petition would not be maintainable in view of the alternative remedy, clarify that this issue would be examined in depth by the High Court if and when it arise for consideration. We do deem it open to examine this issue in the present case after having examined the notice under Section 148A (b) including the annexure thereto, the reply filed by the petitioner and the order under Section 148A (d) of the Income Tax Act, 1961.

Recording the aforesaid, the special leave petition is disposed of. We clarify that the dismissal of the special leave petition would not be construed as a findings or observations on the merits on case."

19. On behalf of the department, Sri Gaurav Mahajan has placed reliance upon a Division Bench judgment of Punjab and Haryana High Court in Anshul Jain vs. Pr. CIT, [2022] 143 taxmann.com 37, wherein the Court observed that no interference by the writ court was warranted in the order passed under section 148A(d) of the Act as all the grounds of challenge to such order would be available to an assessee while challenging the order passed in reassessment proceedings consequent to the notice issued under section 148 of the Act, 1961.

20. The above order of Division Bench of High Court of Punjab and Haryana was challenged before the Supreme Court of India in Anshul Jain vs. Pr. CIT, [2022] 143 taxmann.com 38, wherein the Court has observed as under:-

"What is challenged before the High Court was the re-opening notice under Section 148A(d) of the Income Tax Act, 1961. The notices have been issued, after considering the objections raised by the petitioner. If the petitioner has any grievance on merits thereafter, the same has to be agitated before the Assessing Officer in the re-assessment proceedings.

Under the circumstances, the High Court has rightly dismissed the writ petition.

No interference of this Court is called for.

The present Special Leave Petition stands dismissed."

21. So far as the judgment of Supreme Court of India in Red Chilli International Sales (supra) is concerned, the Court directed the High Court to consider the reply filed by the petitioner to the notice under section 148A(b) as well as the order passed under section 148A(d) of the Act of 1961 as the High Court had refused to examine the issue in view of the alternative remedy. This direction by the Supreme Court of India is on the facts of the case as the issues raised by the petitioner before the High Court were not examined. The Supreme Court did not endorse the view that a writ petition itself would not be maintainable against the order passed under section 148A(d) of the Act, 1961 and consequently directed the High Court to examine the merits of order.

22. Maintainability of the writ petition against the order passed under section 148A(d) is distinct from the scope of adjudication available qua the order passed under section 148A(d) of the Act. The limited scope available under Article 226 of the Constitution of India to adjudicate an order passed under section 148A(d) of the Act, 1961 would be confined to existence of the information only, in view of the scheme of the Act of 1961. A contrary construction cannot be culled out from the judgment of the Supreme Court of India in Red Chilli International Sales (supra).

23. In Anshul Jain (supra) the Supreme Court did examine the scope of proceedings under section 148A vis-a-vis reassessment proceedings under section 148 of the Act to observe that by the very nature of proceedings the examination would remain more exhaustive at the stage of reassessment proceedings with elaborate remedies available under the statute to the assessee.

24. The order passed by the Assessing Officer under section 148A(d) of the Act regarding existence of information suggesting that income chargeable to tax has escaped assessment would otherwise remain subject to reassessment order passed under section 148 of the Act. Thus, any observations of the assessing authority while passing order under section 148A(d) with regard to merits of assessment of income would remain subject to the order to be ultimately passed in reassessment proceedings under section 148 and would not be to the prejudice of rights and contentions of the assessee under section 148 as well as departmental remedies in respect thereof.

25. In view of our deliberations and discussions held above, we do not find any merit in the challenge laid to the order of assessing authority under section 148A(d) of the Act, 1961, dated 29.03.2023, as well as the notice issued under section 148 of the Act, 1961. Subject to the observations contained in this judgment the writ petition accordingly fails and is dismissed.

(2023) 6 ILRA 535
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 4541 of 2023

Jagdish Prasad Gupta & Anr. ...Petitioners
Versus
Smt. Sudha Mehra & Anr. ...Respondents

Counsel for the Petitioners:

Sri Prakhar Tandon, Sri Atul Dayal

Counsel for the Respondents:
Sri Ashutosh Sharma, Sri Sumit Srivastava

A. Civil Law - Code of Civil Procedure, 1908-Order XV, Rule 5-application-striking of defence-rejection-Incorrect or illegal advice cannot be a ground to reject application under Order XV, Rule 5 CPC and issue orders for adjustment of amount so deposited under Section 30 of Act of 1972 against monthly deposit of rent-So far as first part of Order XV, Rule 5 with regard to deposit of arrears of rent on or before first hearing of suit, amount so deposited under section 30 of Act of 1972 can be adjusted, but so far as second part of Order XV, Rule 5, i.e. monthly deposit of rent is concerned, amount so deposited under Section 30 of Act of 1972 cannot be adjusted and it is mandatory requirement to deposit same before Court where suit is pending.(Para 1 to 49)

The petition is dismissed. (E-6)

List of Cases cited:

1. Bimal Chand Jain Vs Gopal Agarwal (1981) 0 SSC 347

2. Asha rani Gupta Vs Vineet Kumar (2022) 0 SSC 594

3. Kedar Nath Vs Waqf Sheikh Abdullah Cheritable Madursa & ors. (2015) SCC Online All 7172

4. Atma Ram Vs Shakuntala Rani (2005) 7 SCC 211

5. Haidar Abbas Vs ADJ & ors. (2006) 1 ADJ 197 All

6. Panaru lal Vs Ganpati Jha (2015) 111 ALR 866 C.M.W.P No 3358 of 2015

7. More Singh Vs Chandrika Prasad, Mukesh Verma & ors. Vs Harishchandra & ors. (2018) 8 ADJ 128

8. Om Prakas Gupta Vs DJ, Mainpuri & anr.. (2019) 3 AWC 253 \

9. Gangu Vs Smt Alka Arora & anr.. C.M.W.P. No 2725 of 2022

10. Sunil Kumar & ors. Vs Shri Kapoor Chandra Agarwal Dharmshala Trust (2019) 10 ADJ 682

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Atul Dayal, learned Senior Counsel, assisted by Sri Prakhar Tandon, learned counsel for the petitioners-defendants and Sri Sumit Srivastava, learned counsel for the respondents-plaintiffs.

2. Present petition has been filed seeking the following relief:

"i. Set aside the impugned order dated 16.08.2018 passed by learned trial court in SCC Suit No. 266 of 2007.

ii. Set aside the impugned order dated 15.12.2022 passed by the learned revision court in SCC Revision No. 120 of 2018."

3. Since, only legal question is involved in this matter, therefore, with the consent of parties without inviting for affidavits, the matter is being decided at the admission stage itself.

4. Brief facts of the case are as follows:

5. The original landlord Late Sudha Mehra filed SCC Suit No. 266 of 2007 against the original tenant Late Munnu Lal seeking ejectment and recovery of arrears of rent upon which, defendant-original tenant has filed written statement in the year 2010. During the pendency of the suit, original plaintiff and defendant died and

substitution applications had also been allowed.

6. Plaintiff-respondent filed application 58-Ga dated 09.07.2015 under Order XV Rule 5, CPC to srtike off the defence of the petitioner-defendant upon which, objection paper No. 59-Ga was filed by the petitioner-defendant. Application 58-Ga was allowed vide first impugned order dated 16.08.2018 upon which, petitioner-defendant preferred SCC Revision No. 120 of 2018 on 27.09.2018. During the pendency of the revision, petitioner-defendant has also filed application 24-Ga dated 28.09.2018 seeking permission of the Revisional Court to deposit the entire amount of rent due on the ground that due to incorrect advice of counsel, he has not deposited the rent as required under Order XV Rule 5 CPC. The Revisional Court vide judgment and order dated 15.12.2022 has dismissed the SCC Revision No. 120 of 2018, hence present petition.

7. Aforesaid facts are undisputed between the parties.

8. Learned Senior Counsel appearing for petitioners-defendants submitted that there is no dispute on the point that from the date of first hearing to the dismissal of the revision vide order dated 15.12.2022, petitioner-defendant has deposited the rent before the court under Section 30 of the Act No. 13 of 1972(hereinafter referred to as, 'Act of 1972').

9. He next submitted that under incorrect advice of the counsel, petitioner-defendant could not deposit the rent before the SCC Court and the mistake so committed by the petitioner-defendant is bonafide due to ill advice of the counsel. Therefore, it is required on the part of the Revisional Court to allow Application 24-Ga and permit the petitioner-defendant to deposit the rent before the SCC Court. He firmly submitted that any order passed under the provision of Order XV Rule 5 CPC is penal in nature, therefore, while passing such order, Court must consider the factum of the bonafide. In the present case, there is no dispute on the point that rent was deposited before the Court under Section 30 of Act of 1972, therefore, same must have been considered while deciding the Revisions along with Application 24-Ga by the Revisional Court. Any order passed by the Revisional Court ignoring the bonafide is bad and liable to be set aside.

10. He further submitted that in Order XV Rule 5 CPC, word 'may' has been used, which indicates that the provision is discretionary in nature and not mandatory. Therefore, it is required on the part of the Revisional Court to consider each and every aspect including the bonafide, i.e. default made due to willful failure or deliberate default or volitional performance. In case it is bonafide, it is required on the part of the Court not to strike off the defence.

11. In support of his contention, Sri Atul Dayal, learned Senior Counsel has placed reliance on the judgment of Apex Court in the matter of ***Bimal Chand Jain Vs. Gopal Agarwal: 1981 0 Supreme(SC) 347, Asha Rani Gupta Vs. Vineet Kumar: 2022 0 Supreme(SC) 594*** and also judgment of this Court in the matter of ***Kedar Nath Vs. Waqf Sheikh Abdullah Cheritable Madursa and Others.: 2015 SCC Online All 7172.***

12. Per contra, Sri Sumit Srivastava, learned counsel for the respondent-plaintiff vehemently opposed the submission made

by learned Senior Counsel appearing for petitioners-defendants and submitted that as provided under Order XV Rule 5 CPC and also in catena of judgments, it is very well settled that any amount so deposited under Section 30 of Act of 1972 can be adjusted against the arrears of rent due before the first hearing of the suit, but so far as monthly deposit of rent is concerned, the same cannot be adjusted. It is undisputed in the present case that written statement was filed in the year 2010 and monthly amount of rent has never been deposited before the SCC Court rather it was deposited under Section 30 of Act of 1972. Therefore, same cannot be adjusted and under such fact of the case, there is no illegality in the impugned orders dated 16.08.2018 and 15.12.2022 and petition is liable to be dismissed.

13. In support of his contention, Sri Sumit Srivastava has placed reliance upon the judgment of Apex Court in the matter of ***Atma Ram Vs. Shakuntala Rani: (2005) 7 SCC 211.*** He also placed reliance upon judgments of this Court in the matter of ***Haidar Abbas Vs. Additional District Judge and others: 2006(1) ADJ 197(All), Panaru Lal Vs. Ganpati Jha: 2015(111) ALR 866, C.M.W.P. No. 3358 of 2015: More Singh Vs. Chandrika Prasad, Mukesh Verma and Ors. Vs. Harishchandra and Ors.: 2018(8) ADJ128, Om Prakas Gupta V. District Judge, Mainpuri and another: 2019 (3) AWC 253, C.M.W.P. No. 2725 of 2022: Gangu Vs. Smt. Alka Arora And Another.***

14. He also pointed out that any ill advice of counsel cannot be a ground to reject the application under Order XV Rule 5 CPC.

15. I have considered submission made by learned counsel for the parties, perused Order XV Rule 5 CPC as well as judgments relied upon by counsels for the parties.

16. The issues before the Court are to decide as to whether any amount so deposited under Section 30 of the Act of 1972 may be adjusted in compliance of Order XV Rule 5 CPC against monthly deposit of rent after first date of hearing of the suit and effect of wrong or incorrect advice of counsel in case of default in deposit.

17. From the perusal of Order XV Rule 5 CPC, it is apparently clear that it is a beneficial legislation in favour of tenant which consists of two parts to be complied with by the tenant. The first part is arrears of rent admitted, which has to be deposited on or before first hearing of the suit and second part is monthly amount of rent, admitted or not admitted to be deposited during the continuation of suit on monthly basis within a week from the date of accrual.

18. Present controversy is arising out of interpretation of Order XV Rule 5, CPC, therefore, the same is being quoted hereinbelow:

"5. Striking off defence for failure to deposit admitted rent, etc.— (1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent. per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly

amount due within a week from the date of its accrual, and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the provisions of sub-rule (2), strike off his defence.

Explanation 1.*— The expression "first hearing" means the date for filing written statement for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned.*

Explanation 2.*— The expression "entire amount admitted by him to be due" means the entire gross amount, whether as rent or compensation for use and occupation, calculated at the admitted rate of rent for the admitted period of arrears after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account and the amount, if any, paid to the lessor acknowledged by the lessor in writing signed by him and the amount, if any, deposited in any Court under section 30 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.*

Explanation 3.*— (1) The expression "monthly amount due" means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any, paid to a local authority, in respect of the building on lessor's account.*

(2) Before making an order for striking off defence, the Court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days of the first hearing or, of the expiry of the week referred to in sub-section (1), as the case may be.

(3)The amount deposited under this rule may at any time be withdrawn by the plaintiff:

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

19. For present controversy, Explanation 2 and 3 are relevant.

20. Explanation 2 provides that any amount so deposited under Section 30 of the Act of 1972 shall also be adjusted while depositing the arrears of rent on or before the first hearing of the suit. Explanation 3 is with regard to monthly amount of rent due and certainly, same does not include the provision of Section 30 of the Act of 1972. Therefore, intention of the legislation is very much clear that any amount deposited under Section 30 of the Act of 1972 can be adjusted against the arrears of rent due to be deposited on or before first hearing of the suit, but the same cannot be adjusted against monthly deposit of rent due, which is to be deposited before the Court, where the suit is pending. Therefore, there is no ambiguity or infirmity in the language of the statutory provision of Order XV Rule 5 CPC. It is a beneficial legislation and to get the benefit of that, it is required on the part of tenant to comply the same in verbatim and he cannot be permitted to read between the lines. Therefore, in light of provisions of Order XV Rule 5 CPC, any amount so deposited under Section 30 of the Act of 1972 before Court cannot be adjusted

against the monthly deposit of rent required before the SCC Court.

21. Now I am coming to the judgments relied upon by the learned counsel for the petitioner-defendant.

22. The first judgment relied upon by learned Senior Counsel is a judgment of Apex Court in the matter of ***Bimal Chand Jain(Supra)***, relevant paragraph of which is quoted hereinbelow:

"6. It seems to us on a comprehensive understanding of Rule 5 of Order XV that the true construction of the Rule should be thus. Sub-rule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and further, whether or not he admits any amount to be due, to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit;

"the court may subject to the provisions of sub-rule (2) strike off his defence". We shall presently come to what this means. Sub-rule (2) obliges the court, before making an order for striking off the defence to consider any representation made by the defendant in that behalf. In other words, the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off. If a representation is made the court must consider it on its merits, and then decide whether the defence should or should not be struck off. This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred, there is good reason for it. Now, it is not impossible that the record may contain such material already. In that event, can it be said that sub-rule (1) obliges the court to strike off the defence? We must remember that an order under sub-rule (1) striking off the defence is in the nature of a penalty. A serious responsibility rests on the court in the matter and the power is not to be exercised mechanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so. It will always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding the absence of a representation under sub- rule (2), the defence should or should not be struck off. The word "may" in sub-rule (1) merely vests power in the court to strike off the defence. It does not oblige it to do so in every case of default. To that extent, we are unable to agree with the view taken by the High Court in Puran Chand (supra). We are of opinion that the High Court has placed an unduly narrow construction on the provisions of clause (1) of Rule 5 of Order XV."

23. In the said judgment, the ratio of law is that, while passing any order under Order XV Rule 5 CPC, it is required on the part of the Court to consider the representation. In case representation has not been filed, even though, Court is required to consider all relevant facts available on record. In the present case, it is not the case of the petitioner-defendant that the material so available have not been considered, but contrary to that, after considering each and every fact, Courts have taken a view that any such application for adjustment of amount so deposited

under Section 30 of the Act of 1972 and permission to tenant to fulfill the requirement of Order XV Rule 5 CPC is not permissible under the law. Therefore, this judgment is of no use in the present controversy.

24. Learned Senior Counsel has also relied upon another judgment of this Court in the matter of ***Kedar Nath(Supra)***, relevant paragraphs of the said judgment are quoted hereinbelow:

"4. The premises No. 205/46, Minhajpur, Dr. Katju Road, Allahabad belongs to the frist respondent, a suit for eviction, arrears of rent and damages was instituted. During the pendency of the suit, an application under Order XV Rule 5 C.P.C. was filed with the allegation that the suit is of 1999 but no amount was deposited on the first date of hearing nor regular deposit was made, thereafter. The applicant contested stating that the entire amount was deposited on the first date of hearing. The trial court allowed the application, struck off the defence of the applicant. The revisional court affirmed the order passed by the trial court.

5. The learned counsel for the applicant would submit that the courts below have failed to record the first date of hearing, written statement was filed on 13 October 2008 and on the said date a sum of Rs. 4000/- was deposited which included the rent from January 1996 to September 2008, interest and expenses, further, it is sought to be urged that even presuming that there was some delay in depositing the subsequent sums, even then the application under Order XV Rule 5 could not have been allowed, admittedly the respondent-landlord received the entire sum. It is, therefore, submitted that the purpose of Order XV Rule 5 is to ensure the payment of the rent and not being a penal provision to punish the defendant.

8. The Supreme Court in Bimal Chand Jain Versus Sri Gopal Agarwal1, on considering the provisions of Order XV Rule 5, as applicable to U.P., observed that the sub-rule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest, thereon, at the rate of nine per cent per annum, whether or not he admits any amount to be due. Sub-rule (2) obliges the court, before making an order for striking off the defence to consider any representation made by the defendant in that behalf. In other words, the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off.

9. Sub-rule (1) obliges the court to strike off the defence which is in the nature of a penalty. A serious responsibility, therefore, rests on the court in the matter, the power is not to be exercised mechanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so.

10. The word "may" in sub-rule (1) merely vests power in the court to strike off the defence. It does not oblige it to do so in every case of default. If on the facts and circumstances already existing on the record it finds good reason for not doing so, the court is not obliged to strike off the defence, merely in the absence of such representation under sub-section(2).

11. This Court in Shiv Balak Singh Versus A.D.J., XI, Lucknow2, held that the provision of Order XV Rule 5 is discretionary.

"7. Even though technically at the time of arguments also, plea of Order XV, Rule 5, C.P.C. could be raised, however in normal course such an application should have been filed (and is normally filed) before the start of the evidence."

12. In Pramod Mehrotra and others Versus Ram Shankar Chaurasia and others3 where the amount was deposited with some delay, this Court relying upon Bimal Chand Jain (supra), held that discretion should be exercised not to strike off the defence where the entire amount has been paid with some delay.

13. Again in Sudhir Kumar Gupta Versus Dr. S.K. Raj and another4, the Court observed that the purpose of enacting the provision Rule 5 Order XV was not to give a lever to the landlord to get a tenant punished for insignificant lapses. The purpose was merely to ensure that the dues of the landlord are properly secured and he can get his rent regularly even though the litigation may continue.

14. In Pyare Lal Versus Distrit Judge, Lucknow and others5 wherein, the Court allowed the deposit of rent upon imposing cost.

15. In Dr. Ram Prakash Mishra Versus Additional District Judge, Etah and another6, it was observed that the question whether the deposit is valid or not is relevant for determining the question whether the tenant could be held to be defaulter or not in the eye of law, but so far as Order XV, Rule 5 C.P.C. is concerned, the only requirement is that the tenant has to deposit the entire amount on or before the first hearing of the suit. If the deposit has been made under section 30 of Act 13 of 1972 then it will ensure to the benefit of the tenant.

16. The provisions of Order XV Rule 5 is discretionary, the court is not bound to strike off the defence in every case of mere technical or bonafide default. The provision should not be interpreted in such a way that the tenant should be trapped to be evicted. (Refer-Vinod Chandra Kala Versus Premier Precisions Tools Manufacturing (P). Ltd. 1996(1) ARC 62; Bhawani Vastrya Bhandan v. Smt. Sahodra Devi, 1996(2) ARC 406)."

25. In the aforesaid judgment, the dispute was about the first date of hearing of the suit and the Court while considering different judgments has taken a view that Court is not bound to strike off the defence in every case. This judgment would also not come in the rescue of the petitioner-defendant for the very simple reason that in the present matter, there is no dispute on the facts and it is very well admitted. The issue was, as to whether any amount so deposited under Section 30 of the Act of 1972 may be adjusted against monthly deposit of rent or not and further, whether permission may be granted to tenant to fulfill the requirement of Order XV Rule 5 CPC.

26. Learned Senior Counsel also placed reliance upon the judgment of Apex Court in the matter of ***Asha Rani Gupta(Supra)***, relevant paragraphs of which are quoted hereinbelow:

"11.1 Though the aforesaid decisions in cases of Miss Santosh Mehta, Smt. Kamla Devi and Manik Lal Majumdar related to the respective rent control legislations applicable to the respective jurisdictions, which may not be of direct application to the present case but and yet, the relevant propositions to be culled out for the present purpose are that any such provision depriving the tenant of defence because of default in payment of the due amount of rent/arrears have been construed

liberally; and the expression 'may' in regard to the power of the Court to strike out defence has been construed as directory and not mandatory. In other words, the Courts have leaned in favour of not assigning a mandatory character to such provisions of drastic consequence and have held that a discretion is indeed reserved with the Court concerned whether to penalise the tenant or not. However, and even while reserving such discretion, this Court has recognised the use of such discretion against the defendant-tenant in case of wilful failure or deliberate default or volitional non-performance. This Court has also explained the principles in different expressions by observing that if the mood of defiance or gross neglect is discerned, the tenant may forfeit his right to be heard in defence. The sum and substance of the matter is that the power to strike off defence is considered to be discretionary, which is to be exercised with circumspection but, relaxation is reserved for a bonafide tenant like those in the cases of Miss Santosh Mehta and Smt. Kamla Devi (supra) and not as a matter of course. The case of Bimal Chand Jain (supra) directly related with Order XV Rule 5 CPC where the tenant had deposited the arrears admitted to be due but, failed to make regular deposits of monthly rent and failed to submit representation in terms of sub-rule (2) of Rule 5 of Order XV. The defence was struck off in that matter with the Trial Court and the High Court taking the said provisions of Order XV Rule 5 CPC as being mandatory in character. Such an approach was not approved by this Court while indicating the reserve of discretion in not striking off defence if, on the facts and circumstances existing on record, there be good reason for not doing so. The common thread running through the aforesaid decisions of this Court is that the power to strike off the defence is held to be a matter of discretion where, despite default, defence may not be struck off, for some good and adequate reason.

11.2 The question of good and adequate reason for not striking off the defence despite default would directly relate with such facts, factors and circumstances where full and punctual compliance had not been made for any bonafide cause, as contradistinguished from an approach of defiance or volitional/elective non-performance.

17. With respect, the said conclusion of the High Court could only be said to be an assumptive one, being not supported by any reason. In paragraph 44, of course, the High Court observed with reference to the decisions of this Court that the discretionary power must be exercised with great circumspection but, such enunciation by this Court cannot be read to mean that whatever may be the fault and want of bonafide in the defendant/tenant, he would be readily given the so-called 'indulgence' of not striking off defence. Such an approach is neither envisaged by the statutory provisions nor by the referred decisions. In fact, such an approach would simply render the relevant provisions of law rather nugatory. The expected circumspection would require the Court to be cautious of all the relevant facts and the material on record and not to strike off the defence as a matter of routine. However, when a case of the present nature is before the Court, disclosing deliberate defiance and volitional/elective non-performance, the consequence of law remains inevitable, that the defence of such a defendant would be struck off."

27. I have perused the abovesaid judgment. The Court is of the view that in case of default, bonafide of the defendant

has to be considered based upon the facts of each case. In this case, facts of filing of application under Order XV Rule 5 is entirely different and same is recorded in paragraph 4.5. of the judgment.

"4.5 Thereafter, the plaintiff-appellant filed an application with reference to the provisions of Order XV Rule 5 CPC as applicable to the present case and prayed that the defence of the defendant-respondent be struck off, for the reason that defendant had not deposited any rent and no evidence was adduced by him to establish any payment of rent. This application was contested by the defendant-respondent with the submissions that the provisions of Order XV Rule 5 CPC were applicable only to a case where the defendant would accept the plaintiff as his landlord; and in the present case, he had taken the special plea that the plaintiff was not the landlord or the owner of the suit shop and had clearly averred that there was no relationship of landlord and tenant between the plaintiff and defendant. The defendant-respondent also referred to certain rent receipts said to have been issued by the said Smt. Sudha Sharma.

28. From the perusal of para 4.5, it is apparently clear that in that case, defendant has disputed the landlord-tenant relationship and that he was not responsible for depositing the rent. Ultimately, Court has taken a view that in such matters bonafide has to be considered and Courts should take a liberal view while striking off the defence, but in the present case, fact was entirely different. There is no dispute on the landlord-tenant relationship and further monthly rent has been deposited under Section 30 of the Act of 1972, but not before the Court where the suit is pending. Therefore, the ratio of law laid down by the Court is not applicable in the present case. This issue was before the Apex Court in the matter of ***Atma Ram(Supra)***, but it appears that the said judgment was not placed before the Apex Court in the matter of ***Asha Rani Gupta(Supra)***

29. Now I am coming to the judgments relied upon by the learned counsel for the respondent-plaintiff.

30. Learned counsel for the respondent-plaintiffs has placed reliance upon the judgment of ***Atma Ram(Supra).*** In the said case, same issue was before the Court for consideration and Court has framed the issue in paragraph 7 of the judgment and the same is quoted hereinbelow:

"7. The core question, therefore, which arises for consideration is whether the appellant defaulted in payment of rent inasmuch as he had not paid or tendered or deposited the rent for the aforesaid period in the manner required by law. The question also arises whether the deposit of rent under the Punjab Act can be construed to be a valid deposit under the Act."

31. The issue referred in the abovesaid paragraph was replied in paragraph 21 of the judgment, which is being quoted hereinbelow:

"21. The Act, therefore, prescribes what must be done by a tenant if the landlord does not accept rent tendered by him within the specified period. He is required to deposit the rent in the Court of the Rent Controller giving the necessary particulars as required by sub-section (2) of Section 27. There is, therefore, a specific provision which provides the procedure to

be followed in such a contingency. In view of the specific provisions of the Act it would not be open to a tenant to resort to any other procedure. If the rent is not deposited in the Court of the Rent Controller as required by Section 27 of the Act, and is deposited somewhere else, it shall not be treated as a valid payment/tender of the arrears of rent within the meaning of the Act and consequently the tenant must be held to bein default.

32. From the perusal of the question so framed and answer given by the Court, it is apparently clear that amount has to be deposited in the Court of Rent Controller, in the present case, SCC Court and any amount deposited somewhere else shall not be treated as valid payment or tender of arrears of rent within the meaning of the Act. The same fact is here that amount so deposited under Section 30 of the Act of 1972 cannot be treated to be deposited as provided under Order XV Rule 5 CPC.

33. In the matter of ***Asha Rani Gupta(Supra)*** alongwith background of fact that landlord-tenant relationship has been denied and amount so required under Order XV Rule 5 CPC has not been deposited, Apex Court has laid down a general principle of law that while dealing with the applications filed under Order XV Rule 5 CPC bonafide of the application has to be considered, whereas in the matter of ***Atma Ram(Supra)***, issue was that in case money deposited under the provision of Act before any other court can be adjusted or not and Court has opined that such amount cannot be adjusted. In the present case, issue is squarely covered by the judgment of ***Atma Ram(Supra)***, therefore, the general law laid down by the Apex Court in the matter of Asha Rani Gupta(Supra) shall not be applicable and this case has to be governed by the law laid down by the Apex Court in the matter of ***Atma Ram(Supra).***

34. Learned counsel for the respondent-plaintiffs has also placed reliance upon the judgment Division Bench of this Court in the matter of ***Haidar Abbas (Supra),*** in which ration of law laid down by the Apex Court in the matter of ***Atma Ram(Supra)*** has been followed. Relevant paragraph of the said judgment is quoted hereinbelow:

"21. It, therefore, follows that when the "entire amount admitted by him to be due" is deposited at or before the first hearing of the suit, the amount deposited under Section 30 of the Act, if any, can be deducted but while depositing the "monthly amount due" throughout the continuation of the suit, the amount deposited under Section 30 of the Act cannot be deducted. Needless to say before making an order for striking off defence, the Court may consider any representation made by the defendant in that behalf provided such representation is made within the period stipulated in Order XV Rule 5 CPC.

22. The Supreme Court in the case of Atma Ram Vs. Shakuntala Rani (2005) 7 SCC 211 had the occasion to examine whether the tenant defaulted in payment of rent if he had not paid or tendered or deposited the rent in the manner required by law and whether the deposit of rent under some other Act could be construed to be a valid deposit. The tenant had sent a money-order remitting the rent but the landlord refused to accept it and, therefore, the tenant deposited the rent for the period from 1st February, 1992 to 31st January, 1995 in January, 1995 under the provisions of the Punjab Relief Indebtedness Act, 1934 (called the "Punjab Act'). The landlord, however, sent a notice dated 16th May,

1996 to the tenant to pay arrears of rent. The tenant on 20th July, 1996 deposited the rent for the period February, 1995 to 12th July, 1996 under Section 27 of the Delhi Rent Control Act, 1961 (called the "Delhi Act'). The arrears of rent from 1st February, 1992 to 31st January, 1995 was not included since the tenant had deposited the same under the Punjab Act. Section 27 of the Delhi Act provides that where the landlord does not accept any rent tendered by the tenant, the tenant may deposit such rent with the Rent Controller in the manner provided for in that section. The landlord then filed an application for eviction of the tenant under Section 14 (1) (a) of the Delhi Act. The Supreme Court after considering a number of its earlier decisions in Kuldeep Singh Vs. Ganpat Lal (1996) 1 SCC 243, Jagat Prasad Vs. Distt. Judge, Kanpur 1995 Supp (1) SCC 318, M. Bhaskar Vs. J. Venkatarama Naidu (1996) 6 SCC 228, Ram Bagas Taparia Vs. Ram Chandra Pal (1989) 1 SCC 257, and E. Palanisamy Vs. Palanisamy (2003) 1 SCC 123 observed:-

"It will thus appear that this Court has consistently taken the view that in the Rent Control legislations if the tenant wishes to take advantage of the beneficial provisions of the Act, he must strictly comply with the requirements of the Act. If any condition precedent is to be fulfilled before the benefit can be claimed, he must strictly comply with that condition. If he fails to do so he cannot take advantage of the benefit conferred by such a provision.

The Act, therefore, prescribes what must be done by a tenant if the landlord does not accept the rent tendered by him within the specified period. He is required to deposit the rent in the Court of the Rent Controller giving the necessary particulars as required by sub-section (2) of Section 27. There is, therefore, a specific provision which provides the procedure to be followed in such a contingency. In view of the specific provisions of the Act it would not be open to a tenant to resort to any other procedure. If the rent is not deposited in the Court of the Rent Controller as required by Section 27 of the Act, and is deposited somewhere else, it shall not be treated as a valid payment/tender of the arrears of rent within the meaning of the Act and consequently the tenant must be held to be in default.

We are, therefore, satisfied that the High Court was right in holding that the appellant had failed to pay/tender arrears of rent for the period 1-2-1992 to 31-1-1995. The deposit made under the provision of the Punjab Act was of no avail in view of the express provision of Section 27 of the Act."

23. The aforesaid decision of the Supreme Court in the case of Atma Ram (supra) emphasizes that if the tenant wishes to take advantage of the beneficial provisions of the Rent Control Act, he must strictly comply with the requirements and if any condition precedent is required to be fulfilled before the benefit can be claimed, the tenant must strictly comply with that condition failing which he cannot take advantage of the benefit conferred by such a provision. It has further been emphasised that the rent must be deposited in the Court where it is required to be deposited under the Act and if it is deposited somewhere else, it shall not be treated as a valid payment/tender of the rent and consequently the tenant must be held to be in default.

24. In view of the aforesaid principles of law enunciated by the Supreme Court in the aforesaid case of Atma Ram (supra), it has to be held that the tenant must comply with the requirements of Order XV Rule 5 CPC and make the deposits strictly in accordance with the procedure contained

therein. A deposit which is not made in consonance with the aforesaid Rule cannot enure to the benefit of the tenant and, therefore, only that amount can be deducted from the "monthly amount" required to be deposited by the tenant during the pendency of the suit which is specifically mentioned in Explanation 3 to Rule 5 (1) of Order XV CPC.

25. It, therefore, follows that the amount due to be deposited by the tenant throughout the continuation of the suit has to be deposited in the Court where the suit is filed otherwise the Court may strike off the defence of the tenant since the deposits made by the tenant under Section 30 (1) of the Act after the first hearing of the suit cannot be taken into consideration.

37. We, therefore, upon an analysis of the provisions of Rule 5 (1) of Order XV CPC, hold that while depositing the amount at or before the first hearing of the suit, the tenant can deduct the amount deposited under Section 30 of the Act but the deposits of the monthly amount thereafter throughout the continuation of the suit must be made in the Court where the suit is filed for eviction and recovery of rent or compensation for use and occupation and the amount, if any, deposited under Section 30 of the Act cannot be deducted. "

35. In the aforesaid judgment, the Court has taken a firm view that while depositing the amount on or before the first hearing of the suit, tenant can deduct the amount deposited under Section 30 of the Act of 1972, but deposit of monthly amount of rent throughout the continuation of the suit must be made in the Court, where the suit is filed for eviction and any amount deposited under Section 30 of the Act of 1972, cannot be adjusted.

36. Again this issue came up before this Court in the matter of ***Panaru Lal(Supra)***. Relevant paragraph of the aforesaid judgment is quoted hereinbelow:

"10. In the facts of the case in hand, it is undisputed that the tenant failed to deposit the monthly rent in the Court where the suit was pending. The courts below have recorded a finding of fact in this regard which learned counsel for the petitioner has failed to demonstrate to be vitiated on any count. Even if, the amount towards rent was being deposited by the tenant under Section 30 of Act No. 13 of 1972, though, not defaulting, still the petitioner was under an obligation to deposit the monthly rent due before the Court where the suit was pending, the amount so deposited under Section 30 of Act No. 13 of 1972 was not liable to be deducted from the said deposit, thus, the tenant was clearly in default. Having due regard to the facts and the legal proposition stated herein above, there is no illegality or infirmity in the impugned orders which requires any interference by this Court."

37. After considering the ratio of law laid down by the Division Bench of this Court in ***Haidar Abbas(Supra)*** the Court has taken the same view that any amount so deposited under Section 30 of Act of 1972 can be adjusted against the arrears of rent before the first hearing of the suit, but so far as monthly rent is concerned, the same cannot be adjusted.

38. Again this issue came up before this Court in the matter of ***More Singh(Supra)***, relevant paragraphs of the said judgment are quoted hereinbelow:

"6. The sole question for consideration is whether the tenant is

entitled to the benefit of deposits made in proceeding under Section 30 in misc. case no. 27/7/08.

A Division Bench of this Court in Haider Abbas vs. Additional District Judge (Court No.3) Allahabad and others1 while considering the provisions of Order XV Rule 5 CPC and the decision of the Supreme Court in Atma Ram2 observed as follows:-

"The aforesaid decision of the Supreme Court in the case of Atma Ram (supra) emphasizes that if the tenant wishes to take advantage of the beneficial provisions of the Rent Control Act, he must strictly comply with the requirements and if any condition precedent is required to be fulfilled before the benefit can be claimed, the tenant must strictly comply with that condition failing which he cannot take advantage of the benefit conferred by such a provision. It has further been emphasised that the rent must be deposited in the Court where it is required to be deposited under the Act and if it is deposited somewhere else, it shall not be treated as a valid payment/tender of the rent and consequently the tenant must be held to be in default."

In view of the aforesaid principles of law enunciated by the Supreme Court in the aforesaid case of Atma Ram (supra), it has to be held that the tenant must comply with the requirements of Order XV Rule 5 CPC and make the deposits strictly in accordance with the procedure contained therein. A deposit which is not made in consonance with the aforesaid Rule cannot enure to the benefit of the tenant and, therefore, only that amount can be deducted from the "monthly amount" required to be deposited by the tenant during the pendency of the suit which is specifically mentioned in Explanation 3 to Rule 5 (1) of Order XV CPC.

It, therefore, follows that the amount due to be deposited by the tenant throughout the continuation of the suit has to be deposited in the Court where the suit is filed otherwise the Court may strike off the defence of the tenant since the deposits made by the tenant under Section 30 (1) of the Act after the first hearing of the suit cannot be taken into consideration."

In Basant Kumar Chauhan Vs. VIIth A.D.J.3 after analyzing the provisions of Order XV Rule 5 CPC, this Court observed:-

"It is, therefore, obvious that the provisions contained in Order XV, Rule 5, read with Explanation II clearly stipulate that any amount deposited in any Court under Section 30 of the U.P. Act No.13 of 1972 could be taken notice of by the Court where the suit was pending only so far as the deposits required to be made at or before the first hearing of the suit were concerned. The other deposits required to be made throughout the continuation of the suit are the regular deposits of the monthly amount due within a week from the date of its accrual.....Considering the Explanation III to Order XV, Rule 5 of the Civil Procedure Code it is clear that for finding out the "monthly amount due' the deposits made in any Court under Section 30 of the U.P. Act No.13 of 1972 are not to be taken into account. .....Obviously, therefore, once in any suit by a lessor for the eviction of a lessee after the determination of his lease, the tenant defendant comes to know of the pendency of the suit and puts in appearance therein, a statutory obligation stands cast upon him to regularly deposit the monthly amount due as envisaged under Explanation III to Order XV, Rule 5(1) of the Civil Procedure Code in the suit regularly throughout its continuation within a week from the date of

its accrual in order to save his defence from being struck-off."

In Ram Kumar Singh Vs. IIIrd Additional District Judge, Ghaziabad4, after placing reliance on the decisions rendered in Basant Kumar Chauhan and Sayeed Hasan Jafar alias Shakil Ahmad Vs. Rurabal Haq and others5, this Court observed as follows:-

"In view of the aforesaid decisions of this Court, it is evident that the deposit of the monthly rent/compensation by the petitioner (defendant) under Section 30 of the U.P. Act No. XIII of 1972 during the continuance of the said S.C.C. Suit No.26 of 1977 were illegal, and the same could not be said to be made in compliance with the provisions of Order XV Rule 5 of the Code of Civil Procedure. Once the "first hearing" in the said S.C.C. Suit No.26 of 1977 arrived, it was no longer open to the petitioner to continue to deposit the monthly rent/compensation under Section 30 of the U.P. Act No. XIII of 1972 in the Court of Munsif, Ghaziabad. The said monthly deposits should have been made in the said S.C.C. Suit No.26 of 1977 before the respondent No.2. Thus, the petitioner failed to comply with the requirements of the second part of Order XV Rule 5(1) of the Code of Civil Procedure namely, head (B) above."

"7. It thus follows that while deposits made under Section 30, before the date of first hearing are to be adjusted but any rent deposited thereafter in proceeding under Section 30 would not enure to the benefit of the tenant for adjudging compliance of the provisions of Order XV, Rule 5 CPC.

8. In the instant case, admittedly after filing of written statement on 28.3.2009, which can safely be assumed to be the date of first hearing in the suit, till the striking off of his defence by the trial court on 15.3.2011, not a single penny was deposited in the suit. The petitioner had also not made any representation, in that regard. As such, there was no error on part of the trial court, in striking off the defence."

39. Here again, the view of the Court was same that any amount so deposited under Section 30 of the Act of 1972 cannot be adjusted against the monthly deposit of rent as required under Order XV Rule 5 CPC.

40. This Court has considered the very same issue in the matter of Mukesh Verma(Supra) and considering the provision of Order XV Rule 5 CPC and law laid down by Courts, this Court has recorded its conclusion. Relevant paragraph of the said judgment is quoted hereinbelow:

"31. The provisions of Order XV Rule 5 C.P.C. and the law laid down by this Court and Hon'ble Supreme Court in the judgments aforenoted conspicuously leads to the conclusions as under:

(a) In a suit by a lessor for the eviction of a lessee after determination of the lease and for recovery of arrears of rent etc. the defendant is required to make two types of deposits. Firstly, at or before the first hearing of the suit he has to deposit the entire amount admitted by him to be due together with interest thereon @ 9% per annum and secondly, whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual. In the event of any default in making the first deposit or the second deposit as aforesaid, the Court may, subject to the provisions of sub-Rule (2) strike off his defence.

(b) The defendant has a statutory right under sub-Rule (2) to make a representation within ten days of the first hearing with respect to the first deposit as aforesaid. With respect to the monthly deposit as aforesaid, he has a right to make a representation within a week from the date of accrual of the monthly deposit.

(c) After considering the representation of the defendant under sub-Rule (2) as aforesaid, the Court may, strike off the defence of the defendant.

(d) Thus, the provisions for the first and the second deposit under sub-Rule (1) are mandatory but striking off the defence is the discretion of the Court which has to be exercised judicially. The delay, if any, in making the second deposit i.e. the monthly deposit, may be condoned on the representation of the defendant-tenant provided he makes out sufficient ground for condonation of delay.

(e) While depositing the amount at or before the first hearing of the suit, the defendant-tenant can deduct the amount deposited under Section 30 of the U.P. Act 13 of 1972 but the deposits of the monthly amount thereafter throughout the continuation of the suit must be made in the Court where the suit is filed for eviction.

(f) If the amount defaulted in making the deposit under sub-Rule (1) is small or negligible then a lenient view may be taken by the Court while considering the application of the lessor for striking off the defence of the lessee/tenant.

(g) If the tenant wishes to take advantage of the beneficial provision of Order XV Rule 5 C.P.C. then he must strictly comply with it before he may claim the benefit/protection against striking off the defence.

(h) The right expressly vested in the defendant under sub Rule (2) enables him to show by bringing material on record that he has not been guilty of the default alleged or if the default has occurred there is good reason for it. The power conferred under sub-Rule (2) is not to be exercised by the Court mechanically but judicially. The Court in its discretion vested in it, may not strike off the defence if on the facts and circumstances already existing on the record it find good reason for not doing so.

(i) The word "representation" as used under sub-Rule (2) may cover a "representation" in answer to an application for striking off defence or a "representation" praying for an extension of time for making the deposit on sufficient grounds shown.

*(j) In the event the deposit under sub-Rule (1) is not made by the defendant-tenant th*en evil consequences of striking off defence shall follow. ”

41. The Court in the aforesaid matter has taken a firm view that any amount so deposited under Section 30 of the Act of 1972 cannot be adjusted for monthly amount of rent as required under Order XV Rule 5 CPC.

42. Again this issue was considered by this Court in the matter of ***Om Prakas Gupta(Supra).*** Relevant paragraph of the said judgment is quoted hereinbelow:

“13. The Division Bench placed reliance on the judgment of Supreme Court in Atma Ram (supra) in holding that if the tenant desires to take advantage of a beneficial provision under the Rent Control Act, he must strictly comply with the requirements thereof. If any condition precedent is required to be fulfilled before the benefit can be claimed, the tenant must strictly comply with that condition, failing which he cannot take advantage of the benefit conferred by the said provision.

Accordingly, it was held that a deposit made not in consonance with the statutory provision would not enure to the benefit of the tenant. The monthly amount required to be deposited by the tenant during pendency of the suit has to be deposited in the court where the suit is filed and not in any other Court or proceedings. It has been concluded by holding that deposit of monthly rent under Section 30 of the Act, after receipt of summons of the suit is contrary to the requirements of Order 15 Rule 5 CPC and would therefore not enure to the benefit of the tenant:-

"The aforesaid decision of the Supreme Court in the case of Atma Ram (supra) emphasizes that if the tenant wishes to take advantage of the beneficial provisions of the Rent Control Act, he must strictly comply with the requirements and if any condition precedent is required to be fulfilled before the benefit can be claimed, the tenant must strictly comply with that condition failing which he cannot take advantage of the benefit conferred by such a provision. It has further been emphasised that the rent must be deposited in the Court where it is required to be deposited under the Act and if it is deposited somewhere else, it shall not be treated as a valid payment/tender of the rent and consequently the tenant must be held to be in default. In view of the aforesaid principles of law enunciated by the Supreme Court in the aforesaid case of Atma Ram (supra), it has to be held that the tenant must comply with the requirements of Order XV Rule 5 CPC and make the deposits strictly in accordance with the procedure contained therein. A deposit which is not made in consonance with the aforesaid Rule cannot enure to the benefit of the tenant and, therefore, only that amount can be deducted from the "monthly amount" required to be deposited by the tenant during the pendency of the suit which is specifically mentioned in Explanation 3 to Rule 5 (1) of Order XV CPC. It, therefore, follows that the amount due to be deposited by the tenant throughout the continuation of the suit has to be deposited in the Court where the suit is filed otherwise the Court may strike off the defence of the tenant since the deposits made by the tenant under Section 30 (1) of the Act after the first hearing of the suit cannot be taken into consideration.

We, therefore, upon an analysis of the provisions of Rule 5 (1) of Order XV CPC, hold that while depositing the amount at or before the first hearing of the suit, the tenant can deduct the amount deposited under Section 30 of the Act but the deposits of the monthly amount thereafter throughout the continuation of the suit must be made in the Court where the suit is filed for eviction and recovery of rent or compensation for use and occupation and the amount, if any, deposited under Section 30 of the Act cannot be deducted."

43. View of the Court is again same and earlier ratio of law laid down by the Courts, that any amount so deposited under Section 30 of the Act of 1972 cannot be adjusted against the monthly deposit as required under Order XV Rule 5 CPC, has been followed.

44. The very same issue again came before this Court in the matter of *Gangu(Supra)*, relevant paragraph of which is being quoted hereinbelow:

"10. There is absolutely no justification here for the petitioner to have deposited rent for months together before the Court exercising jurisdiction under Section 30 of the Act, after he had put in appearance in the suit and filed his written

statement. The monthly rent had to be deposited in the Court, where the suit was pending in accordance with the provisions of Order XV Rule 5 CPC, within a week of accrual of rent every month. This having not been done, the petitioner's defence has been rightly struck off. "

45. In this judgment, this Court after considering the judgment in the case of ***Haidar Abbas(Supra)*** has held that as any amount so deposited under Section 30 of the Act of 1972 cannot be adjusted against monthly deposit of rent as provided in the second part of Order XV Rule 5 CPC.

46. Therefore, in light of law laid down by the Courts, it is apparently clear that any amount so deposited under Section 30 of the Act of 1972 cannot be adjusted against the monthly deposit of rent as provided in second part of Order XV Rule 5 CPC and it has to be deposited in such Court, where the suit is pending.

47. Another issue argued by learned counsel for the petitioner is about the incorrect advice of counsel, relying upon which deposit was made under Section 30 of the Act of 1972. This issue was subject matter before this Court in ***Sunil Kumar and Ors. Vs. Shri Kapoor Chandra Agarwal Dharmshala Trust: 2019(10) ADJ 682***, relevant paragraph of the said judgment is quoted hereinbelow:

"3. The aforementioned suits were contested by the tenants by filing their written statements. It is undisputed that on the first date of hearing, the amount in question, as required under Order XV Rule 5 of the Code of Civil Procedure, was deposited; however, thereafter during the continuation of the suit proceedings, the monthly amount due was not deposited, and subsequently an application was moved under Order XV Rule 5 CPC for condoning the delay and for depositing the arrears of rent which as per the tenant-petitioners could not be deposited earlier due to wrong legal advice. The applications which were moved, were objected to by plaintiff-landlord by filing objections. The aforementioned applications which had been filed by the defendant-tenant on 29.11.2005 seeking condonation of delay and permission to deposit the arrears of rent, were allowed with costs of Rs. 1500/-. The aforementioned orders were challenged by the plaintiff-landlord by filing SCC revisions, which were dismissed vide order dated 01.09.2006 and against the aforesaid order the writ petitions, being writ petition nos. 66771/2006, 66769/2006 and 66770/2006 were filed.

33. The petitioners having admittedly defaulted in making payment of the monthly amount due as per the terms of the second part under Order XV Rule 5 for a period of 40 months, and the only explanation sought to be furnished was by way of shifting the burden upon their earlier counsel, which fact also could not be proved by them by leading any cogent evidence, in view of the settled legal position with regard to the mandatory requirement of making compliance of the beneficial provisions under Order XV Rule 5, the orders passed by the courts below rejecting the representations made by the tenants for condoning the delay and granting them permission for making the necessary deposits, and allowing the application filed by the landlord for striking off their defence, cannot be faulted with."

48. From the perusal of the said judgment, there is no doubt that incorrect or illegal advice cannot be a ground to reject the application under Order XV Rule

5 CPC and allow the application 24-Ga and issue orders for adjustment of amount so deposited under Section 30 of the Act of 1972 against monthly deposit of rent as provided in Order XV Rule 5 CPC.

49. After considering the provision of Order XV Rule 5 CPC as discussed hereinabove and law laid down by the Courts, this Court is of the firm view that so far as first part of Order XV Rule 5 CPC with regard to deposit of arrears of rent on or before first hearing of the suit, amount so deposited under Section 30 of the Act of 1972 can be adjusted, but so far as second part of Order XV Rule 5 CPC, i.e. monthly deposit of rent is concerned, the amount so deposited under Section 30 of the Act of 1972 cannot be adjusted and it is mandatory requirement to deposit the same before the Court where the suit is pending.

50. Therefore under such facts and circumstance of the case as well as law discussed hereinabove, I find no illegality in the impugned orders dated 16.08.2018 and 15.12.2022.

51. Petition lacks merit and is accordingly **dismissed.**

52. No order as to costs.

(2023) 6 ILRA 553
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Matter under Article 227 No. 4772 of 2023

Kalam Uddin ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri M.A. Siddiqui

Counsel for the Respondents:
G.A.

A. Criminal Law - Constitution of India, 1950-Article 227 - Criminal Procedure Code, 1973-Section 73 & 311 - Indian Penal Code, 1860-Sections 147, 148, 307, 323, 341 & 504-Learned Magistrate rejected the application moved by the petitioner-NBW issued to the absconding accused-after lapse of four months accused could not be apprehended-Learned Magistrate cannot issue coercive process yet he can monitor the investigation, he can ask to produce case diary to ensure fair investigation-This is settled law that Magistrate are not to interfere in process of investigation but at the same time Apex Court sent a caution in Sakiri Vasu Case that his meaningful indulgence in the investigation is desirable-The impugned order is set aside.(Para 1 to 19)

The petition is allowed. (E-6)

List of Cases cited:

1. Sakiri Vasu Vs St. of U.P. (2008) AIR SC 907

2. St. thru CBI Vs Dawood Ibrahim Kaskar & ors.(2000) 10 SCC 438

3. Sunil Tyagi Vs Govt. of NCT of Delhi & anr., Crl. M.C. No. 5238 of 2013

4. Jaisukh @ Jayesh Muljibhai Ranparia Vs St. of Guj. CRLR No. 535 of 2016

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

1. The instant writ petition under Article 227 of the Constitution of India has been filed by the petitioner challenging the

order dated 3.3.2023 passed by C.J.M., Prayagraj whereby an application moved by the petitioner in Case No. 1556 of 2022 (State vs. Lallu @ Abdul Mahboob and others) under Sections 147, 148, 307, 323, 341, 504 IPC, P.S. Mau Aima, District Prayagraj, has been dismissed.

2. The brief facts of the case relevant for the purpose of present writ petition are that the petitioner lodged an F.I.R. on 12.8.2022 at 13:52 hours against Waseem @ Gabbar and five others, named accused persons with averments that on 12.8.2022, the informant was coming back to home at around 10:00 AM after participating in Fatiya at the place of his friend Munnan, the accused Waseem acting under conspiracy, way laid him and his companions; they started abusing him and his companions Mohd. Amir, Jafee Arsad, Mohd. Izhar and on exhortation of accused persons; accused Shadab had opened fire on him in which he suffered firearm injury on his left hand and on being given beating by lathi danda by accused persons, Mohd. Amir, Mohd. Izhar and Jafee Arshad suffered head injury.

3. In injury report of the informant Kalamuddin, one lacerated wound 1.5 X 0.3 cm muscle deep was found on his left hand, which was referred for x-ray; after conducting x-ray examination, he was admitted to SRN hospital Prayagraj on 12.8.2022 and was discharged on 18.8.2022; doctor has reported that patient managed operatively by foreign body removal from left arm on 16.8.2022; other injured persons, who also suffered head injury and substantial injury on their person, however, in x-ray of his skull, no fracture was found; police investigated the offence and submitted charge-sheet against four named accused persons in aforesaid charges on 5.11.2022. However, on account of accused Waseem @ Gabbar have still at large, investigation is kept pending against him. Present petitioner being aggrieved by inaction of police in apprehending accused Waseem for long time moved complaint to police commissioner and other higher authorities of police through registered post on 23.12.2022, wherein, he stated that NBW was issued against him on 13.10.2022 but even after lapse of period of two months no action has been taken against him under Section 82 Cr.P.C. and said accused is threatening him and his family members to withdraw the case lodged against him; petitioner also moved an application on 3.3.2023 before the court below, wherein, he stated that accused Waseem has not been arrested by the police as yet despite the fact that court has issued warrant of arrest against him on 13.10.2022 but failed to arrest him even after lapse of four months thereafter and said accused is threatening the informant and injured witnesses and their family members to withdraw cases against him; he also stated that his brother is serving in police department and for that reason an understanding has reached between him and police officials that he will not be arrested and his name will be dropped from the case; he prayed for ensuring arrest of said accused Waseem by complying relevant legal provision; the court below, in a cryptic order dismissed the said application by observing that as the investigation has carried out in the matter, a person cannot be directed to be arrested during investigation.

4. Heard learned counsel for the petitioner, learned AGA for the State-respondent and perused the material on record.

5. Learned counsel has placed reliance on judgement of Hon'ble Apex Court in **Sakiri Vasu vs. State of U.P.,**

2008 AIR (SC) 907, wherein, Hon'ble Apex court has illustrated the scope of Section 154, 156(3) and 482 Cr.P.C. and observed as under:

"if a person has a grievance that the police station is not registering his FIR under Section 154 Cr.P.C., then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156 (3) Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156 (3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

6. Even if an FIR has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156(3) Cr.P.C., and if the Magistrate is satisfied, he can order a proper investigation and take other suitable steps and pass such order as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under section 156(3) Cr.P.C.

7. Section 156(3) Cr.P.C. provides for a check by the Magistrate on the police performing its duties under Chapter XII Cr.P.C. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

8. Section 156(3) Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an F.I.R. and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) Cr.P.C., though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation."

9. A perusal of aforesaid dictum of Hon'ble Apex Court reveals that Hon'ble Apex Court recognized the power of Magistrate to monitor the investigation to ensure that investigation is being done properly (though he cannot investigate himself). What will be the scope of monitoring the investigation by the police is a matter of perception in present context.

10. Section 73 of Cr.P.C. provides that The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non- bailable offence and is evading arrest. So the bare reading of the section shows that Magistrate has a discretion to issue Non-Bailable Warrant (NBW) and the conditions under which he can issue. Whenever Discretion comes it has to be exercised

judiciously. This find in usual course that police officials come to the court prior for issuance of warrant of arrest against some warranted accused on the ground that he evading arrest and he committed non bailable offence as issuance of NBW involves curtailment or deprivation of personal liberty of a person which is most previous right of an individual, therefore, the courts have to be cautious before issuing NBW; court has to strike balance between the liberty which is precious for an individual as well as the public welfare, interest and maintenance of law and order which requires apprehension of an accused who has allegedly committed some non bailable or serious offence.

11. Hon'ble Supreme court in **State through CBI vs. Dawood Ibrahim Kaskar and others, (2000) 10 SCC 438** considered the issue as to whether arrest warrant can be issued on the stage of investigation and finally settled it while holding that Section 73 of Cr.P.C. confers a power upon a Magistrate to issue a warrant and that it can be exercised by him during investigation also. To explain this point, Court gave example of Section 155 of the Code, which provides that police officer can investigate into a non cognizable case with the order of a Magistrate and may exercise the same powers in respect of the investigation which he may exercise in a cognizable case, except that he cannot arrest without warrant. If with the order of a Magistrate the police starts investigation into a non- cognizable and non-bailable offence, (like Section 466 or 467 of the I.P.C.) and if during investigation the Investigating Officer intends to arrest the person accused of the offence he has to seek for and obtain a warrant of arrest from the Magistrate. If the accused evades the arrest, the only course left open to the Investigating Officer to ensure his presence, would be to ask the Magistrate to invoke his powers under Section 73 and thereafter those relating to proclamation and attachment. In such an eventuality, the Magistrate can legitimately exercise his power under Section 73 for the person to be apprehended is accused of a non-bailable offence and is evading arrest. The very fact that police officer may arrest without warrant of Magistrate under Section 155 Cr.P.C. is implied that Magistrate may issue a warrant even at the stage of Section 155 Cr.P.C.

12. Section 73 of the Code is of general application and that in course of the investigation a Court can issue a warrant in exercise of power thereunder to apprehend, inter alia, a person who is accused of a non-bailable offence and is evading arrest. Since warrant is and can be issued for appearance before the court only and only for production of accused before the police in aid of investigation, hence authorization for detention in police custody is neither to be given as a matter of course nor on the mere asking of the police, but only after exercise of judicial discretion based on materials placed before him. The reason behind seeking warrant of arrest for an accused, suspect of committing non bailable offence at the instance of police, who is otherwise empowered to arrest such person without a warrant by virtue of power given under Section 41 Cr.P.C. for under Section 24 of the Police Act is that it can be possible that police after completing the investigation even at the stage of submission of charge-sheet is still unable to arrest the accused; accused keeps absconding and I.O. may ask the court to accept the charge-sheet in abscondance of the accused with submission that inspite of sufficient efforts to trace the accused he

could not arrest him and he asks the court to take back of executed arrest and issue proclamation against the accused under Section 82 Cr.P.C.; there is no gainsaying the fact that process under Section 82 Cr.P.C. can only be issued by the Magistrate after issuance of NBW and after expiry of one month of issuance of process under Section 82 Cr.P.C. and thereafter only the process under Section 83 Cr.P.C. can be issued. The court can give halt to try such accused after declaring him as absconder in terms of Section 299 Cr.P.C. on recording of evidence of witnesses produced by prosecution. It is needless to say that provision of proclamation and attachment are envisaged under Section 82 and 83 Cr.P.C. is to compel the appearance of accused who is evading the arrest; police cannot initiate the proceeding under Section 82/83 Cr.P.C. against absconding accused unless the court is issued warrant of arrest prior to that. Resultantly, if the police has to take the coercive measures for the apprehension of such a person it has to approach the Court to issue warrant of arrest under Section 73 and if need be to invoke the provisions of part `C' of Chapter VI (Section 83 to 86).

13. The Delhi High Court in **Sunil Tyagi vs Govt. of NCT of Delhi & Anr** in Crl. M.C. No. 5238 of 2013 decided on June 28, 2021, has laid down broad guidelines to ensure the NBWs are issued only against the correct persons during the stage of investigation, which are as follows:

14. Issuance of warrant of arrest where the offence is cognizable & non-bailable and proposed warrantee is evading his arrest.

While applying for warrant, the Investigating Officer must show the Magistrate his efforts made for arresting the proposed warrantee.

Investigating Officer must show that the proposed warrantee is ordinarily residing at or was very recently residing at some address which is in the knowledge of the IO through any manner and that now the proposed warrantee is not available at that address due to his deliberate intention to avoid custody in the case in question.

No warrant shall be issued against a proposed warrantee merely on the ground that he is not available for the IO/ Police officials for the purpose of joining him in the investigation.

Investigating Officer must satisfy the criteria that in his belief and on the basis of material collected by him/previous IO during the investigation, he is of the opinion that the proposed warrantee is involved in the case as an accused.

Only a strong suspicion or information of secret informer may not be treated as a ground for issuance of warrant of arrest.

No warrant shall be issued against proposed warrantee unless the Police Officer has categorically stated in writing that there exists grounds of arrest and such grounds are not only legally admissible but are also sufficient to sustain filing of a charge sheet against him in the Court.

Investigating Officer must show that in his opinion custodial interrogation of the proposed warrantee is necessary for the just and fair investigation of the offence(s) in question.

The Magistrate must record his satisfaction in respect of the fact prima facie involvement of proposed warrantee, requirement of his custodial interrogation and that he is evading his arrest

The Magistrate than can exercise his powers to issue warrant of arrest even at the stage of investigation in cognizable & non-bailable offences.

Such prayers shall be endorsed by the SHOs and Asstt. P.P./Addl. P.P./Chief P.P. of the Court as well with a declaration that they are satisfied that it is a fit case for issuance of NBW.

The Investigating Officer shall share the material collected by him during investigation before the Court on the basis of which the accused is connected to the crime.

15. The Gujrat High Court in Criminal Revision No. 535 of 2016, **Jaisukh @ Jayesh Muljibhai Ranparia vs. State of Gujrat** in judgement dated 20.10.2016 also held that Section 73 of the Code is of general application and that in course of the investigation a Court can issue a warrant in exercise of power thereunder to apprehend, inter-alia, a person, who is accused of a non-bailable offence and is evading arrest. This is settled law that Magistrate or criminal courts are not to interfere in process of investigation carried out by the police in performance of its statutory duty. However, the monitoring of process of investigation by Magistrate has not been prohibited under law rather it is recognized by reasoned judgement of Hon'ble Apex Court in Sakiri Vasu (supra), wherein, such power has been readwith section 156(3) of Cr.P.C.; this reflects the role of Magistrate during investigation and recognition of his social function; his meaningful indulgence in the investigation is desirable. At the same time the Apex Court has sent a caution that a Magistrate ought not investigate the case himself. However, Magistrate is empowered to monitor the investigation with a view to ensure that there is free and fair trial. **The Malimath Committee** has also recommended that a provision may be added under Section 311 Cr.P.C. empowering the Magistrate to issue direction to the police regarding investigation to I.O.

16. In present case, learned Magistrate in a very cryptic and cursory manner rejected the application moved by the petitioner without considering the settled proposition of law.

17. According to the petitioner, NBW was issued to absconding accused Waseem @ Gabbar by same court on 13.10.2022 and even after lapse of four months, accused could not be apprehended. If the learned Magistrate or criminal courts issued warrant of arrest against the accused then it is duty for the court to seek whereabouts of said warrant as to what action has been taken by the police to serve the warrant upon the absconding accused whether he has absconded or evading arrest and in that case; whether process under Section 82 Cr.P.C. is desirable against him or not. He can also direct the I.O. to produce case diary for that purpose.

18. It is true that court cannot issue coercive process on its own during course of investigation to compel or direct the police to arrest an accused or on direct issuance of the process under Section 82/83 Cr.P.C. against the accused without involvement of the I.O. and complying necessary legal formalities as provided under chapter 6-C of the code, yet Magistrate can monitor the investigation and seek a report from the police as stated above; otherwise norms of fair investigation will be jeopardized it is also likely to delay the trial of the case of the co-accused persons, who have already been chargesheeted. Therefore, in the light of foregoing discussions, the impugned order is not sustainable and liable to be set aside.

19. The present writ petition is allowed. The impugned order dated 3.3.2023 passed by C.J.M., Prayagraj is set aside.

20. The court is directed to decide the application moved by the petitioner on 3.3.2023 afresh after giving opportunity of hearing to the informant as well as other stakeholders, at the earliest in the light of observations made hereinabove.

(2023) 6 ILRA 559
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2023

BEFORE

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

Application u/s 482 No. 5577 of 2023

Akash Singh ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Mata Pher

Counsel for the Opp. Parties:
G.A., Sri R.S. Dubey, Savita Dubey

Criminal Law- The Code of Criminal Procedure, 1973-Section 482- A finding on the veracity of a material relied on by the prosecution in a case where the allegations levelled by the prosecution disclose a cognizable offence, is not a consideration for the High Court while exercising its power under Section 482 Cr.P.C- it is clear that the opposite party no. 2 had approached the Court in order to wreak vengeance and exert pressure upon the applicant for earlier enmity which has been mentioned in the order dated 04.04.2022 and the same could not be disputed by learned counsel for the opposite party. Thus, the present case falls under the Category (7) of Paragraph-108 as spelt by the Supreme Court in Bhajan Lal. (Para 16 & 20)

Petition allowed. (E-15)

List of Cases cited:

1. St. of Haryana & ors. v. Bhajan Lal & ors. AIR 1992 SC 604

2. R.P. Kapur v St. of Punjab AIR 1960 SC 866

3. Eicher Tractors Ltd. v. Harihar Singh (2008) 16 SCC 763

4. West Bengal St. Electricity Board v. Dilip Kumar Ray AIR 2007 SC 976

5. Neeharika Infrastructure (P) Ltd. Vs St. of Mah. 2021 SCC OnLine 315 AIR 2021 SC 5711

6. Mahendra K.C. v. St. of Karn. & ors. AIR 2021 SC 5711

7. Shafiya Khan alias Shakuntala Prajapati Vs St. of Uttar Pradesh & anr.(2022) 4 SCC 549

8. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr.(2017) 9 SCC 641

9. Ramveer Upadhyay & anr.Vs St. of U.P. & anr.2022 SCC OnLine 484

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

1. The applicant has preferred this application under Section 482 Cr.P.C. challenging the proceedings of Session Case No. 538 of 2022 (Complaint No. 50/2022)1, under Section 354 IPC and Section 7/8 Protection of Children from Sexual Offences Act, 20122, Police Station Tarkulawa, District Deoria, as well as summoning order dated 01.11.2022 passed by the Additional Sessions Judge/ Special Judge, POCSO, Court No. 1, Deoria passed in the aforesaid case, pending in the Court

of Special Judge (POCSO Act), Court No. 1, Deoria.

2. Brief facts of the case are that an application under Section 156(3) Cr.P.C. was moved by opposite party no. 2 against the applicant - Akash Singh S/o Sri Ganesh Singh, Ritesh Singh S/o Arvind Singh, Balmiki S/o Pawhari and Krishna Singh cousin of Akash on 10.02.2022 with the allegation that all the aforesaid persons teased 15 year old daughter of opposite party no. 2, who is student Class-VIII while she went and returned from School. They pass unparliamentary remarks, try to intercept her and click photographs of her by their mobiles. It has further been alleged that on 13.01.2022 at about 06:00 a.m. when the daughter of opposite party no. 2 was sleeping in verandah, Akash Singh entered the house and started doing objectionable acts with her. He also tried to outrage her modesty. On hearing the screams of the victim, the opposite party no. 2 Mohan Sharma along with his wife Urmila Devi ran to the place, on seeing them approaching, Akash while using abusive language ran away from there. He also threatened and blackmailed the victim of making photographs and video of her viral. It has also been alleged that the victim was in a state of shock. The aforesaid application has been treated as a complaint case by order dated 04.04.2022 and after recording statements under Sections 200 and 202 Cr.P.C., the applicant has been summoned.

3. Learned counsel for the applicant submits that the present case has been instituted maliciously with an ulterior motive of wrecking vengeance due to earlier dispute between the parties. Laying emphasis on an order dated 04.04.2022 by which an application under Section 156(3) Cr.P.C. has been treated as complaint case, he submits that a police report was called from the police station, according to which house of the applicant is in the vicinity of opposite party no. 2. The nephew of opposite party no. 2, namely, Rishi Sharma had enticed away daughter of Ganesh Singh (sister of the applicant). When she returned back, a compromise was entered between the parties on 07.03.2021. The opposite party no. 2 was also a witness to the aforesaid compromise. On 10.06.2021, an incident took place wherein there was a fight between the family of opposite party no. 2 and the applicant, for which an information was given by Palkiya Sharma (relating to family of opposite party no. 2), for which a first information report was lodged on 29.01.2022 which was registered as Case Crime No. 36 of 2022, under Sections 147, 148, 323, 308, 427, 452, 504, 506 IPC. The investigation regarding the aforesaid incident was being done by the police personnel. Ganesh Singh (father of of the applicant) had lodged an NCR No. 51 of 2021, under Sections 323, 504, 506 IPC against the opposite party no. 2 and four others. It has also been stated in the police report that both parties have moved applications for lodging cases against each other after exaggerating the incident, if any. Regarding the incident dated 31.01.2022 it has been stated in the police report that prima facie no such incident had happened and no case for the aforesaid incident has also been lodged.

4. The records of Case Crime No. 36 of 2022 as well as NCR No. 51 of 2021 were before the court concerned who had passed the order dated 04.04.2022. The discussion of the NCR also finds place in the aforesaid order, wherein NCR No. 51 of 2021 was lodged by father of the applicant against Mohan Sharma and his wife, due to

old enmity regarding the incident dated 21.10.2021 in which a fight took place and abusive language was used and the family members and father of the applicant were beaten. For the present incident of 31.01.2022 which happened at 06:00 a.m., as alleged, an application has been moved by opposite party no. 2 under Section 156(3) Cr.P.C., however, nothing regarding earlier incident or cases lodged against each other has been mentioned. The concerned court has also observed that the application has been moved by opposite party no. 2 concealing the aforesaid facts, hence has not approached the concerned court with clean hands.

5. The record relating to earlier incident, compromise and police report has also not been filed along with aforesaid application filed by opposite party no. 2. Exaggerated version of the incident dated 31.01.2022 has been placed. Finding the matter to be non-cognizable, the order dated 04.04.2022 was passed. The Court has passed the order dated 04.04.2022 treating the said as complaint case.

6. Laying emphasis on the order dated 04.04.2022, vide which application under Section 156(3) Cr.P.C. has been treated as complaint case, learned counsel for the applicant submits that variations regarding earlier enmity as in the statement under Section 200 Cr.P.C., opposite party no. 2 has stated that there is no enmity between the parties whereas details of earlier incident, compromise between the two for the same, the NCR and other cases have been mentioned. Thus, the aforesaid case goes to show that the present case has been lodged with malafide intention. He further submits that the Court while passing the aforesaid order has also observed that facts regarding the real story have been concealed and the opposite party no.2 has not approached the Court with clean hands thereby showing the conduct of the aforesaid opposite party no.2 who has lodged the present case for the purposes of harassment and in order to wreak vengeance for the incident, wherein sister of the applicant was enticed away by nephew of opposite party no. 2, hence to exert pressure and as a counterblast, present case has been lodged along with few other cases as detailed in the order dated 04.04.2022.

7. From the statements of the victim recorded under Section 202 Cr.P.C., it is clear that though allegations regarding making of video and taking photographs is there, but she herself has not seen any such photographs and video speaks volumes about the intention of the opposite party no. 2 who has initiated malicious proceedings by moving an application under Section 156(3) Cr.P.C. concealing earlier enmity, hence, opposite party no.2 has not approached the concerned court with clean hands as observed by order dated 04.04.2022. She has also denied any fight between her family and family of opposite party no. 2 which also show the variation from the real situation.

8. The applicant has been summoned while noticing the fact that the present case is a case of false and malicious prosecution, therefore, relying upon the judgements of the Supreme Court in the cases of **State of Haryana and others v. Bhajan Lal and others**3; **R.P. Kapur v. State of Punjab**4 and, **Eicher Tractors Ltd. v. Harihar Singh**5, learned counsel for the applicant submits that proceedings may be quashed as the same have been initiated with malafide intention to exert pressure upon the applicant and wreak vengeance.

9. Learned counsel for the opposite party no. 2, on the other hand, submits that from the version of the application moved under Section 156(3) Cr.P.C., which has been treated as a complaint case, same being supported by the statements recorded under Sections 200 and 202 Cr.P.C., prima facie offence is made out, therefore, no interference is required by the Court to grant any relief as prayed.

10. I have heard Sri Mata Pher Tiwari, learned counsel for the applicant, Sri Amit Singh Chauhan, learned A.G.A. for the State, and Sri R.S. Dubey and Smt. Savita Dubey, learned counsel for opposite party no. 2.

11. Before proceeding on the merits of the case, it would be appropriate to understand the meaning of malicious prosecution as defined by the Supreme Court in the case of **West Bengal State Electricity Board v. Dilip Kumar Ray**6. Relevant part of the said judgement reads thus:

"14. ... ...

MALICIOUS. Done with malice or an evil design; wilful; indulging in malice, harboring ill-will, or enmity malevolent, malignant in heart; committed wantonly, wilfully, or without cause, or done not only wilfully and intentionally, but out of cruelty, hostility of revenge; done in wilful neglect of a known obligation.

"MALICIOUS" means with a fixed hate, or done with evil intention or motive; not the result of sudden passion.

*** *** ***

Malicious abuse of legal process. A malicious abuse of legal process consists in the malicious misuse or misapplication of process to accomplish a purpose not warranted or commanded by order of Court - the malicious perversion of a regularly issued process, whereby an improper result is secured.

*** *** ***

Malicious Prosecution – Malice. Malice means an improper or indirect motive other than a desire to vindicate public justice or a private right. It need not necessarily be a feeling of enmity, spite or ill-will. It may be due to a desire to obtain a collateral advantage. The principles to be borne in mind in the case of actions for malicious prosecutions are these: Malice is not merely the doing a wrongful act intentionally but it must be established that the defendant was actuated by mains animus, that is to say, by spite of ill- will or any indirect or improper motive. But if the defendant hod reasonable or probable cause of launching the criminal prosecution no amount of malice will make him liable for damages. Reasonable and probable cause must be such as would operate on the mind of a discreet and reasonable man; 'malice' and 'want of reasonable and probable cause' have reference to the state of the defendant's mind at the date of the initiation of criminal proceedings and the onus rests on the plaintiff to prove them.

OTHER DEFINITIONS OF "MALICIOUS PROSECUTION".

"A judicial proceeding instituted by one person against another, from wrongful or improper motive and without probable cause to sustain it."

"A prosecution begun in malice, without probable cause to believe that it can succeed and which finally ends in failure."

"A prosecution instituted wilfully and purposely, to gain some advantage to the prosecutor or thorough mere wantonness or carelessness, if it be at the same time wrong and unlawful within the knowledge of the actor, and without probable cause."

"A prosecution on some charge of crime which is wilful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to know are wrong and against the dictates of public policy."

The term "malicious prosecution" imports a causeless as well as an ill-intended prosecution.

'MALICIOUS PROSECUTION" is a prosecution on some charge of crime which is wilful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or its bound to know are wrong and against the dictates of public policy.

In malicious prosecution there are two essential elements, namely, that no probable cause existed for instituting the prosecution or suit complained of, and that such prosecution or suit terminated in some way favorably to the defendant therein.

1. The institution of a criminal or civil proceeding for an improper purpose and without probable cause. 2. The cause of action resulting from the institution of such a proceeding. Once a wrongful prosecution has ended in the defendant's favor, lie or she may sue for tort damages - Also termed (in the context of civil proceedings) malicious use of process. (Black, 7th Edn., 1999)

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12. In the facts of the present case wherein observation in this regard has been made by the concerned court while passing order dated 04.04.2022 that the opposite party no. 2 has not disclosed about earlier enmity between the parties and hence has not approached the Court with clean hands, itself goes to show that the proceedings have been initiated with malicious intention in order to harass the applicant. A detail discussion of the earlier proceedings between the parties and the variations in the statements has been recorded under Sections 200 and 202 Cr.P.C., as discussed above, the submissions of learned counsel for the applicant, also goes to prove that the proceedings have been instituted with an ulterior motive for wreaking vengeance on the accused with a view to spite him due to personal grudge for an earlier incident, wherein the nephew of opposite party no. 2, namely, Rishi Sharma had enticed away daughter of Ganesh Singh and though the parties had entered into compromise but cases were lodged by both parties against each other in order to harass the applicant. The discussion of the police reports in the order dated 04.04.2022 also speaks about exaggeration of the incident while moving applications against each other.

13. It is no more res integra that power under Section 482 CrPC to quash a criminal proceeding is exercised only when an allegation made in the FIR or the charge sheet constitutes the ingredients of the offence(s) alleged. Interference by the High Court under Section 482 CrPC is to prevent the abuse of process of any law or Court or otherwise to secure the ends of justice. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is clear from the law laid down by the Apex Court that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding.

14. The Apex Court in **Bhajan Lal (supra)** has enumerated seven categories of the cases where power under Section 482 Cr.P.C. can be exercised by this Court, which are quoted below:-

"108. 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 F.I.R do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1)of the Code except under an order of a Magistrate within the purview of Section 155(2)of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the 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."

15. The principles laid down by the Apex Court in the aforesaid case, have consistently been followed in the recent judgement of Three-Judge Bench of the Apex Court in the case of **Neeharika Infrastructure (P) Ltd. vs. State of Maharashtra**7, wherein it has been held that there is no denial of the fact that power under Section 482 Cr.P.C. is very wide, but as observed by this Court in catena of decisions, conferment of wide power requires the court to be more cautious and it casts an onerous and more diligent duty on the court. Therefore, in exceptional cases, when the High Court deems it fit, it may pass appropriate interim orders, as thought apposite in law, however, the High Court has to give brief reasons which will reflect the application of mind by the court to the relevant facts.

16. It is trite law that the power of quashing criminal proceedings should be exercised with circumspection and that too, in the rarest of rare cases and it was not justified for this Court in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the Final Report or the Complaint. A finding on the veracity of a material relied on by the prosecution in a case where the allegations levelled by the prosecution disclose a cognizable offence, is not a consideration for the High Court while exercising its power under Section 482 Cr.P.C. This view is fortified by the decision of the Apex Court in **Mahendra K.C. v. State of Karnataka and Ors**.8

17. Recently, the Apex Court in the case of **Shafiya Khan alias Shakuntala Prajapati vs. State of Uttar Pradesh and another**9, has observed as under;-

"16. It is no doubt true that the power of quashing of criminal proceedings should be exercised very sparingly and with circumspection and that too in rarest of the rare cases and it was not justified for the Court in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the inherent powers do not confer any arbitrary jurisdiction on the Court to act according to its whims and fancies."

18. The Apex Court in the case of Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others Vs. State of Gujarat and another10, referring to various cases has summarized following principles to govern powers of High Court under Section 482 Cr.P.C.:

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

16.2. The invocation of the jurisdiction of the High Court to quash a first information report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

16.4. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court.

16.5. The decision as to whether a complaint or first information report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the

High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing insofar as the exercise of the inherent power to quash is concerned;

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.

16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8. and 16.9. above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

19. In another judgment, the Apex Court in the case of **Ramveer Upadhyay and Another Vs. State of U.P. and Another**11, has held as under:-

“39. In our considered opinion criminal proceedings cannot be nipped in the bud by exercise of jurisdiction under Section 482 of the Cr.P.C. only because the complaint has been lodged by a political rival. It is possible that a false complaint may have been lodged at the behest of a political opponent. However, such possibility would not justify interference under Section 482 of the Cr.P.C. to quash the criminal proceedings. As observed above, the possibility of retaliation on the part of the petitioners by the acts alleged, after closure of the earlier criminal case cannot be ruled out. The allegations in the complaint constitute offence under the Attrocities 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."

20. From the above discussion, it is clear that the opposite party no. 2 had approached the Court in order to wreak vengeance and exert pressure upon the applicant for earlier enmity which has been

mentioned in the order dated 04.04.2022 and the same could not be disputed by learned counsel for the opposite party. Thus, the present case falls under the Category (7) of Paragraph-108 as spelt by the Supreme Court in **Bhajan Lal (supra).**

21. In view of the above, proceedings of Session Case No. 538 of 2022 (Complaint No. 50/2022)12, under Section 354 IPC and Section 7/8 Protection of Children from Sexual Offences Act, 201213, Police Station Tarkulawa, District Deoria, as well as summoning order dated 01.11.2022 passed by the Additional Sessions Judge/ Special Judge, POCSO, Court No. 1, Deoria passed in the aforesaid case, pending in the Court of Special Judge (POCSO Act), Court No. 1, Deoria, are quashed.

22. The application stands allowed.

(2023) 6 ILRA 567
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2023

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Application u/s 482 No. 12266 of 2023

Nisar ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Ram Pravesh Yadav, Sri Shashank Kumar

Counsel for the Opp. Parties:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Section 482 - Indian Penal Code, 1860 - Sections 34, , 120-B, 212, 302 & 171)(e) – UP Gangsters and Anti-Social Activities (Prevention) Act, 1986 – Sections 2, 3 & 14(1), : - Application U/s 482 – challenging the proceedings, as well as the charge-sheet & cognizance order – FIR - lodged against applicant & 10 other accused persons under Gangsters Act – accused persons are involved in various criminal activities - gang chart - investigation - charge-sheet was filed against Applicant & 5 other accused persons – It is argued that, in a case of *'Mohd. Ruksar'* filed by co-accused challenging the said proceedings, charge-sheet & cognizance order, this Court granted an interim protection – further, Co-ordinate Benches of this Court have quashed the proceedings with regards to the said accused persons in cases in which they were involved in a solitary case – and the proceedings which have been initiated on the basis of a solitary case are not maintainable – the order of Co-ordinate Bench in the case relied upon by the applicant for praying of an interim order on the said ground does not consider – held, the judgment & orders relied upon are an interim order which is not binding on this Court – and an accused can be proceeded against under the Gangsters Act even based on a Solitary case – accordingly, present Application is dismissed.
(Para – 7, 10)

Application u/s 482 Dismissed. (E-11)

List of Cases cited:

1. Mohd. Ruksar Vs St. of U.P. & anr., Application U/S 482 No. 43408 of 2022

2. Nisar Ahmad Vs St. of U.P., Criminal Misc. Bail Application No. 37600 of 2017, order dated 12.10.2017

3. Ritesh Kumar @ Ricky Vs St. of U.P. & anr., Criminal Misc. Writ Petition No. 3938 of 2021, decided on 05.08.2021

4. Shraddha Gupta Vs The St. of U.P. & ors.: 2022 SCC OnLine SC 514

5. Salim Vs St. of U.P. in Application U/S 482 No. 11646 of 2007 decided on 13.08.2019

6. Tej Singh & ors. Vs St. of U.P. & anr. in Criminal Misc. Application U/S 482 No. 3239 of 2005 decided on 24.04.2019

(Delivered by Hon'ble Samit Gopal, J.)

1. List revised.

2. Heard Sri Shashank Kumar, learned counsel for the applicant, Sri Ankit Srivastava, learned counsel for the State and perused the record.

3. This application under Section 482 Cr.P.C. has been filed by the applicant-Nisar with the prayer to quash the proceedings as well as charge-sheet dated 07.06.2021 & cognizance order dated 03.09.2021 in Session Trial No. 52 of 2021 arising out of Case Crime No. 352 of 2020, under Section 2/3 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Mauima, District Prayagraj pending in the Court of Special Judge, Gangsters Act, Allahabad with a further prayer that proceeding of the aforesaid case be stayed against the applicant during the pendency of the present application.

4. The facts in the present case are that a first information report was lodged against the applicant and 10 other persons for offences u/s 2/3 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 with the allegation that the accused persons have formed a gang and are involved in various criminal activities against the public. A gang chart dated 16.02.2020 was prepared by the Sponsoring Officer which finally got approval of the District Magistrate on 29.05.2020. The name of the applicant finds place at serial no.4 in the said gang chart. As per the gang chart, the applicant and the other accused persons are shown to be involved in Case Crime No. 138 of 2017, u/s 302, 120-B, 212, 34 I.P.C. and a charge-sheet no. A-70 dated 21.06.2017, A-70 (B) dated 22.03.2019 have been submitted against the accused persons. The matter went for investigation after which a charge-sheet was submitted against the applicant and other accused persons being a total of 05 accused persons u/s 2/3 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act. It was mentioned in the charge-sheet that the investigation in so far as the other 06 accused persons is pending and further proceedings u/s 14 (1) of the Gangsters Act is also pending. The trial court vide order dated 03.09.2021 took cognizance upon the charge-sheet and summoned the accused persons.

5. Learned counsel for the applicant argued that the applicant has been falsely implicated in the present case. It is argued that the proceedings under the Gangsters Act have been taken up against the applicant on the basis of a solitary case. It is argued that in the said case which has been shown against the applicant, the applicant has been granted bail vide order dated 12.10.20217 passed by this Court in Criminal Misc. Bail Application No. 37600 of 2017 (Nisar Ahmad vs. State of U.P.). It is argued that the implication of the applicant which has been shown against him on the basis of which the first information report of the present case has been lodged is a false case and the applicant is not named in the first information report after which his name has come into light in the said case in the statement of Pappu Fakir an eye-witness who was the driver of the deceased. It is argued that the applicant is not a member of any gang. Learned counsel has further argued that co-accused Mohd. Ruksar challenged the proceedings, charge-sheet and order taking cognizance before this Court in Application U/S 482 No. 43408 of 2022 (Mohd. Ruksar vs. State of U.P. and

another) in which vide order dated 23.03.2023, he has been granted interim protection. It is argued that as such the applicant is also entitled to protection in the matter. Learned counsel has relied upon the judgements of this Court in the case of Tej Singh and others vs. State of U.P. and another in Criminal Misc. Application U/S 482 No. 3239 of 2005 decided on 24.04.2019 and Salim vs. State of U.P. in Application U/S 482 No. 11646 of 2007 decided on 13.08.2019 and has argued that the co-ordinate Benches of this Court have quashed the proceedings with regards to the said accused persons in cases in which they were involved in a solitary case. It is argued that as such the proceedings of the present case be also quashed.

6. *Per contra*, learned counsel for the State opposed the prayer for quashing. 7. After hearing the learned counsels for the parties and perusing the records, it is evident that the applicant is an accused named in the first information report along with other persons and further in the charge-sheet which has come after investigation with regards to him and some other accused persons on which cognizance has been taken and they have been summoned by the trial court. The investigation with regards to some other accused persons is pending. In so far as the argument of learned counsel for the applicant that the applicant has been falsely implicated in the case referred to in the first information report and gang chart on the basis of which the present case has been lodged is concerned, the same cannot be looked into by this Court. Further with regards to the argument that the proceedings have been initiated on the basis of a solitary case and as such are not maintainable also does not hold good. A Division Bench of this Court in the case of ***Ritesh Kumar @ Ricky vs. State of U.P. and another, Criminal Misc. Writ Petition No. 3938 of 2021, decided on 05.08.2021*** which was connected with some other petitions took up the matter on the question which was framed therein in paragraph 4 of the said judgement. The same reads as under:-

"4. The present bunch of writ petitions along with other writ petitions are connected together on the following question:

"Whether a first information report under the provisions of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 [hereinafter referred to as the "Gangsters Act'] can be lodged and is maintainable on the basis of involvement of the petitioner(s) / accused in a single previous case".

8. The question as framed was answered in paragraph 29 of the said judgement that lodging of a first information report on the basis of a single case is valid and permissible. It was further held that the court cannot adjudicate the correctness of the allegations in the first information report or cases on the basis of which the first information reports have been lodged. Paragraph 29 of the said judgement reads as under:-

"29. After having heard the learned counsels for the parties and perusing the records, it is apparent that barring Criminal Misc. Writ Petition No. 4149 of 2021, all the above writ petitions were argued on the common point for which the question as framed, is answered that as per the settled principles of law, the lodging of a first information report on the basis of a single case, is valid and permissible. In a petition under Article 226 of the

Constitution of India, this Court cannot adjudicate the correctness of the allegations in the impugned first information reports or the cases on the basis of which the impugned first information reports have been lodged. The writ petitions are thus dismissed."

9. The Apex Court in the case of ***Shraddha Gupta vs. The State of U.P. and others:2022 SCC OnLine SC 514***, wherein an order refusing interference in a petition u/s 482 Cr.P.C. for quashing of the proceedings under the Gangsters Act was taken up and it was posed for consideration as to whether a person against whom a single first information report / charge-sheet is filed can be prosecuted under the Gangsters Act, it was held that such an accused can be prosecuted under the Gangsters Act, 1986. Paragraph 6, 7, 8, 9 and 10 of the said judgement reads as under:-

6. The short question which is posed for the consideration of this Court is, whether, a person against whom a single FIR/charge sheet is filed for any of the anti-social activities mentioned in section 2(b) of the Gangsters Act, 1986 can be prosecuted under the Gangsters Act. In other words, whether a single crime committed by a 'Gangster' is sufficient to apply the Gangsters Act on such members of a 'Gang'.

7. While considering the aforesaid issues/questions, the relevant provisions of the Gangsters Act, 1986 are required to be referred to. The object and purpose of enactment of the Gangsters Act, 1986 is to make special provisions for the prevention of, for coping with, gangsters and anti-social activities and for matters connected therewith or incidental thereto. Section 2(b) defines 'Gang' and Section 2(c) defines 'Gangster'.

Sections 2(b) and 2(c) read as under:

"2(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities (Act no. 2 of 1974), namely—

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code (Act no. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act no. 4 of 1910) or the Narcotic Drugs and Psychotropic Substances Act, 1985 or any other law for the time being in force, or

(iii) occupying or talking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or (Act no. 61 of 1985)

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Art, 1956, or

(vi) offences punishable under section 3 of the Public Gambling Act, 1867 (Act no. 104 of 1956), or

(vii) preventing any person from offering bids in auction lawfully conducted,

or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking for any lease or right or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under section 171-E of the Indian Penal Code, or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities."

7.1 Section 3 of the Gangsters Act, 1986 provides for punishment, which reads as under:

"3. (1) A gangster shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees:

Provided that a gangster who commits an offence against the person of a public servant of the person of a member of the family of a public servant shall be punished Kith imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees,

(2) Whoever being a public servant renders any illegal help or support in any manner to a gangster, whether before or after the Commission of any offence by the gangster (whether by himself or through others) or abstains from taking lawful measures or intentionally avoids to carry out the directions of any court or of his superior officers, in this respect, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than three years and also with fine."

7.2 Section 5 of the Gangsters Act provides for constitution of Special Courts for the speedy trial of the offences under the Act. Section 6 provides that a Special Court may, if it considers it expedient or desirable so to do, hold its sitting for any of its proceedings at any place, other than the ordinary place of its sitting or seat. Section 8 of the Act provides that when trying any offence punishable under the Gangsters Act, a Special Court may also try any other offence with which the accused may, under any other law for the time being in force, be charged at the same trial. Under Section 9 of the Gangsters Act, the State Government shall appoint a person to be the Public Prosecutor for every Special Court. Section 10 provides that a Special

Court may take cognizance of any offence triable by it, without the accused being committed to it for trial upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. Section 12 provides that the trial under the Gangsters Act of any offence by Special Court shall have precedence over the trial of any other case against the accused in any other court (not being a Special Court) and shall be concluded in preference to the trial of such other case and accordingly the trial of such other case shall remain in abeyance. Section 13 of the Gangsters Act provides that where, after taking cognizance of any offence, a Special Court is opinion that the offence is not triable by it, it shall, notwithstanding that it has no jurisdiction to try such an offence, transfer the case for trial of such offence to any other court having jurisdiction under the Code and the court to which the case is transferred may proceed with the trial of the offence as if it has taken cognizance of the offence.

8. From the aforesaid, it can be seen that all provisions are to ensure that the offences under the Gangsters Act should be given preference and should be tried expeditiously and that too, by the Special Courts, to achieve the object and purpose of the enactment of the Gangsters Act.

9. Now so far as the main submission on behalf of the accused that for a single offence/FIR/charge sheet with respect to any of the antisocial activities, such an accused cannot be prosecuted under the Gangsters Act, 1986 is concerned, on a fair reading of the definitions of 'Gang' and 'Gangster' under the Gangsters Act, 1986, it can be seen that a 'Gang' is a group of one or more persons who commit/s the crimes mentioned in the definition clause for the motive of earning undue advantage, whether pecuniary, material or otherwise. Even a single crime committed by a 'Gang' is sufficient to implant Gangsters Act on such members of the 'Gang'. The definition clause does not engulf plurality of offence before the Gangsters Act is invoked.

A group of persons may act collectively or anyone of the members of the group may also act singly, with the object of disturbing public order indulging in anti-social activities mentioned in Section 2(b) of the Gangsters Act, who can be termed as 'Gangster'. A member of a 'Gang' acting either singly or collectively may be termed as a member of the 'Gang' and comes within the definition of 'Gang', provided he/she is found to have indulged in any of the anti-social activities mentioned in Section 2(b) of the Gangsters Act.

10. On a fair reading of the definitions of 'Gang' contained in Section 2(b) and 'Gangster' contained in Section 2(c) of the Gangsters Act, a 'Gangster' means a member or leader or organiser of a gang including any person who abets or assists in the activities of a gang enumerated in clause (b) of Section 2, who either acting singly or collectively commits and indulges in any of the anti-social activities mentioned in Section 2(b) can be said to have committed the offence under the Gangsters Act and can be prosecuted and punished for the offence under the Gangsters Act. There is no specific provision under the Gangsters Act, 1986 like the specific provisions under the Maharashtra Control of Organized Crime Act, 1999 and the Gujarat Control of Terrorism and Organized Crime Act, 2015 that while prosecuting an accused under the Gangsters Act, there shall be more than one offence or the FIR/charge sheet. As per the settled position of law, the provisions of the statute are to be read and considered as it is. Therefore, considering the provisions

under the Gangsters Act, 1986 as they are, even in case of a single offence/FIR/charge sheet, if it is found that the accused is a member of a 'Gang' and has indulged in any of the anti-social activities mentioned in Section 2(b) of the Gangsters Act, such as, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person and he/she can be termed as 'Gangster' within the definition of Section 2(c) of the Act, he/she can be prosecuted for the offences under the Gangsters Act. Therefore, so far as the Gangsters Act, 1986 is concerned, there can be prosecution against a person even in case of a single offence/FIR/charge sheet for any of the anti-social activities mentioned in Section 2(b) of the Act provided such an anti-social activity is by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person.

10. In view of the law on the subject and facts of the matter, it is clear that an accused can be proceeded against under the Gangsters Act even on the basis of a solitary case. The merits of the case on the basis of which the case under the Gangsters Act has been lodged cannot be seen. The order of the co-ordinate Bench in the case of Mohd. Ruksar which is being relied upon by learned counsel for the applicant for praying of an interim order on the said ground does not consider the judgements passed by the Division Bench of this Court and also the judgement of the Apex Court. More so, it is an interim order which is not binding on this Court.

11. The present petition is devoid of any merits, the same is accordingly, ***dismissed.***

12. Office is directed to place a copy of this order in Criminal Misc. Application U/S 482 No. 43408 of 2022 (Mohd. Ruksar vs. State of U.P. and another) within three weeks from today.

(2023) 6 ILRA 573
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.05.2023

BEFORE

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

Application u/s 482 No. 17220 of 2023

Mujeem ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Prabhakar Chandel

Counsel for the Opp. Parties:
G.A., Sri Devendra Singh

Criminal Law - Criminal Procedure Code, 1973 - Section 482 - Indian Penal Code, 1860 - Section – 307: - Application U/s 482 – for quashing the entire proceedings of Session Trial U/s 307 IPC – on the ground that, parties have compromised the matter and also moved a compromise application before the trial court – there are no chances of conviction since the complainant-opposite party has compromised and would not testify in support of the prosecution, in case trial is held – court finds that, evidence shows that the weapon used was a fire-arm and it brooks little doubt that a person who opens fire at another does so with the intention to kill, - certainly does not do so with the intention to lover or play a jest - held, the compromised would be an abdication of the St.'s function to prosecute offences against the society, cannot be permitted - and the principle laid down in '*Narinder Singh'* case does not approve of such a composition – hence, Application is dismissed.(Para – 6, 7)

Application u/s 482 Dismissed. (E-11)

List of Cases cited:

Narinder Singh & ors. Vs St. of Punj. & anr., (2014) 6 SCC 466,

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

1. This application has been filed seeking to quash the entire proceedings of Session Trial No. 152 of 2012, State vs. Mujeem (arising out of Case Crime No. 950 of 2010) under Section 307 IPC, P.S. Raipura, District Chitrakoot, pending in the Court of the Additional Sessions Judge, Court No. 1, Chitrakoot.

2. The submission of learned counsel for the applicant is that the parties have compromised the matter and moved a compromise application before the learned Additional Sessions Judge, Court No. 1, Chitrakoot in Session Trial No. 152 of 2012, State vs. Mujeem on 04.04.2023, a certified copy whereof is annexed as Annexure no. 5 to this application. It is argued that there are no chances of conviction since the complainant-opposite party has compromised and would not testify in support of the prosecution, in case trial is held.

3. A perusal of the prosecution case shows that according to the first informant, who is the complainant-opposite party no. 2 here, the complainant Sahid Ali son of Raja Husain, a resident of Village Dera, Mauja Bandhi of P.S. Raipura, District Chitrakoot along with his uncle Shamshad on 29.12.2010 was riding a motorcycle proceeding home from village Bandhi. When the two reached the Kapoori turning, the applicant, Mujeem was waiting by the side of the canal. It is said that he bore a grudge against the applicant. Upon seeing the complainant, the applicant chased the complaiant at about 7:30 in the evening, and, shortly thereafter, opened fire. The complainant received a gun shot injury to his neck. Despite the injury, the complainant and his uncle gave a chase to the applicant, but he made good his escape. The injuries were subjected to a medico-legal examination at the Combined Hospital Chitrakoot, where the following injury was noted:

"1. Lacerated wound 2cm x 1 cm back of the neck blackening 12cm x 12 cm around it. Swelling goes to lateral side of neck up to neck. Depth could not be ascertained. Kept under observation. Fresh blood present. Adv. X-ray Neck

Opinion- Above mention injury caused by fire-arm and fresh."

4. Later on an X-ray examination of the injury was done and the Department of Radiology, M.L.N. Medical College, S.R.N. Hospital, Allahabad submitted a medico legal report dated 11.02.2011, which reads:

1. X-ray cervical spine

-Xray face

-No evidence of bony fracture seen on cervical region.

-Evidence of radio opaque shadow of metallic density seen on temporomandibular joint.

2. X-ray chest PA view.

No evidence of bony fracture seen part under view.

(emphasis by Court.)

5. A reading of the FIR and the medico-legal report does not spare a shadow of doubt that the applicant shot the complainant-opposite party with a country-made pistol and the complainant received a gun shot wound to his neck. It is only by

sheer luck that he survived the fatal attack. Learned counsel for the applicant says that since there are no chances of conviction and given the stance of the complainant-opposite party, who is willing to compromise, proceedings of the case ought to be quashed in view of the holding of the Supreme Court in **Narinder Singh and others vs. State of Punjab and another (2014) 6 SCC 466**. In **Narinder Singh(Supra)**, the following guidelines have been laid down:

"29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of

sparing a convict found guilty of such a crime."

(Emphasis by Court)

6. Now, here the evidence shows that the weapon used was a fire-arm and it brooks little doubt that a person who opens FIR at another does so with the intention to kill. He certainly does not do so with the intention to love or play a jest.

7. In this case, the gun shot injury was sustained on the neck, which is a vital part of the body. The medico legal report clearly shows that there was blackening in the area of 12cm x 12cm at the site of the injury on the neck, where the gun shot injury was received. The supplementary medical report shows evidence of a radio-opaque shadow of metallic density seen in the temporomandibular joint. This shows that the pellets from the fire-arm were lodged in the temporomandibular joint. This being the nature of and injury and the site, beside the weapon used, to permit the parties to compromise would be an abdication of the State's function to prosecute offences against the society. This certainly, in opinion of the Court, cannot be permitted. To the understanding of this Court, the principle laid down in **Narinder Singh** case does not approve of such a composition and quashing on its basis.

8. This order will in no manner prejudice in doing an independent of evidence at the trial.

9. This application is **rejected.**

10. Let this order be communicated to the Additional Sessions Judge, Court No. 1, Chitrakoot through the learned Sessions Judge, Chitrakoot by the Registrar (Compliance) **within 48 hours**.

(2023) 6 ILRA 576
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.0.52023

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Application u/s 482 No. 17732 of 2018

Anuj Kumar Pandey & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Sanjay Singh, Sri Amrendra Nath Rai

Counsel for the Opp. Parties:
G.A., Sri Ved Prakash Pandey

Criminal Law - Criminal Procedure Code, 1973 - Sections 125, 128 & 482: - Application U/s 482 –Criminal Procedure Code, 1973 - Sections - 125, 128 & 482: - Application U/s 482 – applicant challenging the summoning order and order passed in criminal revision as well as further proceedings – Complaint u/ section 156(3) of Cr.P.C. – FIR - investigation – final report – protest petition – final report was rejected – but, after recording the St.ment u/section 200, 202 Cr.P.C. and after perusal of entire facts court below dismissed the complaint case u/section 203 of Cr.P.C. – against which informant were preferred a criminal Revision – revisional court allowed the revision and remanded the matter to court below for fresh consideration – consequently, trial court summoned all the accused – applicant takes plea that they have a right of being heard before the revision court while remanding the matter afresh - court finds that, it is not clear as whether an opportunity of hearing was afforded to the applicants or the proper service of notices upon them was ever effected or not which should have been explicitly mentioned in the revisional order – held, order of issuance of process against the accused applicants cannot be sustained which causing prejudice to him as such, the impugned order, allowing the revision without hearing the accused-applicants, is

vulnerable in law – hence, applicant is allowed – matter is remanded back to the revision court to pass a fresh order in accordance with law after hearing the accused applicants, within three months.
(Para – 9, 10, 11)

Application u/s 482 Allowed. (E-11)

List of Cases cited:

1. Manharibhai Muljibhai Kakadia Vs Shaileshbhai Monhanbhai Patel (2012 vol. 10 SCC 517),

2. Jagannath Verma Vs St. of UP & ors. (Criminal Misc. Case NO. 3778/2012 decided on Dt. 23.09.2014.

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Heard learned counsel for the applicants, learned AGA for the State and perused the record. None is present on behalf of the private respondent.

2. By means of this application, applicant has prayed for quashing of the order dated 9.12.2016, passed by learned Addl. Sessions Judge, Court No. 5, Shahjahanpur in Criminal Revision No. 91 of 2016 and the summoning order dated 20.7.2017 passed in Case No. 3659 of 2013 by CJM, Shahjahanpur under Sections 498-A,304-B IPC and Section 4 of the D. P. Act as well as further proceedings of Complaint Case No. 3659 of 2013, under Sections 498-A,304-B IPC and Section 4 of the D. P. Act, P.S. Sindhauli, District Shahjahanpur.

3. Brief facts of the case are that on the FIR dated 19.5.2013 lodged by opposite party no. 2 on the basis of application under Section 156(3) Cr.P.C. investigation was carried out and the Investigating Officer after recording the statements of the witnesses and the informant as well as the victim, submitted final report in the matter on 2.6.2013. Thereafter protest petition was filed by the informant upon which learned Magistrate rejected the final report and registered the complaint and after recording the statement of the complainant/informant and his witnesses said to have been recorded under Section 200/202 Cr.P.C. and after considering the entire facts and circumstances of the case as well as veracity of the allegations dismissed the complaint under Section 203 Cr.P.C. vide order dated 6.4.2016 on the ground that there is no reason to disbelieve the dying declaration of the victim and the Tehsildar, concerned, who had recorded her dying declaration. Aggrieved by the said order, informant/complainant filed criminal revision No. 91 of 2016, which was allowed by the revisional court vide order dated 9.12.2016 and the matter was remanded back to the concerned Magistrate for fresh consideration after hearing the complainant/opposite party on the point of summoning. Thereafter, learned Magistrate vide order dated 20.7.2017 summoned all the accused applicants to face trial under Section 498-A,304-B IPC. It is this order which is subject matter of challenge before this Court.

4. Submission of learned counsel for the applicants is that the revisional court has decided the criminal revision in absence of the opposite party/applicants and the order was passed without giving any notice and opportunity of hearing to all the accused applicants. The grounds taken by the applicants that if the complainant filed revision against the order rejecting the complaint under Section 203 Cr.P.C., the applicants have a right of being heard and if opportunity has not been afforded to them, the order would not be allowed to sustain. In support of his arguments, he

relied upon the case of **Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel, reported in [(2012) 10 SCC 517].**

5. Learned AGA also supported the aforesaid legal contention of learned counsel for the applicants.

6. The relevant extract of the Apex Court's judgement in the case of Manharibhai **Muljibhai Kakadia (supra)** is quoted hereunder:-

"46. The legal position is fairly well-settled that in the proceedings Under Section 202 of the Code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, upto the stage of issuance of process, the accused cannot claim any right of hearing. Section 202 contemplates postponement of issue of process where the Magistrate is of an opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs 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. If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. The Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process Under Section 204, yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence."

7. The precise issue covered in the Constitution Bench of the Apex Court in the aforesaid case was as to whether a suspect is entitled to hearing by the revisional court in a revision preferred by the complainant, challenging an order of Magistrate, dismissing the complaint under Section 203 of the Cr.P.C.. It held that once a criminal complaint is dismissed under Section 203 Cr.P.C. and a revision is preferred by the complainant, then in such a revision, prospective accused becomes a necessary party in view of the provisions contained in sub-section (2) of Section 401 of the Cr.P.C.

8. The Full Bench of this Court in the case of **Jagannath Verma v. State of U.P. and others in Criminal Misc. Case No.3778/2012 decided on 23.9.2014**, while answering one of the questions, has also held that in proceedings in revision under Section 397, the prospective accused or as the case may be, the person who is suspected to have been committed the offence, is entitled to be heard before a decision is taking in the criminal revision.

9. In view of aforesaid legal position, it becomes clear that order of issuance of process against the accused applicants cannot be sustained since the said accused was not heard by the Sessions Court before an order causing prejudice to him was passed. That prejudice in question is with regard to the fact that the learned

Magistrate having rejected the complaint under Section 203 of the Cr.P.C. and whereas such a decision being overturned by the Sessions Court in revision, reopening the complaint against the accused, thus the order of the Sessions Court was causing prejudice to the applicants and under such circumstances it was incumbent upon the Sessions Court to have heard them. Moreover, on going through the impugned revisional order it is not clear as to whether an opportunity of hearing was afforded to the applicants/prospective accused persons or as to whether the proper service of notice upon the applicants/prospective accused was ever effected or not and they have been properly served, which should have been explicitly mentioned in the revisional order.

10. As such, this Court is of the view that the order dated 09.12.2016, allowing the revision of O.P. No.2, without hearing the accused applicants, was in the teeth of the aforesaid legal position, rendering the impugned orders vulnerable in law.

11. Accordingly, the application is allowed. The orders dated 9.12.2016, passed by learned Addl. Sessions Judge, Court No. 5, Shahjahanpur in Criminal Revision No. 91 of 2016 and the summoning order dated 20.7.2017 passed in Case No. 3659 of 2013 by CJM, Shahjahanpur under Sections 498-A,304-B IPC and Section 4 of the D. P. Act are hereby quashed. Matter is remanded back to revisional court to pass a fresh order in accordance with law after hearing the accused applicants, as expeditiously as possible, preferably within 3 months from the date of receipt of this order.

12. Let office intimate the court concerned of this order forthwith.

(2023) 6 ILRA 579
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.04.2023

BEFORE

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

First Appeal from Order No. 63 of 1997

United India Insurance Co. Ltd. **...Appellant**

Versus

Smt. Usha Rani & Ors. **...Respondents**

Counsel for the Appellant:
Ms. Aarushi Khare, Sri Vinay Kumar Khare (Sr. Adv.)

Counsel for the Respondents:
Sri Virendra Pal Singh, Sri K. Singh, Sri Prem Babu Verma, Sri Shyamji Gaur

A. Civil Law - Motor Vehicles Act, 1988-Section 173-Challenge to-Award of compensation-Negligence-A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place-Deceased was not the author or co-author of accident-Also not not proved that driving licence was fake-Deceased was a pillion rider on the motor-cycle and it was tractor's driver who was held to be solely negligent for accident-Rate of interest being higher side, modified accordingly-Appeal allowed.(Para 10 to 13)

The appeal partly allowed. (E-6)

List of Cases cited:

1. Bajaj Allianz Gen. Ins. Co. Ltd. Vs Smt Renu Singh & ors.. FAFO No. 1818 of 2012

2. Rylands Vs Fletcher (1868) 3 HL (LR) 330

3. Jacob Mathew Vs St. of Punj. (2005) 0 ACJ SC 1840

4. Khenyei Vs New India Assoc. Co. Ltd & ors. (2015) LawSuit SC 469

5. T.O. Anthony Vs Karvaman & ors. (2008) 3 SCC 748

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

1. Heard Sri Aarushi Khare, learned counsel for the for United India Insurance Company Ltd. Despite several adjournment, none appears for the respondents.

2. This appeal, at the behest of the United India Insurance Co. Ltd., challenges the judgement and award dated 30.08.1996/6.9.1996 passed by M.A.C.T/IIIrd-Additional District Judge, Badaun (hereinafter referred to as "Tribunal") in M.A.C.P. No. 55 of 1990.

3. Brief facts as culled out from the record are that on 01.04.1990 deceased Lalta Prasad was going to village Pipriya on a motor-cycle bearing no. U.P.O. 9328 driven by one Dular Singh as a pillion rider. When Lalta Prasad and Dular Singh reached near village Lakhanpur at about 10:15 p.m then only a tractor trolley bearing no. U.P.O.8144 going towards Dataganj was driven by Tejpal rashly and negligently. Dular Singh blew horn to Tejpal and wanted way but Tejpal instead of giving way to Dular Singh and Lalta Prasad without giving any indication turned the tractor trolley towards right and was dashed with the motor-cycle and dragged the motor-cycle with it as a result of which Lalta Prasad received grievous injuries and Dular Singh also received injuries. Lalta Prasad was taken to the District Hospital Badaun where Lalta Prasad succumbed to his injuries.

4. The deceased was 52 years of age at the time of accident and he was a Government servant working as a Compounder in Animal Husbandary Department of State Government and was earning Rs. 1742/-p.m. He was a married person having a wife and three daughters and a son. The tribunal has granted a lumsum amount of Rs. 1,33, 296/-.

5. It is submitted by the learned counsel for the appellant that respondent nos. 7 and 8 was guilty of negligence. The driving licence at the time of accident was not a valid driving license so as to drive motor-cycle. The rate of interest granted by the tribunal is on the higher side.

6. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

7. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

8. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And**

Others) decided on 19.7.2016 has held as under :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330****. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species,

new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits ***(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840)****.*

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."

emphasis added

9. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748] has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence

in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in ***Challa Bharathamma &Nanjappan (supra)*** *has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the*

remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

emphasis added

10. The latest decision of the Apex Court in Khenyei (Supra) has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident.

11. While going through the record it is very clear that for the evidence on record the driving licence being fake was not proved by the appellant herein. The said ground fails and as it was not proved that driving licence was fake which is finding of fact.

12. The deceased was a pillion rider on the motor-cycle and it was tractor's driver who was held to be solely negligent and therefore, the principles of negligence has been rightly considered by the tribunal, hence, there is no question of contributory/composite negligence been invoked as the tractor driver is found to be solely negligent. It is submitted by the learned counsel for the appellant that the rate of interest granted by the tribunal is on the higher side, no doubt that in the year of accident, the rate of interest was 9%, however, going through the judgment of the tribunal, the tribunal has not granted any amount under the head of future loss of income to the young person hence 3% rate of interest which is on the higher would meet the end of justice.

13. Hence, appeal is partly allowed to the said effect. No amount be recovered.

14. Record be sent back to the tribunal.

15. The amount be disbursed to the claimant as 23 years has elapsed from the date of filing of this appeal.

16. This Court is thankful to Ms Aarushi Khare, learned counsel for the for United India Insurance Company Ltd. for ably assisting this Court.

(2023) 6 ILRA 585
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2023

BEFORE

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

First Appeal from Order No. 796 of 1993

M/s National Insurance Co. Ltd.
...Appellant
Versus
Smt. Wasimunnisha & Ors. ...Respondents

Counsel for the Appellant:
Sri Kuldip Shanker Amist

Counsel for the Respondents:
Sri Ram Jee Saxena, Sri Raghuvansh Chandra, Sri Pravesh Kumar

A. Civil Law - Motor Vehicles Act, 1988-Section 173-enhancement of compensation-Tribunal awarded a sum of Rs. 2,94,400/- @ of 10% per annum-Tribunal did not grant any amount under the head of future loss of income though the deceased was a salaried person-Added 50% for future prospects-deducted 1/3 for personal expenses of deceased-Multiplier of 18 applied-Total loss of dependency comes to Rs. 2,59,200/-Amount under non-pecuniary heads comes to Rs. 80,000-Entitlement to compensation of Rs. 3,39,200/- made out. (Para 1 to 27)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Santlal Vs Rajesh (2017) SC 4054

2. NICL Vs Jugal Kishore (1998) AIR SC 719

3. St. of Ori. & ors. Vs Bijaya C. Tripathy (2005) AIR SC 1431 Fahim Ahmad & ors. Vs United India Ins. Co. Ltd & ors. (2014) 2 TAC 383 SC

4. UPSRTC thru Reg. Mgr. Vs Smt. Sukha Devi & ors. FAFO No 1507 of 2003

5. Doodh Nath Chaurasiya Vs Kanhaiya Lal & ors. FAFO No. 381 of 2017

6. Mukund Dewangan Vs Oriental Ins. Co. Ltd (2017) AIR SC 3668

7. Sant Lal Vs Rajesh & ors., Etc (2017) 3 RCR (Civil) 757

8. Smt. Manjuri Bera Vs Oriental Ins. Co. Ltd (2007) AIR SC 1474

9. NICL, Lucknow Vs Lavkush & anr. FAFO No. 199 of 2017

10. Bajaj Allianz Gen. Ins. Co. Ltd. Vs Smt Renu Singh & ors. FAFO No. 1818 of 2012

11. Khenyei Vs New India Assoc. Co. Ltd & ors. (2015) LawSuit SC 469

12. Gobald Motal Services Ltd & anr. Vs R.M.K Velusamy (1962) SCR 1 929

13. Gen. Mgr, Ker. SRTC Vs Susamma Thomas (1994) SCC 2 176

14. Sarla Verma & ors. Vs DTC & anr. (2009) ACJ 1298

15. Smt. Hansagori P. Ladhani Vs The Oriental Ins. Co. Ltd. (2007) 2 GLH 291

16. Smt. Sudesna & ors. Vs Hari Singh & anr. FAFO No. 23 of 2001

17. Tej Kumari Sharma Vs Chola Mandlam M.S. Gen. Ins. Co. Ltd. FAFO No. 2871 of 2016

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

1. This First Appeal From Order is preferred by the appellant-Insurance Company challenging the award dated 27.5.1993, passed by the Motor Accident Claims Tribunal/Additional District Judge, Banda (*herein after referred to as 'Tribunal') in M.A.C.P. No.102 of 1989 (Smt.Wasimunnishan and others vs. Battu Ram and another)* awarding a sum of Rs.2,94,400/- as compensation to the claimants with interest at the rate of 10% per annum from the date of filing of the petition. The claimants have also filed cross-objection for enhancement of compensation.

2. The brief facts of the case are that aforesaid claim petition was filed before learned Tribunal with the averments that on 2.3.1989 at about 7:00 pm the deceased Mohammad Anwar was going from Pangara to Naraini. In front of the Naraini Dak Bunglow, a tractor bearing No.URE-9674 was also going towards Naraini, which was laiden with iron bars and other agricultural implements on the trolley and the iron bars were protruding outside from the trolley on the back side. There was no red flag or any other cloth for warning nor there was any light on the back side. The tractor driver without giving any indication or blowing horn suddenly stopped the tractor wrongly due to which the iron rod hit the deceased, who was coming from behind on a scooter. The rod hit in the neck of deceased and he died instantaneously. The deceased was pillion of scooter.

3. Heard Shri K.S.Amist, learned counsel for the appellant-Insurance Company and Shri Pravesh Kumar, learned counsel appearing for respondent-claimants. None appears for the owner. Perused the record.

4. By way of this appeal, the appellant-Insurance Company, who has been saddled with liability by the Motor Accident Claims Tribunal, has felt aggrieved by the compensation awarded and by the finding of fact that the driver of the motor-cycle was not negligent. The appellant has felt aggrieved that question of non-joinder of the owner and the Insurance Company of the motor-cycle has been rejected despite the fact that the deceased was the brother of the driver of the vehicle (motorcycle).

5. The appellant even felt that the Tribunal granted compensation despite the fact that the claimants did not prove the dependency by holding that claimants were entitled for compensation being legal representative and that they were dependent on deceased. The Insurance Company was made liable, which finding is assailed as perverse.

6. It is further contended by Insurance Company that the original policy was not produced by the owner despite that the Tribunal did not hold that there was breach of policy condition as the tractor was attached with a trolley and trolley was not insured by it.

7. It is further submitted by learned counsel for the appellant that the driving licence to drive the tractor was either fake or say a learner's licence despite that liability is fixed on the appellant. The liability of the Insurance Company under the Motor Vehicles Act, 1939 will have to be determined from the facts of the case. The defences, which are available to the Insurance Company have been taken by

them that the licence was a learner's licence.

8. PW1 has stated that a thresher and the iron rods were loaded on the tractor trolley. Defence Witness No.1 Ram Asrey has stated that a thresher with a machine used for agricultural purpose to cut fodder was there, therefore, the judgment of the Apex Court in the case of ***Santlal vs. Rajesh AIR 2017 SC 4054*** will not permit this Court to take a different view then that taken by the Tribunal that the tractor was being used for agricultural purposes. This takes this Court to the question whether the vehicle was plied against the terms of the policy, namely, that it was used for non-agricultural purposes. The fact that it had a thresher with the trolley will not permit this Court to take a different view and Insurance Company cannot avoid its liability.

9. As far as the driving licence of the driver of tractor is concerned, the finding of fact goes to show that driving licence of the driver of the tractor was produced before the Tribunal and the Tribunal has considered this aspect and has rejected the objection of the Insurance Company. In its finding in paragraph 17 of the judgment of the Tribunal where the contention regarding fake and/or learner's driving licence of tractor driver has been answered by assigning reasons. The document as 91-Ga, which is issued by the Motor Vehicles Department, Banda, on 20.2.1989, which was valid up to 20.2.1994, which has the photo of dirver-Sukhdeo, if the driving licence was a learner's licence, it could not have been for more than one month and, therefore, the Insurance Company cannot avoid its liability only by contending that there was breach of policy condition. In our case, there is no breach of Section 93 of the Motor Vehicles Act, 1939. This fact has been held to be wrongly agitated and the document, which has been considered by the Tribunal while deciding Issue No.2 cannot be found fault with. The finding as to licence being not learner's licence is affirmed on facts proved.

10. The contention that the policy, which was produced was not the policy, but only cover note and hence Insurance Company be exonerated cannot be accepted. A celebrated judgment of the Apex Court in the case of ***National Insurance Co.Ltd. vs. Jugal Kishore, AIR 1988 SC 719***, it is held that it is for the Insurance Company to produce the policy as it has to act fairly. In our case, the owner has the policy and document as exhibited at 91-Ga also supports the finding recorded by the Tribunal, which is confirmed and affirmed by this Court.

11. This takes this Court to the last ground as the tractor being attached with a trolley and trolley was insured with the Insurance Company and, therefore, they are not liable. Whether attaching trolley to tractor and the trolley not insured will be sufficient to exonerate the Insurance Company, the answer is given by the apex court in ***State of Orissa & others Vs. Bijaya C. Tripathy AIR 2005 SC 1431 and Fahim Ahmad & others Vs United India Insurance Company Ltd and others 2014 (2) T.A.C. 383 (SC) and this High Court in First Appeal From Order No. 1507 of 2003 (UPSRTC through Regional Manager Vs. Smt. Sukha Devi & Others)*** has held that if there is no fundamental breach of policy, the Insurance Company cannot be exonerated. In our case, tractor was used for carriage of Iron Bars and thresher, which is used for agricultural puposes is not a fundamental breach of

policy under Section 147 of the Motor Vehicles Act, 1988 giving rise to the Insurance Company to avoid its liability, the provisions are applicable in accidents under the Act, 1939 also.

12. This Court in ***First Appeal From Order No. - 381 of 2017 (Doodh Nath Chaurasiya Vs. Kanhaiya Lal And 3 others***) decided on 6.12.2017 has held as under:

"7. On issue no 5, the Tribunal has held against the appellant as the trolley was not insured with the Insurance Company. Learned counsel for the appellant has relied on Fahim Ahmad and Others Vs. United India Insurance Company Limited and Others, 2014 LawSuit (SC) 198 and National Insurance Company Limited Vs. V. Chinnamma, 2004 LawSuit (SC) 905 and, therefore, the same cannot be said to be breach of policy condition. The vehicle was in fact being used for agricultural purposes only. There is no other finding as to tractor was used for carrying goods."

13. The question of driver driving the vehicle with LMV license is also now covered by the decision in ***Mukund Dewangan Vs. Oriental Insurance Company Limited, A.I.R. 2017 (SC) 3668 and Sant Lal Vs. Rajesh and Others, Etc., 2017 (3) R.C.R. (Civil) 757.***

14. It is submitted that the claimants were not dependent on the deceased and that the claimants are not the legal representatives of the deceased as they fall in class II heirs under Hindu Succession Act, 1956. This issue is no longer res integra as it is not necessary that the deceased must be the sole bread winner. The term "heirs" which has been time and again interpreted to partake within itself heirs in Class I and Class II heirship would be covered. I am supported in my view by the decision in ***Smt. Manjuri Bera Vs. Oriental Insurance Company, Limited, AIR 2007 SC 1474***. The said decision has been incorporated by this Court in ***FIRST APPEAL FROM ORDER No. - 199 of 2017, National Insurance Company Limited, Lucknow Vs. Lavkush and another decided on 21.3.2017*** speaks about representatives. The adopted son and the brother is said to be representatives falling in class I and class II heirs respectively and, therefore, this submission of the Insurance Company also cannot be accepted hence, the same is rejected.

15. As far as the question whether the claimants are the dependents or not is concerned, this Court concurs with the finding of fact by the Tribunal. The fact that the minor sister and brother are legal representatives and the term used even in the Act, 1939 is legal representative and not dependants. Mother would be also dependent on the deceased.

16. This takes this Court to decide as to who was negligent. At the outset qua deceased even if both drivers are held to be negligent would be a case of composite negligence.

17. The term ‘negligence’ means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned

or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

18. The Division Bench of this Court in First Appeal From Order No. 1818 of 2012 (***Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others***) decided on 19.7.2016 has held as under :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in Rylands V/s. Fletcher, (1868) 3 HL (LR) 330. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle

of social justice should have any meaning at all.

20. These provisions (section 110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."

(Emphasis added)

19. The Apex Court in ***Khenyei Vs. New India Assurance Company Limited & Other***s, *2015 LawSuit (SC) 469* has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant."

20. As far as the deceased is concerned, it is a case of composite negligence. There are divergent version of the parties. Even if we accept the version of the driver of the tractor that the tractor was standing and it was on its extreme left and he was went for taking tea. The finding of fact that there was no red-lights, no marks that the vehicle had iron bars. The version of the claimants is that the tractor trolley driver took an abrupt turn and that is how the accident occurred. The driver was also

injured on shoulder and the rod pierced the neck of the deceased, who died instantaneously. From the facts, the driver of the motorcycle, who was coming from behind, rather rear side head a duty cast on him, but in this trafficated area, where the distance are very less maintained. His negligence can be set to be 20%. Qua that the Insurance Company ground that there was negligence on the part of the driver has to be accepted. However, claimants are third-party, no amount can be deducted from their share as per the judgment of **Khenyei** *(supra)* as it was a case of composite negligence. The amount of 20% can be recovered from the owner and the driver of the scooter, whose number is there in the records and who was the elder brother of the deceased. Hence, this issue is partly answered in favour of the Insurance Company.

21. This takes this Court to the question of quantum and compensation awarded. The compensation will have to be reworked as the submission of Shri K.S. Amist, learned counsel for the appellant, that the multiplier of 400 months could not have been granted has to be accepted. The submission that the claimants were not representatives or dependents on the deceased is answered in favour of claimants and will have to reassessed vis-a-vis the fact that the claimants have filed cross-objection, therefore, the issue of compensation amount admissible to the claimants will have to be recalculated and the said exercise is undertaken. The factual data goes to show that deceased was employed as a Junior Teacher, but his appointment was not as an confirmed employee but was a tranee and, therefore, to that the income of Rs.1,000/- taken by the Tribunal is required to be modified as Tribunal has not considered amount of dearness allowance.

22. The submission of Shri Amist that multiplier of 400 months cannot be given has to be accepted, but at the same time, the submission of learned counsel for the respondent-claimants that the Tribunal did not grant any amount under the head of future loss of income though the deceased was a salaried person. The judgment of **Gobald Motor Services Ltd. And another vs. R.M.K. Velusamy, 1962 SCR (1) 929 and General Manager, Kerala S.R.T.C. vs. Susamma Thomas, 1994 SCC (2) 176** will permit this Court at enough figure of 50%, hence, the amount would be Rs.1500/- per month as the deceased was a bachelor, but his younger brother, younger sister and mother were there and it is come on evidence that elder brother after his marriage had started living separately and it was the deceased the sole bread-earner for the family, hence, 1/3 would be deducted. The data figure would be Rs.1,000/- per month, which means Rs.12,000/- per year. The multiplier of 18 will have to be granted in view of the judgments even prevailing in those days and the judgment of ***Sarla Verma and others vs. Delhi Transport Corporation and another, 2009 ACJ 1298***, which has been applied retrospectively also in all pending matters. As it is a matter under the old Act, Rs.50,000/- plus Rs.30,000/- (additional) for non-pecuniary damages would have to be granted.

23. As far as rate of interest is concerned, the rate of interest granted by the Tribunal for the awarded amount is maintained, but the deductions as given by the Tribunal for lump sum amount cannot be accepted. The deduction has to be 1/3 as

there were three dependants though the deceased was a bachelor.

24. Hence, the total compensation payable to the appellants and daughters of the deceased as per the discussion above is recomputed herein below:

i. Monthly Income : Rs.1200/-

ii. Percentage towards future prospects : 50% = Rs.600/-

iii. Total income : Rs.1800/-

iv. Income after deduction of 1/3 : Rs.1800/- - Rs.600/- = Rs.1,200/-

v. Annual income : Rs.1,200/- x 12 = Rs.14,400/-

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs.14,400/- x 18 = Rs.2,59,200/-

viii. Amount under non-pecuniary heads : Rs.50,000/- + Rs.30,000/- = Rs.80,000/-

ix. Total compensation : Rs.2,59,200/- + Rs.80,000/- = **Rs.3,39,200**/-

25. Learned Tribunal has awarded rate of interest at 10% per annum. Thus the compensation of works out to what is granted but is recalculated on the basis of 9% per annum looking to the period of litigation. The additional amount be refunded to Insurance Company from the fix deposit.

26. This Court granted stay, hence, the additional amount is to be deposited calculating amount with 9% rate of interest.

27. In view of the above, the appeal is **partly allowed**. Judgment and award passed by the Tribunal is modified to the aforesaid extent. The appellant-Insurance Company shall deposit the entire amount within a period of **12 weeks** from today with interest @ 9% per annum from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

28. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd.***, *[2007(2) GLH 291]* and this High Court in 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 claimants 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)*** and in First Appeal From Order No.2871 of 2016 (***Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.***) decided on 19.3.2021 while disbursing the amount.

(2023) 6 ILRA 592
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2023

BEFORE

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

First Appeal from Order No. 1208 of 1992

The New India Assurance Co. ...Appellant
Versus
Murli Manohar Saxena & Anr.
...Respondents

Counsel for the Appellant:
Sri Rajiv Chaddha

Counsel for the Respondents:
Sri N.C. Rajvanshi, SrI Mukesh Kumar Kushwaha

A. Civil Law-Motor Vehicles Act, 1988-Section 173-quantum of compensation-In the instant case, the insurance policy was taken at 2.00 p.m. and the accident had occurred earlier in the day at 10.30 a.m.-Thus, the principles of law laid down by the Apex Court in Sunita Rathi and Smt. Sobina lakai, squarely apply to the insurer's case- The Insurance coverage would not enable the claimant to seek recovery of the amount from the appellant Company-(Para 1 to 23)

B. In this case, the Court held that in absence of any specific time mentioned in the policy, the contract would be operative from midnight of the day by operations of the provisions of the General Clauses Act but in view of the special contract mentioned in the insurance policy, the effectiveness of the policy would start from the time and date indicated in the policy.(Para 22)

The appeal is allowed. (E-6)

List of Cases cited:

1. New India Assr. Co. Ltd. Vs Ram Dayal & ors. (1990) 2 SCC 680

2. Oriental Ins. Co. Ltd. Vs Sunita Rathi & ors. (1998) 1 SCC 365

3. NICL Vs Sobina lakai (Smt) & ors. (2007) 7 SCC 786

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

1. This is an appeal by the Insurance Company challenging an award of the Motor Accident Claims Tribunal/ XIth Additional District Judge, Agra dated 13.10.1992 passed in Motor Accident Claims Petition No.64 of 1992, allowing the claim.

2. According to the claimant-respondent No.1, Murli Manohar Saxena on the 4th of September, 1991 at half past ten in the morning hours, he was proceeding from Kamla Nagar to the Civil Court, Agra, riding pillion on Scooter, bearing registration No. UTM-8322, driven by his younger brother, Bhagwanji Saxena. The Scooter was moving on the left hand side of the road and had reached the Abbu Ullah Dargah Bypass Road when suddenly a Jeep, bearing registration No. UVJ-6096 appeared, driven negligently and at a high speed. The driver of the Jeep did not sound any horn and hit the Scooter, that the claimant-respondent No.1 (for short, 'the claimant') was riding. In consequence of the impact, the claimant and his brother fell down injured. They fainted. The Scooter was damaged. The claimant's right lower limb was fractured, and in addition, he sustained injuries to his brain and eyes, besides a number of other body parts. The claimant says that despite treatment, his right lower limb does not function normally. The claimant cannot move about conveniently. He has turned quite a handicapped man both physically and mentally. The claimant was an upcoming lawyer, who had a bright future. However, on account of the injuries sustained in the accident, his practice was adversely affected. Accordingly, the claimant demanded a compensation in the sum of Rs.10 lacs.

3. The Uttar Pradesh State Bridge Corporation Limited are the owners of the offending Jeep. They put in a written statement asserting that the claimant is not entitled to relief. The Uttar Pradesh State Bridge Corporation, who are arrayed as

respondent No.2 to this appeal, shall hereinafter be called 'the owners'. The owners in their written statement further on said that the claimant has incorrectly shown his monthly income. He has not disclosed the particulars of the Scooter's insurance nor impleaded the Scooter's insurers as parties to the claim petition. According to the owners, on 04.09.1991, Jeep bearing registration No. UVJ-6096 was being driven by their driver Prithvi Singh, who was proceeding from the owners' office in Nehru Nagar to their work site at the Yamuna Bridge. He was driving the vehicle at a controlled speed. At the Abbu Ullah Dargah, a scooter, proceeding from the direction of the Bhagwan Talkies, overtook the offending Jeep and hit the claimant's Scooter, causing it to be thrown to the ground. The rider of the scooter did not sustain any injury nor was the Scooter damaged. The rider of the scooter, however, escaped. In the disarray, the Jeep driver, in order to save the claimant, jumped off the road into a kachcha pit by the roadside and proceeded on. Suddenly, a Scooter came on from the direction of Kamla Nagar and collided with the owners' Jeep. There was no collision, however, between the offending Jeep and the Scooter, the claimant was riding. Whatever compensation the claimant has sought, he is not entitled to.

4. The New India Assurance Company Limited, who are the insurers of the offending Jeep, were arrayed as opposite party No.2 to the claim petition. The said Insurance Company are the appellants here. They will hereinafter be referred to as 'the Insurers'. A written statement was filed on behalf of the Insurers, denying the allegations in the claim petition generally. It is the Insurers' case that at the time of the accident, the offending Jeep was not insured with the Insurers. The claim petition is barred by Section 149 of the Motor Vehicles Act, 1988 (for short, 'the Act'). On 04.09.1991 at 2:00 p.m., a Senior Engineer got the offending Jeep insured with the Insurers. At the time the Insurance Policy was taken out, the fact was suppressed by the owners that earlier in the day at 10:30 a.m., the offending Jeep was involved in an accident. It is pleaded that if the fact of the accident was within the Insurers' knowledge, they would never have issued the Insurance Policy. It is the Insurers' case that the policy was taken out by the owners playing fraud upon the Insurers. According to the Insurers, they are not obliged to indemnify the owners on the policy held by them.

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

"1. Whether the accident on 04.09.1991 at 10:30 a.m. happened on account of the negligence and mistake of the driver of Jeep, bearing registration No. UVJ-6096?

2. Whether the accident was not caused by Jeep, bearing registration No. UVJ-6096?

3. Whether Jeep No. UVJ-6096 at the time of the accident was insured with opposite party No.2, New India Assurance Company Ltd.?

4. Whether the claimant is entitled to receive any compensation, if yes, how much and from whom?"

6. On behalf of the claimant, Mr. Shailendra Kulshreshtha, Advocate testified as PW-1, who is an eye-witness of the accident. The claimant, Murli Manohar Saxena testified as PW-2. On behalf of the Insurers, Suresh Chandra Goyal, a

Development Officer with the Insurers, was examined as DW-1 and the driver of the offending Jeep, Prithvi Singh was examined as DW-2. Documentary evidence was also led on both sides, to which allusion would be made during the course of this judgment.

7. The Tribunal decided Issues Nos.1 and 2 together. And, rightly so in our opinion, because both issues are identical and involve a similar controversy to decide albeit with some difference. In answering the two issues, the Tribunal considered the evidence of PW-1, who had seen the accident from a distance of about 15 yards. According to this witness, the offending Jeep proceeded from the side of the Bhagwan Talkies, driven at a high speed and negligently. It attempted to overtake the ill-fated Scooter. It is in that attempt that the offending Jeep hit the ill-fated Scooter, causing the accident. The Tribunal has taken note of the fact that it is this witness, who carried the injured to emergency medical aid and lodged a report at Police Station New Agra. The Tribunal has taken note of this witness's testimony, where it is said that he was accompanied by Mr. Naim Sheikh, Advocate, who caught the driver of the offending Jeep on the spot and handed him over to the Police. It is this witness, who has proved the FIR in the case. The Tribunal has noted that PW-1 was cross-examined at length on behalf of the owners, but the cross-examination does not create any doubt about the witness's presence at the site of the accident. PW-2 also supported his claim, the case of accident involving the offending Jeep and the injuries sustained in the accident. The witness does not appear to have been much discredited in the cross-examination.

8. The Tribunal has then taken note of the testimony of the two witnesses produced on behalf of the Insurers. It has been recorded by the Tribunal that DW-1, Suresh Chandra Goyal has said in his testimony that he had insured the offending Jeep on 04.09.1991 against third party risk. The insurance was taken out by the Senior Manager of the owners and it was issued in the name of the Senior Engineer. A Junior Engineer in the owners' establishment, Ashok Varma had come to take out the Insurance Policy. This witness has said in his cross-examination that the policy was taken out at 2 o'clock in the afternoon. He has also said that the coverage of the risk is there after the deposit of money on account of premium due on the policy is accepted. It has further been said that if the premium is not deposited, the coverage of risk does not come into force. The Tribunal has remarked that this witness (DW-1) has testified to the fact that the offending Jeep's insurance was taken out at 2 o'clock in the afternoon.

9. The Tribunal has considered the testimony of DW-2, Prithvi Singh, who is the driver of the offending Jeep. This witness has been noticed to say that on 04.09.1991 between 10:00 – 10:45, he was proceeding from the Nehru Nagar Office to the Water Works Office. As soon as he reached near the Abbu Ullah Chauraha, a scooter overtook him at high speed. At that time, another scooter came from the opposite direction and collided with the other scooter. The riders of one of the two scooters were thrown down. The witness has said that he stopped his vehicle and helped the injured board a three wheeler to ferry them to the hospital. The witness has said that after he had proceeded across some distance, he was caught by 7 or 8 Advocates. The witness has been noticed to say that he requested the Advocates that he did not cause the accident, but he was

forced to ride a motorcycle and his vehicle was parked, where he had been stopped. The witness has also said that he was mistreated and got detained at the police station.

10. The Tribunal has remarked that the accident did not happen the way DW-2, Prithvi Singh has described it. It has also been observed that the witness's version is not dependable. It has been observed by the Tribunal that the witness under reference has said that both scooters were thrown down and damaged, but he does not give out the number of the other scooter or its description. The Tribunal has also recorded the fact that the witness has acknowledged in his cross-examination that when the offending Jeep was got released from the Police Station, its mudguard was damaged. The bonnet was depressed and the glass also damaged. The witness does not say in his cross-examination that he had made any report to the Police regarding this damage to the Jeep caused elsewhere. The Tribunal has remarked that since no FIR regarding the damage sustained by the Jeep was lodged, it is evident that it was this witness, who was driving the Jeep negligently, and it is the offending Jeep, which caused the accident. The issues, therefore, were answered in the manner that the accident was caused on account of the rash and negligent driving by the driver of the offending Jeep and further that it was the offending Jeep, that was involved in the accident.

11. Heard Mr. Rajiv Chaddha, learned Counsel for the Insurers in support of the appeal and perused the records. No one appears for the owners.

12. The learned Counsel for the Insurers has attempted to assail the findings of the Tribunal on the two issues aforesaid saying that the offending Jeep was not involved in the accident nor the driver negligent. Upon going through the testimony of PW-1, who is not at all an interested witness, the involvement of the offending Jeep as also the driver's negligence are evident.

13. The driver has acknowledged that the offending Jeep had sustained damage to its mudguard, that was broken. The bonnet and the wind shield were also broken. Though, it is said that this was the condition of the Jeep, when it was released from the Police Station, but in the absence of any action taken by the owners, who are themselves no less a face of the Government than the Police, lends credence to the claimant's case that the offending Jeep was the one involved in the accident and the damage mentioned in his testimony by DW-2, Prithvi Singh, the driver of the Jeep, is attributable to the very accident, that caused injury to the claimant. Also, the fact that the Jeep and the driver were apprehended on the spot and the Jeep later on released from the Police Station, are assurance enough about the involvement of the Jeep. The Tribunal's findings on Issues Nos.1 and 2 cannot be faulted. Those findings are, accordingly, upheld.

14. The Insurers assail the findings of the Tribunal recorded on Issue No.3. It is argued with much vehemence on behalf of the Insurers that the Tribunal has erred in holding that the Insurers are liable, because they did not get the Insurance Policy cancelled, a course of action they should have followed if it was their case that the policy was taken out at 2:00 p.m. on 04.09.1991, after the accident had already happened earlier in the day at 10:30 a.m. It

is submitted on behalf of the Insurers that the policy was obtained by the owners practicing fraud on the Insurers and the policy is, therefore, void. The Insurers say that they are not liable to satisfy the award.

15. Upon a perusal of the records, this Court finds that the original cover note issued by the Insurers dated 04.09.1991 is on record as paper No. 44-Ga. Besides that, there are photostat copies of the cover note also on record as paper Nos. 39-Ga and 46-Ga and another photostat copy, paper No. 5-Ga. The cover note, that has been filed on record and marked as paper No. 44-Ga, clearly mentions the time of issue as 2:00 p.m. on 04.09.1991, whereas the photostat copy bearing paper No. 46-Ga does not mention any time. Again, the photostat copy, bearing paper No. 5-Ga, does not mention the time of issue, whereas the photostat copy, bearing paper No. 39-Ga mentions the time of issue as 2:00 p.m.

16. Going by the principles of admissibility of documentary evidence, the original alone is admissible and there is no reason to look into secondary evidence when the primary evidence is there. The photostat copies, numbering two, that do not mention the time of issue of the cover note, could possibly have been used to discredit the genuineness of the document while cross-examining DW-1, Suresh Chandra Goyal, but Suresh Chandra Goyal in his cross-examination has stood firm by the fact that the cover note was issued by him on behalf of the Insurers on 04.09.1991 at 2:00 p.m. He took the said stand in his examination-in-chief, where he has said:

"सशपथ ब्यान किया कि मैं न्यू इंडिया इस्योंरेंस कम्पनी OP No.2 में विकास अधिकारी हूँ और बीमा करता हूँ। दिनांक 4.9.91 को दोपहर 2 बजे जीप नम्बर UVJ 6096 का बीमा केवल Third Party Risk के लिए सीनियर इंजीनियर यू पी स्टेट बृज कारपोंरेशन के नाम से किया था। बीमा कराने J.E. अशोक वर्मा व एक बाबू चौहान कम्पनी के ब्रांच आफिस महात्मा गांधी रोड आगरा पर आये थे और उन्होंने जीप का बीमा करने को कहा था। 4.9.91 से पहले यह गाड़ी न्यू इंडिया में इन्सोर्ड नहीं रही। 4.9.91 का बीमा First बीमा था। रिनूअल नहीं था। पिछले बीमा का कोई कागज नहीं दिखाया था। यह लोग गाड़ी लेकर नहीं आए थे। इनके द्वारा यह नहीं बताया गया था 4.9.91 को सुबह 10.30 बजे इस जीप से कोई दुर्घटना हुई है।"

17. This witness when cross-examined on behalf of the owners stood firm by his stand that the cover note was issued by him at 2:00 p.m. on 04.09.1991. DW-1 has stated in his cross-examination, at the instance of the owners, thus:

"एक समय में कवर नोट का असल सहित चार कापी बनती है। एक Original Party के पास चली जाती है बाकी आफिस में रहती है। कवर नोट पर मेरे ही दसखत हैं किसी अन्य अधिकारी के नहीं होती। चारो कापियों पर समय एक सा है। बकाया कि दो कापी आफिस में है जीप नम्बर UVJ 6096 का बीमा मैंने किया था। यह मैंने 4.9.91 को दोपहर दो बजे किया था। मैंने यह नहीं कहा कि बीमा दो बजे के बाद किया था। दाखिलशुदा कवर नोट के अलावा मैं अन्य रिकार्ड इसलिए नहीं लाया कि मुझे बताया नहीं गया था। बीमा के समय जीप उपलब्ध नहीं थी व जीप मैंने नहीं देखी। Third Party बीमा पार्टी के विश्वास पर बिना वाहन देखे किया जाता है। असल कवर नोट व कार्बन कापी एक ही समय एक ही Process में लिखी व दसखती है। असल व कार्बन कापी में भिन्नता नहीं है। यह कहना गलत है कि दुर्घटना के समय जीप बीमित हुई है। यह भी कहना गलत है कि दाखिलशुदा कार्बन कापी में समय बढ़ा दिया गया हो।"

18. This Court finds that the original cover note, bearing paper No. 44-Ga has been filed through a list of documents, bearing paper No. 41-Ga by Mr. Rama Kant Dixit, Advocate, Civil Court, Agra. This Court finds from a perusal of paper No. 45-Ga, which is a letter dated

28.05.1992, addressed by the Deputy Project Manager of the owners to Mr. Rama Kant Dixit, Advocate that Mr. Dixit was the owners' Counsel. Thus, it is apparent that the original cover note, bearing paper No. 44-Ga was filed on behalf of the owners, from whose custody it should have logically come. DW-1, Development Officer of the Insurers, has already said in his cross-examination that the original cover note was issued to the owners, which otherwise too is obvious. Therefore, the cover note, being filed by the learned Counsel for the owners, is a document, produced from custody of the party, with whom it should have been. The cover note clearly indicates that it was issued on 04.09.1991 at 2:00 p.m. At the same time, the author of the cover note, who issued it on behalf of the Insurers, has said that it was not a case of renewal, where the Insurers were renewing an existing policy of theirs. He had issued a fresh cover note, without examining the vehicle, which this Court must say, he ought not have done, trusting the onwers. It must be remarked that the Insurers' official should never have issued a cover note, which was a fresh proposal, without examining the vehicle, that does not appear to be a new vehicle. The reference to the trust reposed in the owners, for whatever worth it might be, can only be salvaged for the Insurers by the fact that the owners were a Government Corporation, and it was not expected that they would indulge in practice of fraud or tell falsehood to the Insurers. Unfortunately, in this case the way the evidence has turned out, the officials of the owners, a State Corporation, have practiced apparent fraud on the Insurers, by deliberately not disclosing the fact that the vehicle they proposed to be insured, had met with an accident earlier in the day. Therefore, it must be held that the cover note, on which the owners rely, was issued on 04.09.1991 at 2:00 p.m. Thus, there was no proposal for the Insurers to insure the offending Jeep on 04.09.1991, prior to 2:00 p.m. of that day. The accident happened at 10:30 a.m. on 04.09.1991. At that time, there was no cover note issued by the Insurers.

19. There is no case on behalf of the owners that the Jeep was insured under a policy of insurance by some other Insurer that was expiring on 04.09.1991. Thus, the inference is that until the cover note was issued by the Insurers at 2:00 p.m. on 04.09.1991, there was no insurance cover for the offending Jeep.

20. An issue arises whether a policy issued on a particular day would cover the risk for that day commencing the previous midnight, or what would be the time when the cover note purchased on a particular day becomes effective pending issue of a policy. The question fell for consideration of the Supreme Court in **New India Assurance Co. Ltd. v. Ram Dayal and others, (1990) 2 SCC 680**, where it was held:

"2. The insurer repudiated its liability by maintaining that the policy had been taken after the accident and, therefore, it had no liability to meet the award of compensation against the owner. The Tribunal accepted this stand and rejected the claim against the insurer. In appeal, the High Court took the view relying upon certain decisions that the insurance policy obtained on the date of the accident became operative from the commencement of the date of insurance — i.e. from the previous midnight and since the accident took place on the date of the policy the insurer became liable.

3. Apart from the judgment under appeal, we find that this view is supported by two judgments of the Madras High Court and an earlier decision of the Punjab and Haryana High Court. Two Division Benches of the Madras High Court have taken the view after discussing the law at length that the policy taken during any part of the day becomes operative from the commencement of that day. Besides these judgments a Division Bench decision of the Allahabad High Court in Jaddoo Singh v. Malti Devi [AIR 1983 All 87] supports this view on principle.

4. There is evidence in this case that the vehicle was insured earlier up to August 31, 1984 and the same was available to be renewed but instead of obtaining renewal, a fresh insurance was taken from September 28, 1984, which is the date of the accident. We are inclined to agree with the view indicated in these decisions that when a policy is taken on a particular date, its effectiveness is from the commencement of the date and, therefore, the High Court, in our opinion, was right in holding that the insurer was liable in terms of the Act to meet the liability of the owner under the award."

21. The decision in **Ram Dayal (supra)** was distinguished in **Oriental Insurance Co. Ltd. v. Sunita Rathi and others, (1998) 1 SCC 365** on principle, depending on the fact that the commencement of the liability of the insurer would be different, where just the date of the issue of the insurance policy or the cover note was mentioned and a cover note where the date and time of the issue of the insurance policy or the cover note was also mentioned. In Sunita Rathi (supra), which is a three Judge Bench decision of their Lordships of the Supreme Court, it was held:

"2. The motor accident occurred on 10-12-1991 at 2.20 p.m. It was only thereafter the same day at 2.55 p.m. that the insurance policy and the cover note were obtained by the insured, owner of the motor vehicle involved in the accident. There is express mention in the cover note that the effective date and time of commencement of the insurance for the purpose of the Act was 10-12-1991 at 2.55 p.m. The applicability of the decision in Ram Dayal case [(1990) 2 SCC 680 : 1990 SCC (Cri) 432 : (1990) 2 SCR 570] has to be considered on these facts. In our opinion the decision in Ram Dayal case [(1990) 2 SCC 680 : 1990 SCC (Cri) 432 : (1990) 2 SCR 570] is distinguishable and has no application to the facts of this case. The facts of that decision show that the time of issuance of the policy was not mentioned therein and the question, therefore, was of presumption when the date alone was mentioned and not the time at which the insurance was to become effective on that date. In such a situation, it was held in Ram Dayal case [(1990) 2 SCC 680 : 1990 SCC (Cri) 432 : (1990) 2 SCR 570] that in the absence of any specific time being mentioned, the logical inference to draw was that the insurance became effective from the previous midnight and, therefore, for an accident which took place on the date of the policy, the insurer became liable. There is no such difficulty in the present case in view of the clear finding based on undisputed facts that the accident occurred at 2.20 p.m. and the cover note was obtained only thereafter at 2.55 p.m. in which it was expressly mentioned that the effective date and time of commencement of the insurance for the purpose of the Act was 10-12-1991 at 2.55 p.m. The reliance on Ram Dayal case [(1990) 2 SCC 680 : 1990 SCC (Cri) 432 : (1990) 2 SCR 570] by the Tribunal and the High Court was,

therefore, misplaced. We find that in a similar situation, the same view which we have taken, was also the view in National Insurance Co. Ltd. v. Jikubhai Nathuji Dabhi [(1997) 1 SCC 66 : (1996) 8 Scale 695] wherein Ram Dayal case [(1990) 2 SCC 680 : 1990 SCC (Cri) 432 : (1990) 2 SCR 570] was distinguished on the same basis."

(emphasis by Court)

22. The issue again came up for consideration before the Supreme Court in **National Insurance Co. Ltd. v. Sobina Iakai (Smt.) and others, (2007) 7 SCC 786. In Smt. Sobina Iakai** (supra), it was held:

"14. This Court had an occasion to examine the similar controversy in New India Assurance Co. Ltd. v. Ram Dayal [(1990) 2 SCC 680 : 1990 SCC (Cri) 432 : (1990) 2 SCR 570] . In this case, this Court held that in absence of any specific time mentioned in the policy, the contract would be operative from the midnight of the day by operations of the provisions of the General Clauses Act but in view of the special contract mentioned in the insurance policy, the effectiveness of the policy would start from the time and date indicated in the policy.

15. A three-Judge Bench of this Court in National Insurance Co. Ltd. v. Jikubhai Nathuji Dabhi [(1997) 1 SCC 66] has held that in the absence of any specific time mentioned in that behalf, the contract would be operative from the midnight of the day by operation of provisions of the General Clauses Act. But in view of the special contract mentioned in the insurance policy, it would be operative from the time and date the insurance policy was taken. In that case, the insurance policy was taken at 4.00 p.m. on 25-10-1983 and the accident had occurred earlier thereto. This Court held (at SCC p. 67, para 3) that "the insurance coverage would not enable the claimant to seek recovery of the amount from the appellant Company".

16. Another three-Judge Bench of this Court in Oriental Insurance Co. Ltd. v. Sunita Rathi [(1998) 1 SCC 365] dealt with similar facts. In this case, the accident occurred at 2.20 p.m. and the cover note was obtained only thereafter at 2.55 p.m. The Court observed that the policy would be effective from the time and date mentioned in the policy.

17. In New India Assurance Co. v. Bhagwati Devi [(1998) 6 SCC 534] this Court observed that, in absence of any specific time and date, the insurance policy becomes operative from the previous midnight. But when the specific time and date is mentioned, then the insurance policy becomes effective from that point of time. This Court in New India Assurance Co. Ltd. v. Sita Bai [(1999) 7 SCC 575 : 1999 SCC (Cri) 1322] and National Insurance Co. Ltd. v. Chinto Devi [(2000) 7 SCC 50 : 2000 SCC (Cri) 1272] has taken the same view.

18. In J. Kalaivani v. K. Sivashankar [(2007) 7 SCC 792 : JT (2001) 10 SC 396] this Court has reiterated clear enunciation of law. The Court observed that it is the obligation of the court to look into the contract of insurance to discern whether any particular time has been specified for commencement or expiry of the policy. A very large number of cases have come to our notice where insurance policies are taken immediately after the accidents to get compensation in a clandestine manner.

19. In order to curb this widespread mischief of getting insurance policies after the accidents, it is absolutely imperative to clearly hold that the effectiveness of the insurance policy would start from the time

and date specifically incorporated in the policy and not from an earlier point of time."

(emphasis by Court)

23. In view of the findings of this Court that the policy was issued in fact at 2:00 p.m. on 04.09.1991 and the accident happened at 10:30 a.m., earlier in the day, the principles of law laid down by the Supreme Court in **Sunita Rathi and Smt. Sobina Iakai**, squarely apply to the Insurers' case. In the opinion of this Court, therefore, the liability to satisfy the award would go to the owners and the insurers have to be relieved.

24. In the result, this appeal **succeeds** and is **allowed.** The impugned judgment and award dated 13.10.1992 passed by the Motor Accident Claims Tribunal is modified and it is ordered that the award shall be satisfied by the owners and not the Insurers. The Insurers shall be entitled to costs in the sum of Rs.10,000/- recoverable from the owners.

(2023) 6 ILRA 601
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Habeas Corpus No. 43 of 2020

Aarav Shukla & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Upendra Singh, Sri Nitin Chopra, Sri Prakhar Saran Srivastava, Sri Suvarna Singh, Sri Tarun Agarwal, Ms. Rosemarry Raju

Counsel for the Respondents:
G.A., Sri Ashish Deep Verma

The Constitution of India, 1950-Article-226- WRIT of Habeas Corpus- Doctrine of intimate and closest concern are of persuasive relevance only when the child has uprooted from its native country and taking to a place to encounter alien environment, language, customs and surroundings etc.,which may have substantial bearing on the process of his over all growth and grooming. As the child was very tender age it cannot be supposed that he was segregated from social customs prevalent to U.S.A. to which he has been accustomed. He did not receive any schooling, education or care of any daycare institution in U.S.. On the contrary minor child is under due care of his mother and maternal grand parents and other relatives of maternal side since his arrival in Noida (India). There is no consent order with regard to custody of child by U.S court or any competent authority in U.S. even after alleged order dated 24.12.2020 which was passed by U.S. court with regard to custody of child long after his departure from U.S-No compelling reason to direct return of minor child to U.S., nor his stay in the company of his mother along with maternal grand parents at Greater Noida is prejudicial to his interest in any manner warranting his return to U.S - Issue of custody of child ought not to be on the basis of rights of parties claiming custody of minor child but to focus should stand on whether the factum of best interest of the minor child-Visitation rights to father are admissible so that he may have access to minor child whenever he would visit India. (Para 33 & 34) (E-15)

List of Cases cited:

1. Tejaswini Gaud & ors.Vs Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42

2. Yashita Sahu VS St. of Rajasthan & ors., (2020) 3 SCC 67

3. Kanika Goel VS St. of Delhi Through Station House Officer & anr., (2018) SCC 578.

4. Nithya Anand Raghavan Vs St. (NCT of Delhi) & anr., (2017) 8 SCC 454

5. K.S. Puttaswami Vs U.O.I., (2017) 10 SCC 1.

6. Prateek Vs Shilpi, (2018) SCC 309

7. Shilpa Aggarwal Vs Aviral Mittal (2010) 1 SCC 591

8.V. Ravi Chandran Vs U.O.I., (2010) 1 SCC 174

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

1. Heard Ms. Rosemarry Raju, learned counsel for the petitioners, Mr. Ashish Deep Verma, learned counsel for the private respondent, learned A.G.A. for the State and perused the material on record.

2. Instant habeas corpus petition under Article 226 of the Constitution of India has been filed by petitioner no. 2 Abhishek Shukla on behalf of the corpus Arav Shukla, who is his minor son, against state respondent and respondent no. 3 (the mother of the corpus and wife of petitioner no. 2) with following prayers:-

(i) Issue a writ order or direction in the nature of habeas corpus commanding the respondent no. 3 to produce the petitioner no. 1 in the Hon'ble Court and thereafter the Hon'ble Court may be pleased to give the custody of the petitioner no. 1 to the petitioner no. 2.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the respondents not to interfere in petitioner no. 2 right to meet his son.

(iii) Issue a writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(iv) To allow the writ petition and award the cost in favour of the petitioner.

3. During pendency of present writ petition, an amendment application has been moved by petitioner no. 2 with prayer to add the prayer in writ petition at Sr. No. i-(a) in prayer clause of writ petition i.e. i-(a) issue an appropriate writ, order or direction directing the Authorities to produce the minor child namely Arav Shukla, a U.S. Citizen and direct the repatriation of the minor child back to U.S. in compliance of orders dated 24.12.2020 passed by the Superior Court of Washington, King County, U.S. being Case No. 20-3-04720-5-SEA- and also to deposit the passport of the minor child and other documents of the minor child which ought to be delivered to the petitioner no. 2 to enable the petitioner no. 2 to take minor child back to U.S..

4. At the time of final hearing of writ petition, learned counsel for the parties could not brought the attention of this Court towards amendment application which was filed on 21.9.2021, as no objection has been filed on this amendment application and proposed amendment appears to have been filed with a view to clarify the prayer made in writ petition in view of subsequent developments which took place after filing of writ petition, therefore, the amendment sought in amendment application will be treated as included in writ petition.

5. Factual matrix of the case are that present petition under Article 226 of the Constitution of India has been filed by the petitioner no. 2 with averment that he is permanent resident of District Kanpur

Nagar (U.P.) and works as Software Engineer in U.S.A. at present. Petitioner no. 2 was married with respondent no. 3 Esha Pathak at G.B. Nagar on 6.3.2011 according to Hindu rites and rituals and said marriage was registered under Marriage Registration Rules ,1973 at Kanpur Nagar on 20.12.2013, a copy of marriage certificate has been filed along with writ petition. The parents of petitioner no. 2 are residing at Kanpur Nagar. His academic qualification is B.Tech and M.S., whereas respondent no. 3, his wife, is M.B.A.. The petitioner nos. 2 and respondent no. 3 after multiple discussions decided to go to America. Petitioner no. 2 even suggested the respondent no.3 that if she wishes then she could stay in India for now and continue her career and thereafter both of them could reevaluate their situation and take a decision that best suited the interest of the family, however, respondent no. 3 did not concede to the proposal and forced petitioner no. 2 to take her to U.S.A. They reached there on 7.2.20215 but after arrival in U.S.A., respondent no. 3 got upset due to change in life style in U.S.. She also did not adjust herself in U.S., being away from her parents. The son was born on 7th of December 2017 from the wedlock of petitioner no. 2 and respondent no. 3 at Kirkland, King Country Washington in the hospital namely Evergreen Health Medical Center and birth certificate was issued by State of Washington, Department of Health, wherein their son name has been christened as Master Aarav Shukla dated 12.12.2017. The petitioner no. 2 also registered for child's stem cell and cord blood cell preservation with Cord Blood Registry in U.S.A. to cope with future health issues arising to the child if any. The respondent no. 3 used to blame the parents of petitioner no. 2 who had arrived after birth of child to visit him. The respondent no. 3 and petitioner no. 2 came with the child in India on 2nd of June, 2018 with their son Master Aarav. Respondent no. 3 has been very demanding for money from petitioner no. 2 and for that she used to threaten him. The petitioner no. 2 had made an U.S. credit card available to respondent no. 3 so that she could cater to her educational and other needs but she would decline to provide any information about the expenses incurred through credit card. Even before respondent no. 3 came to U.S., petitioner no. 2 tried to apply for a work permit for respondent no. 3 through Microsoft, but the petitioner no. 2 was advised that it could only be done when she is in U.S. but she was not interested in working. Respondent no. 3 told the petitioner no. 2 that she has booked her tickets for the U.S. The petitioner started baby-proofing the house. He installed cameras for the safety and security of the child as well. When she came back to U.S. on 19th February, 2019 she was very aggressive. She was blaming and threatening the petitioner no. 2 to get everything done her away. Even her mother was provoking her to agitate and stress out the petitioner no. 2. The respondent no. 3 and her family members used to take objection if he was engaged in conversation with his parents. The petitioner no. 2 and respondent no. 3 were looking for a daycare of the child and in the meanwhile respondent no. 3 was having driving lessons which was scheduled at noon everyday in spite of the requests of petitioner no. 2 that this should be planned after 5:00 pm so that he could come back from work to watch his son while she takes driving lesson but she did not oblige and got a driving lesson in the noon and asked the petitioner no. 2 to visit the home in lunch hours to take care of the child and when he stated that it was not possible for

him, she became agitated and began threatening him. The petitioner no. 2 had planned snowboarding after work on that day to which respondent no. 3 became very angry and at 10:00 pm she sent a message to him that she was not feeling well and he immediately started hitting back from the location. He could reach home at 11:30 pm due to distance of the location from his home, however, she did not accompany him to the hospital and went there in a Taxi. The petitioner no. 2 left behind to take care of his son at home. Respondent no. 3 finalized a daycare for the child which was 13 km away from their place of residence and this was not acceptable to petitioner no. 2 but she was adamant that he signed the cheques immediately so that the money could be deposited in daycare. When he did not succumb to his pressure, she became furious. She called police in U.S. with complaint of domestic violence. The Redmond Police of U.S. came to their place within few months and after thorough investigation they concluded that no case of domestic violence was made out and filed a final report on 15.3.2019. In the midst of these sequence of events the petitioner no. 2 got frightened and troubled due to unusual behaviour of respondent no. 3 and he started living outside the home to avoid any future problem created by respondent no. 3, but she did not express any concern for his well being. She filed a complaint of domestic violence against petitioner no. 2 through her Twitter Account wherein she tweeted at 11:00 am on 15th March 2019 to C.E.O's of his Microsoft Office Mr. Satya Nadella Mr. Bill Gates and Indian External Affairs Minister Sushma Swaraj and Indian Ambassador to U.S., Mr. Harsh Shringla, and even to President of United States of America, Mr. Donald Trump, copies have been filed as annexures to the affidavit. The petitioner no. 2 met his lawyer on 19.3.2019 and after consulting him he went to his apartment and found that his wife and child were not there. He came to know that respondent no. 3 had left for India on 17.3.2019 along with the son and did not let him know that she was leaving country and illegally took his child without his permission and knowledge. He sent a notice to respondent no. 3 on 26.3.2019 through the attorney at law in U.S.A., Mr. Patrick Shearer, with regard to take his son without the consent of the petitioner and behind his back, he threatened him to implicate in some dowry related criminal cases and filed written complaint to National Commission for Women against petitioner no. 2 with allegation of maltreatment with false allegations.

6. Feeling perturbed by conduct of respondent no. 3, petitioner no. 2 had filed a divorce petition to dissolve his marriage with respondent no. 3 in the court of Principal Judge, Family Court, G.B. Nagar, numbered as Matrimonial Petition No. 709 of 2019 (Abhishek Shukla Vs. Esha Shukla) in which notice was issued to respondent no. 3.

7. Petitioner no. 2 regularly paid the expenses of respondent no. 3 without any break even that the parents of respondent no. 3 did not allow him to meet his son when he was in India in July, 2019, August 2019 and December, 2019. Even he approached the police officials but they directly refused to intervene in the matter. The corpus is a minor child who was aged about two years when he was abducted by respondent no. 3 from U.S. to India without consent and permit of his father. Petitioner no. 2 is legal guardian and custodian of petitioner no. 1. The custody of petitioner no. 1, who is a U.S. citizen, is not safe in the hands of respondent no. 3, therefore,

custody of child be given to petitioner no. 2, who is his father and natural guardian.

8. Rule nisi was issued to respondent no. 3 by this Court to produce the corpus Master Aarav Shukla on 17.1.2020 and petitioner no. 2 deposited Rs. 20,000/- as charges for production of the child in registry which is payable to petitioner no. 1, on his appearance before the court, however, respondent no. 3 did not produce the child before the court and filed a SLP before Hon'ble Apex Court against rule nisi issued vide order dated 17.1.2020 which was decided by Hon'ble Apex Court vide order dated 11.3.2022 with observation that "notice was issued in this SLP only to explore possibility of settlement between the parties. The matter was referred to mediation centre. We are informed by the Mediation Centre that the parties could not arrive at a settlement. There is no reason to interfere with the order passed by High Court issuing notice. Special Leave Petition is accordingly, disposed of. Pending application(s), if any, shall stand disposed of. We make it clear that we have not expressed any opinion on the merits of the case. We are informed that the High Court did not hear the habeas corpus petition in view of the pendency of this Special Leave Petition before this Court. The High Court is requested to dispose of the habeas corpus petition expeditiously."

9. From perusal of record it appears that after disposal of SLP filed by respondent no. 3, the corpus was not produced by respondent no. 3 before this Court. The respondent no. 3 appeared in present petition on 22.4.2022 through counsel Sri Azad Khan and counter affidavit was filed by her on 30.5.2022. A rejoinder affidavit was filed by the petitioner no. 2 with a view to counter the averments made in counter affidavit, thus, the pleadings have been duly exchanged between the parties.

10. Learned counsel for the petitioners based his submissions on the basis of pleadings made in the writ petition. He further submitted on the basis of averments made in rejoinder affidavit filed that the entire agenda of respondent no. 3 is to alienate the minor child from the petitioner no. 2 and indulge in parental alienation in the same way that she has indulged in intercontinental parental abduction of petitioner no. 1. The allegations made against petitioner no. 2 in counter affidavit filed on behalf of respondent no. 3 are scandalous and shocking. The respondent no. 3 has entangled petitioner no. 2 in many cases with false and concocted allegations. Petitioner no. 2 has filed a divorce petition in the court of Principal Judge, Family Court, G.B. Nagar and subsequently filed a divorce suit in U.S. Court. Learned Family Judge in India has not passed any order in ante suit injunction restraining petitioner no. 2 from pursuing the petitioner's case in U.S. Court and pending divorce petition in the Family Court, G.B. Nagar. Petitioner no. 2 went out of his way to pay for the air tickets of respondent no. 3 to travel to U.S.A. to meet the petitioners and copy thereof has been filed as Annexure P-3 with rejoinder affidavit. The counter affidavit has been filed by the respondent no. 3 is based of unfounded facts and concocted allegations. The minor child Aarav Shukla ought to be repatriated back in compliance of the order dated 24.12.2020 passed by Superior Court of Washington, King County, U.S.A.. Respondent no. 3 had filed a suit seeking ante suit injunction against petitioner no. 2 in Noida District Court, U.P. for pursuing the divorce and custody

proceedings filed by the petitioner no. 2 in U.S. by concealing various documents and important facts from the court and got an order dated 16.4.2022 passed therein by suppressing material facts.

11. In the present case minor child has been removed from his native country, U.S. to India and therefore it would be in the interest and welfare of the minor to return its native country as the child has not developed roots in India and no harm would be caused to the minor child on his return. Petitioner no. 2 has been a caring from the very beginning and some photographs are filed showing petitioners in the company of each other to fortify this claim.

12. Per contra, learned counsel for the respondent no. 3 vehemently opposed the prayer made in present habeas corpus petition and submitted that the respondent no. 3 is a victim of domestic violence and matrimonial cruelty to which she was subjected by the petitioner no. 2 and his family members. She visited U.S. to live with petitioner no. 2 and a child was born to them in U.S., however, due to non cooperating attitude, high handedness, carelessness and ill-treatment meted out to her, she was forced to leave the place of petitioner no. 2 in U.S. along with her minor child. Respondent no. 3 along with his minor child, being mother and natural guardian of minor child who was around two years of age, left U.S.A. along and presently her minor child is aged around 5-6 years and cannot be given to custody of petitioner no. 2, his father. Petitioner no. 2 cannot claim that welfare and interest of the child will be more safe and secure in his custody by removing him from custody of his mother. The petitioner no. 2 is not fulfilling his obligations with regard to his wife as well as his son. Respondent no. 3 had lodged an F.I.R. on 14.4.2021 under Sections 498-A, 323, 506, 406, 342, 313, 351 IPC and Section ¾ of D.P. Act, against petitioner no. 2 and his parents at Greater Noida, District G.B. Nagar in which necessary facts and stand of respondent no. 3 are enumerated. She had also filed complaint under Section Domestic of Violence Act against petitioner no. 2. Petitioner no. 2 and his family members filed separate writ petitions with prayer to quash the said first information report lodged against them by respondent no. 3 but same was dismissed vide order dated 10.6.2022 passed by the Division Bench of this Court. Respondent no. 3, with prior consent of petitioner no. 2 opt to join the college in U.S. where they moved together in February, 2015, on dependent visa. Petitioner no. 2 persuaded to resign from the company in which she was working to visit U.S.A. with a view to pursue her higher studies in M.S. Degree course to enhance her skills and employability. She secured admission in Pepperdine University with 50% scholarship in the U.S.A., however, contrary to his assurances and undertaking the petitioner no. 2 did not bear the financial burden of her higher studies in U.S.A. and she had to depend on her parents for her financial assistance who subsequently transferred Rs. 10,0000/- for her tuition fees, however, she could not continue her studies on account of pregnancy and she decided to take break from the study for a year with consent of petitioner no. 2 and thus, she put her studies on hold. On September, 2017, petitioner no. 2 moved to Seattle from Las Angeles because of the news of offer to respondent no. 3 in Microsoft and on 17.12.2017 she gave birth to a male child at Evergreen Health Medical Centre, Kirkland, Washington. The stay of

respondent no. 3 in U.S. became verbatim due to high handedness and hostile attitude of petitioner no. 2. At one point of time she was not having any money with her. Her credit card was blocked by petitioner no. 2 and he was not extending any financial support to her. He further submits that Section 6(A) of Hindu Minority and Guardianship Act provides that the mother is natural guardian after the father and in addition to that proviso to Section 6-A provides that custody of minor child who has not completed age of five years shall ordinarily be with the mother. He lastly concluded that corpus or petitioner no. 1 lies with respondent no. 3 who is no other than biological mother for petitioner no. 1 and custody of minor with his mother cannot be permitted as illegal. The claim of petitioner no. 2 that petitioner no. 1 is supposed to be with petitioner no. 2 is wrong and not legally tenable, rather his uncaring and irresponsible conduct towards the petitioner no. 1 demonstrates his absenteeism and neglect which under law will occasion the the guardianship of the mother therefore writ petition is liable to be dismissed in total.

13. He further submitted that petitioner no. 2 is engaged in practicing forum shopping which is deprecated by Hon'ble Apex Court. Petitioner no. 2 has filed a petition for divorce before Family Court, G.B. Nagar and thereafter filed a suit for divorce after returning to U.S.A. in U.S. court also, thus he approached two different courts in two National Jurisdiction for litigating the same subject matter. Hon'ble Apex Court in Union of India Vs. Cipla Ltd. (2017) 5 SCC 262, held that court is required to adopt a functional test vis-a-vis the litigation and the litigant. What has to be seen is whether there is any functional similarity in the proceedings between one court and another or whether there is some sort of subterfuge on the part of the litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not. Prior to switching over to U.S., respondent no. 3 was qualified MBA and was working with Yamaha Motors as Sr. HR Executive, however, on persuation of petitioner no. 2 she resigned the company on 30.1.2015 and ultimately left her employment at Delhi and thereafter both spouse moved to U.S.A. on 7.2.2015 on dependent visa. Petitioner no. 1 was faced with abandonment and empowerment owing to which she could not her ends meet in alien country and therefore was left with no option but to return back to India where she could live wit her parents who could provide her and infant basic amenities of life and above all love and affair which was denied to her by the petitioner no. 2. The petitioner no. 2 had met corpus in presence of respondent no. 3 at Greater Noida at the instance of Family Court on 14.12.2019 but he has deliberately concealed this material fact in present habeas corpus petition. In any manner the custody of petitioner no. 1 with his mother cannot be presumed or treated as unlawful and therefore, custody of corpus may not be changed in favour of petitioner no. 2.

14. Hon'ble Apex Court in three Judges Bench judgment in **Tejaswini Gaud and Ors. Vs. Shekhar Jagdish Prasad Tewari and Ors., (2019) 7 SCC 42**, held that writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. when the guardian of a minor is wrongly deprived of the custody of the child, a writ can be sought to be issued. When a minor is detained by

someone who does not have the legal custody of the child, which will be considered as illegal detention for applying the writ, in such a situation the restoration of custody is to be done from a person who is not a legal or natural guardian of the child, the writ can be applied. The Hon'ble Apex Court in paragraph nos. 21, 22, 26 and 27, observed as under:-

"21. Custody of the child – removed from foreign countries and brought to India:- In a number of judgments, the Supreme Court considered the conduct of a summary or elaborate enquiry on the question of custody by the court in the country to which the child has been removed. In number of decisions, the Supreme Court dealt with habeas corpus petition filed either before it underArticle 32of the Constitution of India or the correctness of the order passed by the High Court in exercise of jurisdiction underArticle 226of the Constitution of India on the question of custody of the child who had been removed from the foreign countries and brought to India and the question of repatriation of the minor children to the country from where he/she may have been removed by a parent or other person. In number of cases, the Supreme Court has taken the view that the High Court may invoke the extraordinary jurisdiction to determine the validity of the detention. However, the Court has taken view that the order ofthe foreign court must yield to the welfare of the child. After referring to various judgments, in Ruchi Majoo6, it was held as under:-

"58. Proceedings in the nature of habeas corpus are summary in nature, where the legality of the detention of the alleged detenu is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction. A High Court may, therefore, invoke its extraordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the Court views the rival claims, if any, to such custody.

59. The Court may also direct repatriation of the minor child to the country from where he/she may have been removed by a parent or other person; as was directed by this Court in Ravi Chandran (2010) 1 SCC 174 and Shilpa Aggarwal (2010) 1 SCC 591 cases or refuse to do so as was the position in Sarita Sharma case (2000) 3 SCC 14. What is important is that so long as the alleged detenu is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ court's jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detenu is within its territorial jurisdiction."

22. After referring to various judgments and considering the principles for issuance of writ of habeas corpus concerning the minor child brought to India in violation of the order of the foreign court, in Nithya Anand, it was held as under:-

Ruchi Majoo v. Sanjeev Majoo(2011) 6 SCC 479 7Nithya Anand Raghavan v. State (NCT of Delhi) (2017) 8 SCC 454 "46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and

circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised."

26. After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, Lahari Sakhamuri v. Sobhan Kodali2019 (5) SCALE 97education, intellectual development and favourable surroundings, in Nil Ratan Kundu, it was held as under:-

"49.In Goverdhan Lal v. Gajendra Kumar, AIR 2002 Raj 148 the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party.Section 6of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

50. Again, inM.K. Hari Govindan v. A.R. Rajaram, AIR 2003 Mad 315 the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

51.In Kamla Devi v. State of H.P. AIR 1987 HP 34 the Court observed:

"13. ... the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other." 9Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing

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

27. Reliance was placed upon Gaurav Nagpal, where the Supreme Court held as under:-

"32. In McGrath, (1893) 1 Ch 143, Lindley, L.J. observed: (Ch p. 148) The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded." (emphasis supplied) ……

50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis 10Gaurav Nagpal v. Sumedha Nagpal(2009) 1 SCC 42on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mausami Moitra Ganguli case (2008) 7 SCC 673, the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word "welfare" used inSection 13of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases."

15. Learned counsel for the petitioner has drawn attention of this Court towards the supplementary affidavit filed on 25.3.2021 wherein it is stated that the corpus is a citizen of U.S.A., by virtue of his birth in that country and in accordance with laws prevalent in that country and the respondent no. 3 has illegally detained him without any provision of law and it defines his right. Petitioner no. 2 filed a Declaration about Child Custody Jurisdiction (UCCJEA) along with application seeking parenting plan before Superior Court of Washington, County of King, U.S.A., in the month of September, 2020 and a copy of Declaration about Child

Custody Jurisdiction has been annexed as Annexure SA-3 to the supplementary affidavit. Summons were duly received by respondent no. 3 issued by Superior Court of Washington, County of King, USA but she did not pay to the summon of court concerned. Well-Child Visits for Infant and Young Children in U.S.A. is to be followed by all the parents failing which they will be liable to be punished in respect of child till he attains the age of five years.

16. Learned counsel for the petitioner cited various judgments of Hon'ble Apex Court and High Courts in support of his/her submissions in ***Jeewanti Pandey Vs. Kishan Chandra Pandey, 1981 (4) SCC 517, Smt. Surindar Kaur Sandhu Vs. Harbax Singh Sandhu And Anr., 1984 (3) SCC 698, Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw and Anr., 1987 (1) SCC 42, Mr. Paul Mohinder Gahun Vs. Mrs. Selina Gahun, 2006 (130) DLT 524, Aviral Mittal Vs. The State and Anr., 2009 (112) DRJ 635, Shilpa Aggarwal Vs. Aviral Mittal & Anr., 2010 (1) SCC 591, Dr. V. Ravi Chandran Vs. Union of India, 2010 (1) SCC 174, Sondur Gopal Vs. Sondur Rajini, (2013) 7 SCC 426, Arathi Bandi Vs. Bandi Jagadrakshaka Rao & Ors., (2013) 15 SCC 790, Surya Vadanam Vs. State of Tamilnadu & Ors., (2015) 5 SCC 450, Nithya Anand Raghavan Vs. State of NCT of Delhi, (2017) 8 SCC 454, Tippa Srihari Vs. State of A.P., 2018 SCC Online Hyd 123, Ganamukkala Sirisha Vs. Tippa Srihari, MANU/SCOR/239343/2019, Lahari Sakhamuri Vs. Sobhan Kodali, (2019) 7 SCC 311, Varun Verma Vs. State of Rajasthan, 2019 SCC Online Raj 5430, Yashita Sahu VS. State of Rajasthan & Ors., (2020) 3 SCC 67, Tejaswini Gaud Vs. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42, Nilanjan Bhattacharya Vs. The State of Karnataka, 2020 SCC Online SC 928, Ghadian Harshavardhan Reddy Vs. State of Telangana & Ors., MANU/TK/1033/2021, Vasudha Sethi Vs. Kiran V. Bhaskar, 2022 SCC Online SC 43, Rohith Thammana Gowda Vs. State of Karnataka & Ors., 2022 SCC Online SC 937, Rajeswari Chandrasekar Ganesh Vs. State of Tamil Nadu, 2022 SCC Online SC 885 and Abhinav Gyan Vs. State of Maharashtra & Anr., Crl. Writ Petition No. 693 of 2021***. Their main thrust was on decision of Apex Court in Yashita Sahu's case (supra) as this case was also related to custody of minor child who was born in U.S.A. and wife of the petitioner brought the child in India in violation of orders of jurisdictional court in U.S.A.. Yashita Sahu (the appellant) and Varun Verma (respondent) got married on 30.5.2016 in India. Husband was already working in U.S.A. The wife accompanied the husband to U.S.A. on 17.7.2016. A daughter named Kiyara Verma was born to the couple on 3.5.2017. She is citizen of U.S.A.. Relationship between husband and wife got strained and they make various allegations and counter allegations against each other. Wife applied for an emergency protection order on 25.8.2018 to the Norfolk Juvenile and Domestic Relations District Court praying for her protection and an ex-parte preliminary protection order was passed against the husband. Thereafter on 29.8.2018, the wife instituted a petition in the same Court seeking sole custody of the minor child. She also filed a petition praying that husband be directed to give monitory support to her and the minor child. An order was passed by the court on 26.9.2018 in terms of agreement reached between the parties. The wife along with child left USA and came to India on 30.9.2018 after few days of passing of order dated 26.9.2018. The husband on

coming to know that wife along with their child had left the USA for India, filed a motion for emergency relief before Norfolk Court on 2.10.2019. The ex-parte order was passed in favour of the husband whereby Norfolk Court granted sole legal and physical custody of the child to the husband and directed the wife to return to USA along with their child but she did not comply the order of Norfolk Court and a warrant was also issued against her for violation of order dated 26.9.2018 of Norfolk Court. The husband filed a petition for writ of habeas corpus before Rajasthan High Court for production of a minor child. High Court on 1.7.2019 directed the wife to return to USA along with her minor daughter within a period of six weeks to enable jurisdictional court in USA to pass further orders in this regard in the proceedings already pending. Aggrieved by the order of Rajasthan High Court, wife has filed present appeal before Hon'ble Apex Court. Hon'ble Apex Court held that we reject contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary jurisdiction for the best interest of the child. Hon'ble Apex Court quoted judmgment of the court in ***Elizaeth Dinshaw Vs. Arvand M. Dinshaw and Ors., (1987) 1 SCC 42, Nithya Anand Raghavan Vs. State (NCT of Delhi) and Anr., (2017) 8 SCC 454 and Lahari Sakhamuri Vs. Sobhan Kodali, (2019) 7 SCC 311.*** Hon'ble Apex Court in the case of Yashita Sahu (supra) in paragraph no. 13, 16, 17, 18, 19 and 20, 21, 25, 31 and 32 of the said judgment observed as under:-

"Comity of Courts

13. In the fast shrinking world where adults marry and shift from one jurisdiction to another there are increasing issues of jurisdiction as to which country's courts will have jurisdiction. In many cases the jurisdiction may vest in two countries. The issue is important and needs to be dealt with care and sensitivity. Though the interest of the child is extremely important and is, in fact, of paramount importance, the courts of one jurisdiction should respect the orders of a court of competent jurisdiction even if it is beyond its territories. When a child is removed by one parent from one country to another, especially in violation of the orders passed by a court, the country to which the child is removed must consider the question of custody and decide whether the court should conduct an elaborate enquiry on the question of child's custody or deal with the matter summarily, ordering the parent to return the custody of the child to the jurisdiction from which the child was removed, and all aspects relating to the child's welfare be investigated in a court in his/her own country.

14. Reference in this regard may be made to the judgment in Elizabeth Dinshaw (supra) wherein this Court was dealing with a case where the wife was an American citizen whereas the husband was a citizen of India. They got married in America and a child was born to them in the year 1978. In 1980, differences arose between the couple and the wife filed a petition for divorce. The jurisdictional court in America had dissolved the marriage by a decree of divorce on 23.04.1982 and by the same decree it was directed that the wife would have the care, custody and control of the child till he reaches the age of 18 years. The husband wasgiven visitation rights. Taking advantage of the weekend visitation rights,

the husband picked up the child from school on 11.01.1986 and brought him to India. The wife filed a petition underArticle 32of the Constitution of India before this Court. Not only was the petition entertained, but the same was allowed and we would like to refer to certain important observations of this Court in Para 8:

"8. Whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. We have twice interviewed Dustan in our chambers and talked with him. We found him to be too tender in age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with. The child is an American citizen. Excepting for the last few months that have elapsed since his being brought to India by the process of illegal abduction by the father, he has spent the rest of his life in the United States of America and he was doing well in school there.

In our considered opinion it will be in the best interests and welfare of Dustan that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent court in that country. We are also satisfied that the petitioner who is the mother, is full of genuine love and affection for the child and she can be safely trusted to look after him, educate him and attend in every possible way to his proper upbringing. The child has not taken root in this country and he is still accustomed and acclimatized to the conditions and environments obtaining in the place of his origin in the United States of America. The child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child in someschool in Pune. The conduct of the father has not been such as to inspire confidence in us that he is a fit and suitable person to be entrusted with the custody and guardianship of the child for the present." In V. Ravi Chandran (Dr.) (2) vs. Union of India (UOI) and Ors.5 it was held as follows:

"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own

country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interest of the child…." 5 (2010) 1 SCC 174 15. In Nithya Anand Raghavan (supra), this Court took the following view::-"42. The consistent view of this Court is that if the child has been brought within India, the courts in India may conduct: (a) summary inquiry; or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign court. In an elaborate inquiry, the court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a preexisting order of the foreign court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native State." Thereafter, another bench of this Court in Lahari Sakhamuri (supra), while interpreting the judgment in Nithya Anand Raghavan (supra) held as follows :- "41…the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child etc., cannot override the consideration of the best interest and the welfare of the child and the direction to return the child to the foreignjurisdiction must not result in any physical, mental, psychological, or other harm to the child."

16. We are of the considered view that the doctrine of comity of courts is a very healthy doctrine. If courts in different jurisdictions do not respect the orders passed by each other it will lead to contradictory orders being passed in different jurisdictions. No hard and fast guidelines can be laid down in this regard and each case has to be decided on its own facts. We may however again reiterate that the welfare of the child will always remain the paramount consideration. Welfare of the child – the paramount consideration

17. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

18. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that

more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very vary of what is said by each of the spouses.

19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

20. The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

21. Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the childby frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks, and holidays. In cases like the present one where the parents are in two different continents effort should be made to give maximum visitation rights to the parent who is denied custody.

25. Nationality of the child The child is a citizen of USA by birth. Her father was already working in the USA when he got married. We are told that the mother had visited the USA once before marriage and when she got married it was done with the knowledge that she may have to settle down there. The child was born in a hospital in the USA and the mother did not come back to India for delivery which indicates that at that time the parents wanted the child to be a citizen of USA. Since the child is a citizen of USA by birth and holds a passport of that country, while deciding the issue of custody we have to take this factor into consideration.

31. There are various factors to be taken into consideration while deciding what is best in the interest of the child. No hard and fast rules can be laid down and each case has to be decided on its own merits. We are also not oblivious of the fact that when two parents are at war with each other it is impossible to provide a completely peaceful environment to the

child. The court has to decide what is in the best interest of the child after weighing all the pros and cons of both the respective parents who claim custody of the child. Obviously, any such order of custody cannot give a perfect environment to the child because that perfect environment would only be available if both the parents put the interest of the child above their own differences. Even if parents separate, they may reach an arrangement where the child can live in an environment which is reasonably conducive to her/his development. As far as the present case is concerned other than the age of the child nothing is in favour of the mother. She herself approached the jurisdictional court in Norfolk. She entered into an agreement on the basis of which a consent order was passed. She has violated that order with impunity and come back to India and, this is a factor which we have to hold against her.

32. In view of the above discussion, we are clearly of the view that it is in the best interest of the child to have parental care of both the parents, if not joint then at least separate. We are clearly of the view that if the wife is willing to go back to USA then all orders with regard to custody, maintenance etc., must be looked into by the jurisdictional court in USA. A writ court in India cannot, in proceedings like this direct that an adult spouse should go to America. We are, therefore, issuing directions in two parts. The first part will apply if the appellant wife is willing to go to USA on terms and conditions offered by the husband in his affidavit. The second part would apply if she is not willing to go to USA, how should the husband be granted custody of the child."

17. Hon'ble Apex Court ultimately taking into consideration and undertaking of the husband held that we feel it would be in the interest of the child if the mother herself accompanies the child to the USA. The appellant's wife may like to live in USA or not, and this is personal choice of the appellant's wife. However, if she goes back to USA along with child then she must comply with the orders of Norfolk Court. Obviously, she can apply for modification/vacation of the order, if so advised. In case, the wife goes back to USA it shall be responsibility of the husband to pay reasonable expenses for her entire travel and stay. If she expressed her willingness to go to USA along with child, husband shall purchase tickets for travel of the wife and minor child to the USA which journey will be performed on or before 20.2.2020 and it is wife's responsibility to obtain requisite travel document required by her to travel to USA by the said date. In case the wife does not inform the counsel for the husband within a week from the order that she is willing to go back to USA then it shall be presumed that she has no intention to go to USA along with child and in that event the wife shall hand over custody of minor child to the husband, if he travels to India otherwise the custody may be handed over to mother of the husband before Registrar General of High Court on a fixed date. Thereafter the husband shall make necessary arrangements for taking the child to USA accompanied by at least one of the husband parents. Husband shall ensure that child talks to his mother from video calling facilities such as whatsapp, skype etc. every day on a fixed time. Some other visitation rights were also granted to mother of the child.

18. Learned counsel for the respondent placed reliance on ***Prateek Gupta Vs. Shilpi Gupta and Ors., (2018) 2 SCC 309, Vivek Singh Vs. Romani Singh,***

(2017) 3 SCC 231, Ritika Sharan Vs. Sujoy Ghosh, 2020 SCC Online SC 878, Nithya Anand Raghavan Vs. State (NCT of Delhi) and Another, (2017) 8 SCC 454, Gaurav Nagpal Vs. Sumedha Nagpal, (2009) 1 SCC 42, Smriti Madan Kansagra Vs. Perry Kansagra, 2020 SCC Online SC 887 and Kanika Goel VS. State of Delhi Through Station House Officer and Another, (2018) SCC 578.

19. In Kanika Goel's (supra) case first marriage between the parties was performed in New Delhi as per Sikh rites i.e. Anand Karaj ceremony, and Hindu Vedik rites, whereas, the civil marriage ceremony was performed at Circuit Court of Cook Country, Illinois, U.S.A. to complete the formalities. The appellant mother after coming to India, filed a petition for divorce under Section 13(1) of Hindi Marriage Act,1955 ground of cruelty along with an application seeking a restrain order against husband/respondent for taking the minor child away from jurisdiction of Indian Courts. The husband (respondent no. 2) also filed a petition before Circuit Court, Illinois (U.S.) which court directed that the child was to be immediately returned to residence located in Cook Country, Illinois. Since the appellant's wife did not comply with the order of Circuit Court, respondent husband filed a writ petition before the High Court to issue a writ or habeas corpus and directed the appellant to produce the minor child and cause her return to the jurisdiction of the court in U.S.. The High Court by speaking judgment and order dated 16.11.2017 in favour of respondent no. 2, husband of appellant, after recording a finding that the paramount interest of the minor child was to return to USA, so that she could be in her natural environment. To facilitate the parties to have a working arrangement and to minimize inconvenience, the Division Bench of High Court issued certain directions like the return of respondent no. 2 (present appellant) with the minor child should be at the expense of the petitioner; their initial stage shicago, U.S.A. sholuld also be entirely funded and taken care of by the petitioner by providing a separate furnished accommodation from basic amentities coupled with internet connection etc. for the two of them in the vicinity of matrimonial home of the parties, wherein they have lived till December, 2016. In terms of direction contained in judgment dated 16.11.2017 petitioner Karan Goyal had filed the affidavit on 20.11.2017 wherein he undertook and consented to abide by all the conditions imposed upon him so that respondent no. 2 could return to USA with the minor child. Again on 6.12.2017 another order was passed by High Court finally disposed of, on certain specified terms.

20. However, being aggrieved by the judgment of High Court, the appellant being mother of the minor child has approached Apex Court by way of Special Leave under Article 236 of the Constitution. The appellant being mother of the child has assailed the decision of the High Court for having overlooked rudimentary princples governing issue of invoking jurisdiction to issue a writ of habeas corpus in respect of a minor child who was in lawful custody of her mother. According to appellant, High Court has completely glossed over or to put it differently, misconstrued and mis applied the principles of paramount interest of the minor girl child of tender age of about four years. Similarly the High Court has glassed doctrine of choice and dignity of the mother of a minor girl child keeping in

mind the exposition in ***K.S. Puttaswami Vs. Union of India, (2017) 10 SCC 1***. Hon'ble Apex Court had given a through and meticulous consideration of the impugned order passed by High Court including reasons given therein and noticed that High Court has taken note of all the relevant decisions including latest three Bench decisions in Nithyanand (Supra) which had occasion to exhaustively analyse the earlier decision on the subject matter under consideration. The exposition in the earlier decisions has been again reinstated and reaffirmed in the subsequent decision of this Court in ***Prateek Vs. Shilpi, (2018) SCC 309.*** In Nithya Raghvan's case (supra) this Court observed as under:-

"40. The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the preexisting order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation-be it a summary inquiry or an elaborate inquiry-the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition."

(emphasis supplied)

Again in paragraph 42, the Court observed thus:

"42. The consistent view of this Court is that if the child has been brought within India, the courts in India may conduct: (a) summary inquiry; or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the court may deem it fit to order return of the child to the country from where he/she was removed

unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign court. In an elaborate inquiry, the court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native State."

(emphasis supplied),

"67. The facts in all the four cases primarily relied upon by Respondent 2, in our opinion, necessitated the Court to issue direction to return the child to the native state. That does not mean that in deserving cases the courts in India are denuded from declining the relief to return the child to the native state merely because of a pre-existing order of the foreign court of competent jurisdiction. That, however, will have to be considered on case to case basis - be it in a summary inquiry or an elaborate inquiry. We do not wish to dilate on other reported judgments, as it would result in repetition of similar position and only burden this judgment.

xxx xxx xxx

69. ..... The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. Again the summary jurisdiction be exercised only if the court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interests and welfare of the child."

(emphasis supplied)

20. At this stage, we deem it apposite to reproduce paragraphs 70 and 71 of the reported judgment, which may have some bearing on the final order to be passed in this case. The same read thus:

"70. Needless to observe that after the minor child (Nethra) attains the age of majority, she would be free to exercise her choice to go to the UK and stay with her father. But until she attains majority, she should remain in the custody of her mother unless the court of competent jurisdiction trying the issue of custody of the child orders to the contrary. However, the father must be given visitation rights, whenever he visits India. He can do so by giving notice of at least two weeks in advance intimating in writing to the appellant and if such request is received, the appellant must positively respond in writing to grant visitation rights to Respondent 2 Mr Anand Raghavan (father) for two hours per day twice a week at the mentioned venue in Delhi or as may be agreed by the appellant, where the appellant or her representatives

are necessarily present at or near the venue. Respondent 2 shall not be entitled to, nor make any attempt to take the child (Nethra) out from the said venue. The appellant shall take all such steps to comply with the visitation rights of Respondent 2, in its letter and spirit. Besides, the appellant will permit Respondent 2 Mr Anand Raghavan to interact with Nethra on telephone/mobile or video conferencing, on school holidays between 5 p.m. to 7.30 p.m. IST.

21 In prateek Gupta Vs. Shilpi Gupta (supra), Hon'ble Apex Court in paragraph nos. 49 to 51, has observed as under:-

"49. The gravamen of the judicial enunciation on the issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of "intimate contact and closest concern" notwithstanding. Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which a child is removed are factors which deserve notice in deciding the issue of custody and repatriation of the child, it is no longer res integra that the ever-overriding determinant would be the welfare and interest of the child. In other words, the invocation of these principles/doctrines has to be judged on the touchstone of myriad attendant facts and circumstances of each case, the ultimate live concern being the welfare of the child, other factors being acknowledgeably subservient thereto. Though in the process of adjudication of the issue of repatriation, a court can elect to adopt a summary enquiry and order immediate restoration of the child to its native country, if the applicant/parent is prompt and alert in his/her initiative and the existing circumstances ex facie justify such course again in the overwhelming exigency of the welfare of the child, such a course could be approvable in law, if an effortless discernment of the relevant factors testify irreversible, adverse and prejudicial impact on its physical, mental, psychological, social, cultural existence, thus exposing it to visible, continuing and irreparable detrimental and nihilistic attenuations. On the other hand, if the applicant/parent is slack and there is a considerable time lag between the removal of the child from the native country and the steps taken for its repatriation thereto, the court would prefer an elaborate enquiry into all relevant aspects bearing on the child, as meanwhile with the passage of time, it expectedly had grown roots in the country and its characteristic milieu, thus casting its influence on the process of its grooming in its fold.

50. The doctrines of `intimate contact' and `closest concern' are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom, etc. with the portent of mutilative bearing on the process of its overall growth and grooming.

51. It has been consistently held that there is no forum convenience in wardship jurisdiction and the peremptory mandate that underlines the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration."

22. Hon'ble Apex Court finally observed in paragraph nos. 33 and 34 as under:-

"33. The High Court in the present case focused primarily on the grievances of the appellant and while rejecting those grievances, went on to grant relief to respondent No.2 by directing return of the minor girl child to her native country. On the totality of the facts and circumstances of the present case, in our opinion, there is nothing to indicate that the native language (English) is not spoken or the child has been divorced from the social customs to which she has been accustomed. Similarly, the minor child had just entered preschool in the USA before she came to New Delhi along with her mother. In that sense, there was no disruption of her education or being subjected to a foreign system of education likely to psychologically disturb her. On the other hand, the minor child M is under the due care of her mother and maternal grandparents and other relatives since her arrival in New Delhi. If she returns to US as per the relief claimed by the respondent No.2, she would inevitably be under the care of a Nanny as the respondent No.2 will be away during the day time for work and no one else from the family would be there at home to look after her. Placing her under a trained Nanny may not be harmful as such but it is certainly avoidable. For, there is likelihood of the minor child being psychologically disturbed after her separation from her mother, who is the primary care giver to her. In other words, there is no compelling reason to direct return of the minor child M to the US as prayed by the respondent No.2 nor is her stay in the company of her mother, along with maternal grandparents and extended family at New Delhi, prejudicial to her in any manner, warranting her return to the US.

34. As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom etc. interfering with his/her overall growth and grooming and whether continuance there will be harmful. This has been the consistent view of this Court as restated in the recent three Judge Bench decision in Nithya Anand Raghavan (supra), and the two Judge Bench decision in Prateek Gupta (supra). It is unnecessary to multiply other decisions on the same aspect.

23. With above observations, the Hon'ble Apex Court set aside the impugned order passed by the High Court and disposed of the writ petition in the light of observations made in the judgment.

24. This was a three Judge Bench judgment in which reliance was placed on Nithya Anand Raghavan (supra), Prateek Gupta (supra) and ***Shilpa Aggarwal Vs. Aviral Mittal (2010) 1 SCC 591 and V. Ravi Chandran Vs. Union of India, (2010) 1 SCC 174***. In this judgment, Hon'ble Apex Court in paragraph no. 23 held as below:-

"23. In a case such as the present one, we are satisfied that return of minor

Adithya to United States of America, for the time being, from where he has been removed and brought here would bein the best interest of the child and also such order is justified in view of the assurances given by the petitioner that he would bear all the traveling expenses and make living arrangements for respondent no. 6 in the United Sates of America till the necessary orders are passed by the competent court; that the petitioner would comply with the custody/parenting rights as per consent order dated June 18, 2007 till such time as the competent court in United States of America takes a further decision; that the petitioner will request that the warrants against respondent no. 6 be dropped; that the petitioner will not file or pursue any criminal charges for violation by respondent no. 6 of the consent order in the United States of America and that if any application is filed by respondent no. 6 in the competent court in United States of America, the petitioner shall cooperate in expeditious hearing of such application. The petitioner has also stated that he has obtained confirmation from Martha Hunt Elementary School, Murphy, Texas, 75094, that minor son Adithya will be admitted to school forthwith.

25. Hon'ble Apex Court finally concluded that there was no compelling reasons to direct return of the minor girl child who was lying in custody of her mother to U.S. nor his stay in company of her mother or other family members was prejudicial in any manner warranting to her return to USA. as expounded in recent decisions was not applicable in facts of the case. As observed in Nitya Anand (supra) the court must take into account totality of the facts and circumstances while ensuring the best interest of the minor child. Further the doctrine of intimate and cogent concern are of persuasive relevance only when the child is uprooted from its native country and taken to place to uncounter alien environment, any custom etc. with the portent of mutuality bearing in process of its over all growth and moving. The minor child had just enter pre-school in the USA before she came to New Delhi along with her mother. She was at that time of three years of age. There was no disciption of her education or being subjected to a foreign system of education likely to psycholigically distrubed her. On the other hand, minor child is under due care of her mother and maternal grand parents and other relatives seeks her arrival in New Delhi. If she returns to U.S., as per, the relief claimed by the respondent no. 2, she would inevitably be under the care of a nani as the respondent no. 2 will be away during the time for work and no one else from the family would be there at home to look after her. Placing her under a trained Nani may not be harmful as such but its is certainly avoidable. For, there is likelihood of the minor child being psychologically disturbed after her separation from her mother, who is the primary care given to her.

26. Learned counsel for the petitioner placed reliance on three Judge Bench Judgment in Dr. V. Ravi Chandran (supra), wherein Hon'ble Apex Court held that court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with matter summarily order a parents to return the custody of the child to the country from which the child was removed and all aspects relating to child welfare be investigated in a court in his own country. Should the court take a view that an

elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and to go into all relevant aspects of welfare of the child including stability and security, loving and understanding, care and guidance and full development of the child's character, personality and talents, while doing so the order of foreign court as to which custody may be given due weight; the weight and persuasive effect of foreign judgment must depend on circumstances of each case, however, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and must intimate contact with the issues arisen in the case, court may leave the aspects relating to welfare of the child to be investigated by the court in his own native country as that could be in the best interest of the child. The child is an American citizen born and brought up in U.S.A., spent his initial years. Keeping in view the child welfare and happiness and in his best interest, parties have obtained a series of consent orders concerning his custody/parenting rights, maintenance etc. from the court of competent jurisdiction in America. Return of minor child to the U.S., for the time being, from where he has been removed and brought to India, would be in the child best interest.

27. In above case child was born on 1.7.2022 in U.S.A.. Habeas corpus petition was filed by father of the child for the production of his minor son Aditya and for handing over the custody and his passport to him. On 28.8.2009, Hon'ble Apex Court passed an order requesting Director, CBI to produce him before the court due to fact that despite best efforts made by police officers of different states, child and his mother could not be traced and their whereabouts could not be found for more than two yeas since the notice was issued by the Apex Court. C.B.I. issued look out notices on all India basis through the heads of India police and ultimately child and mother were traced on Chennai on 24.10.2009 and they were produced at the residential office of one of Hon'ble Judges of the Apex Court hearing the matter on 25.10.2009. The petitioner was permitted to meet child for one hour. Pleadings were exchanged. During course of hearing it was found that petitioner and respondent no. 6 were got married on 14.12.2008 at Andhra Pradesh. On 1.7.2022 a child was born in U.S.. In month of July, 2023, respondent no. 6, mother approached New York Supreme Court for divorce and dissolution of marriage. The consent order governing the issues of custody and guardianship of minor was passed by the Hon'ble New York Supreme Court on 18.4.2005. The court granted joint custody of the child to the petitioner and respondent no. 6 and it was stipulated in the order that to keep the other party informed about the whereabouts of the child. On 28.7.2005 a separation agreement was entered between the spouse for distribution of marital property, spouse maintenance and child support. As regards the custody of the minor son and parenting time, the petitioner and respondent no. 6 consented to order dated 18.4.2005. On 8.9.2005 the marriage between petitioner and respondent no. 6 were dissolved by the New York Supreme Court and child custody order dated 18.4.2005 was incorporated in that order. The Family Court of State of New York on 18.6.2007 ordered that the parties shall share joint legal and physical custody of the minor child and the child shall reside in Allen, Texas. The parties shall alternate share

physical custody on a weekly basis with the exchange being on Friday at the end of the school day or at that time when school would ordinarily let out in the event that there is no school on Friday, therefore from perusal of facts of Dr. V. Ravi Chandran's case (supra) it is crystal clear that there were number of consent orders passed by competent court in U.S. in presence of the spouse prior to 28.6.2007 when respondent no. 6 brought minor to India informing the petitioner that she would be residing with her parents in Chennai, whereas in present case there was no order regarding custody of the child, joint parenting plan before the alleged parental abduction of child by his mother, respondent no. 3, therefore, ratio of V. Ravi Chandran's case is not likely to extend benefit to present petitioner in facts and circumstances of the present case.

28. In Yashita Sahu (supra) case, the guiding force behind the reasoning of Hon'ble Apex Court was that in that case since the wife brought the minor to India in violation of the orders of jurisdictional court in USA, her custody of the child cannot be said to be strictly legal and the girld child Kiyara Verma was born to couple Yashita Verma and Varun Verma on 3.5.2017 in U.S.. She was citizen of U.S.A.. The wife had filed a petition before Norfolk Court praying for her protection and an ex-parte primary protection order was passed against the respondents thereafter she had instituted a petition in same court seeking sole custody of the minor child. Wife, along with the child left USA and came to India on 30.9.2018 and after knowing this fact husband filed a motion for emergency relief before Norfolk Court on 2.10.2019 and an ex-parte order was passed in favour of the husband whereby Norfolk Court granted sole legal and physical custody of the minor child to the husband and directed the wife to return to USA along with the child. A warrant was also issued against wife for violating the order dated 26.9.2018 of the Norfolk Court in terms of the agreement reached between the parties which was made part of the order wherein it was provided that joint legal custody and shared physical custody of the child was given to the parents, with each parent being given individual parenting time, whereas in present case when the Respondent No. 3 left U.S.A. along with child Aarav Shukla, there was no binding order of U.S. Court was in existence. Only allegations against her is that she had taken the child along with her from U.S.A. to India at her parental place without consent or knowledge of the petitioner no.2, her husband. In habeas corpus petition, there is no description of any U.S. Court order with regard to custody of the child except the legal notice issued by Patrick F. Shearer, Attorney of Law, in USA to the respondent no. 3 dated 26.3.2019 wherein he has addressed the respondent no. 3 Ms. Esha Shukla and asked her not to contact Mr. Abhishek Shukla with harassing disparaging remarks and allegations. He has also asked her to cease any contact with Mr. Shukla, both directly or indirectly, however, in Rejoinder affidavit he has stated that pursuant to filing of the writ petition before this Court petitioner no. 2 filed a petition before the Superior Court of Washington, County King, U.S.A. seeking dissolution of marriage along with custody of the minor son, who is a U.S. citizen, U.S. Court issued summon to respondent no. 3, wife of the petitioner no. 2. On 24.10.2020 respondent no. 3 was served with summons of divorce and custody petition and in this regard petitioner no. 2 filed a proof of service being effected upon respondent no. 3(wife) in India, however, pursuant to

receipt of notice by her, she issued a notice through her counsel dated 18.11.2020 calling upon petitioner no. 2 husband to withdraw the divorce and custody case filed in U.S. Court and informed that she had also filed an anti suit injunction before Noida District Court. Since respondent no. 3 failed to appear after being affected service upon her, the U.S. Court vide order dated 24.12.2020 granted the motion in favour of petitioner no. 2 and proceeded in the case without notice to the respondent no. 3. U.S. Court vide another order dated 24.12.2020 directed that respondent no. 3 (mother) shall return the child to the U.S., native State of the minor child i.e. State of Washington within 30 days of the passing of the said order and the petitioner no. 1 i.e. child shall live with his father i.e. petitioner no. 2 and the mother shall exercise appropriate visitation rights with the minor child in the State of Washington, up to ten days as she provides three weeks' notice and does not remove the child from the State of Washington. The U.S. Court also passed an order dated 24.12.2020 directing that respondent no. 3, mother, shall not remove the child from State of Washington but for summer visitation or by agreement of the parties. According to the petitioner U.S. Court is the Court of competent jurisdiction and having the closest concern with the issue of custody and welfare of the minor child and, therefore, this Court has to exercise its summary jurisdiction and repatriate the minor child back to U.S. Court where U.S. Court would finally determine as to what would be the best interest and welfare of the minor child.

29. The petitioner no. 2's stand is that admittedly the minor child is a U.S. citizen and should not be deprived of his status and available as well as the facilities such as social security available to a minor child being a U.S. citizen. The parties had intended to give birth to the minor child in U.S. and therefore it is only the U.S. Court which had to determine as to what is in the best interest and welfare of the minor child. He has filed copy of personal service of notice of divorce and custody petition filed by the petitioner no. 2 on respondent no. 3, dated 26.2.2021, at her residential address in Greater Noida, U.P.. He has also filed a copy of parenting plan filed before Superior Court of Washington, King County, U.S.A. dated 18.12.2020 which is unilaterally signed by petitioner no. 2 and it is nowhere appearing signature of the mother of child namely Easha Shukla, the respondent no. 3. He has also filed a Declaration about Child Custody Jurisdiction before Superior Court of Washington, County of King, dated 18.12.2020 at Seatel City, Washington State, which is also signed by petitioner no. 2 with regard to custody of child Aarav Shukla, born on 12.7.2017 and this is admitted fact that prior to this, the child was taken away by his mother to India on 17.3.2019 and thereafter petitioner no. 2 has filed the divorce petition before Principal Judge, Family Court, G.B. Nagar. This version of petitioner no. 2 has been refuted by respondent no. 3 in counter affidavit that after alleged abduction of child by respondent no. 3, who is mother, petitioner no. 2 was not permitted to meet his son while he was in India in July and August, 2019 and December, 2019. In paragraph no. 12 of the counter affidavit it is specifically stated that petitioner no. 2 met petitioner no. 1 at very Small Greater Noida on 24.12.2019 in presence of respondent no. 3 prior to filing of present habeas corpus petition. In annexure no. 4 to the supplementary affidavit dated 25.3.2021, the parenting plan dated 18.12.2020 has been filed together with

King County Superior Court, Judicial Electronic Signature Page, Case No. 20-3-04720-5, Case Title Shukla Vs. Shukla, document title-Parenting Plan (final order), signed by Leonid Ponomarchuk dated December 24, 2020, the Commissioner, therefore, it appears that court concerned in U.S. has not passed any separate order regarding custody of child on 24.12.2020, however, the court has approved parenting plan filed by petitioner no. 2 on 18.12.2020 in which it is stated inter alia that mother shall not remove the child from Washington State but for summer visitation or by agreement of the parties, neither parents shall disparage the other, nor discuss any legal matters in front of the child. Mother shall return the child to U.S. with whom State of Washington within 30 days, entry of this order. This Court in order dated 26.7.2021 observed that "petitioner no. 2 submits that there is an order passed by Superior Court of Washington, King County dated 24.12.2020, but is not in a position to answer query of this Court that, when this order itself provides for disputes resolution and names and arbitrator or agency to carry out arbitration/mediation for dispute resolution and proceedings are according to learned counsel and proceedings are according to learned counsel for the petitioners are already under way before the concerned arbitrator, though he submits that respondent no. 3 is not appearing before the said arbitrator, how this petition is maintainable. List this case on 29.7.2021." However, the query made by this Court in order dated 26.7.2021 has not been replied by the petitioner no. 2 on subsequent dates of listing.

30. In present case every legal action was taken by the petitioner no. 2 before U.S. Court after departure of respondent no. 3 along with petitioner no. 1 from U.S.A. to India and that too after filing of present habeas corpus petition and all these proceedings are the ex-parte qua respondent no. 3. She has neither signed the joint parenting plan nor the Declaration as stated which has been approved by court's order dated 24.12.2020.

31. Dictum of Hon'ble Apex Court in Kanika Goel's case (supra), is more proximate to the facts and circumstances of the present case as in that case also the minor child is an U.S. citizen by birth and and grown up in her native country for over three years before she was brought to New Delhi by his biological mother. Father and mother of the child are of Indian origin but the father is domiciled in U.S.A. after marriage.

32. The mother in instant case had visited U.S. for studies in M.S. course and came back to India along with child after the relations between spouse became strained after birth of the child there. As the child was withdrawn from the country of his birth at tender age of one and 1/3 years, on totality of the facts and circumstances of the present case there is nothing to indicate that the child has been divorced from the social customs to which he has been accustomed. There is no statement of either of the petitioner that the child has received any sort of education in U.S.. It appears that immediate cause of marital discord was on the issue of keeping the child in child care and non signing of a cheque to meet out the expenses of daycare by petitioner no. 2, therefore, there is no question of disruption of his education from his movement from U.S. to India. However, this thing is obvious that on being directed to be transferred from India to U.S. and from custody of his mother to father, the child will be taken care of either

by a naini or by a daycare institution as the according to material on record father is presently residing alone in Washington, U.S. whereas the respondent no. 3 is residing with her parents where the child is being nurtured in maternal and maternal grand parental care. He might be aged around five years at present, therefore, it would be pertinent to observe that his roots have been developed in India rather than in U.S., in more unobstructed manner and for long time than in U.S., despite the fact that being born in U.S., he will be treated as U.S. citizen.

33. Keeping in view the totality of facts and circumstances of the case at anvil of binding judicial Authorities of Hon'ble Apex Court, it is not open to contend that custody of male minor child with his biological mother would be unlawful only due to the fact that mother had taken child from U.S.A., from the place of his father to her native place in India without intimate to or seeking consent of father. The child was only at around 1 and 1/3rd years of age at that time and he was supposed to reside in safe custody of his mother and the custody of minor child with mother is continuing from very inception, this court is not inclined to undertook detail and elaborate enquiry into the matter. Doctrine of intimate and closest concern are of persuasive relevance only when the child has uprooted from its native country and taking to a place to encounter alien environment, language, customs and surroundings etc.,which may have substantial bearing on the process of his over all growth and grooming. As the child was very tender age it cannot be supposed that he was segregated from social customs prevalent to U.S.A. to which he has been accustomed. He did not receive any schooling, education or care of any daycare institution in U.S.. On the contrary minor child is under due care of his mother and maternal grand parents and other relatives of maternal side since his arrival in Noida (India). There is no consent order with regard to custody of child by U.S court or any competent authority in U.S. even after alleged order dated 24.12.2020 which was passed by U.S. court with regard to custody of child long after his departure from U.S.. In this factual scenario this Court finds no compelling reason to direct return of minor child to U.S., as prayed by petitioner no. 2 nor his stay in the company of his mother along with maternal grand parents at Greater Noida is prejudicial to his interest in any manner warranting his return to U.S.. As the legal position is settled on the basis of catena of decisions of Hon'ble Apex Court that issue of custody of child in such type of cases ought not to be on the basis of rights of parties claiming custody of minor child but to focuss should stand on whether the factum of best interest of the minor child is to return to U.S. or otherwise. It cannot be said that continuance of custody of minor child with his mother in Iindia is in any manner prejudicial to his over all growth, nurturing or grooming of the child or in other words his continue custody with his mother in this country will be harmful to his over all interest. Petitioner no. 2, father of the child, has already filed a petition of dissolution of marriage before U.S. Court having jurisdiction in that behalf.

34. Be that as it may, in any manner whatsoever custody of minor child with his mother in present case cannot be held to be unlawful. It would be in fitness of things that custody of minor male child remain with his mother who is presently living at her native place in India until he attains the age of majority, or the court of competent

jurisdiction in U.S. or India, as the case may be, trying the custody of minor child orders to the contrary. However, visitation rights to father are admissible so that he may have access to minor child whenever he would visit India. If the U.S. court summons the respondent no. 3 with regard to any legal issue of custody of child, she is expected to appear before the court as the child is U.S. citizen by birth, however expenses of visit of respondent no. 3 along with the child and her stay in U.S. for appearing in legal proceedings will be born by petitioner no. 2 along with travel expenses incurred by her. The visitation right is being granted to petitioner no. 2, father of the child, as follows:-

(i)- whenever petitioner no. 2, Abhishek Shukla, is available in India, he shall respondent no. 3 by E-mail, or telephonically so that she can make the child available for meeting with the father at a mutual agreed and comfortable place for meeting between father and son, either in Greater Noida or in Delhi between 11:00 am to 5:00 pm on holidays when his school is closed, or between 5:30 pm to 7:30 pm on week days.

(ii) when father will be meeting child, they shall meet without any supervision. They shall meet and mother or her family members may appear there but will have sufficient distance from them so that they may not be able to over hear the conversation between father and son and any interference by respondent no. 3 or her family members will not be created.

(iii) When petitioner no. 2 in India, he may have communication/interaction with his minor son through video call, skype or whatsapp with the child at about 7:30 pm (IST) or any other mode online.

35. While granting aforesaid visitation right to father i.e. petitioner no. 2 is conducive to paramount interest of the child as interaction with the child by both parents is necessary and desirable for emotional and intellectual growth and grooming of the child. The respondent no. 3 will extend all cooperation to petitioner no. 2 so that visitation right granted to him in respect of the child are duly realised and complied with.

36. Accordingly, present habeas corpus petition stands dismissed with above observations and directions.

(2023) 6 ILRA 628
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Special Appeal No. 138 of 2021

Satyapal ...Appellant
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Ms. Atipriya Gautam, Sri Vinod Kumar Mishra

Counsel for the Respondents:
C.S.C.

A. Service Law – Appointment – Suppression of material information - The credibility, and/or, trustworthiness of such an employee who at the initial stage of the employment, i.e., while submitting the declaration / verification for a post made false declaration of having not being involved in a criminal case. The employer would be justified in not appointing such candidate, further, the employer cannot be compelled to continue/appoint, such an employee on the post. The candidate / employee cannot claim appointment,

and/or, continue on the post as a matter of right. (Para 12, 13, 14)

This Court in exercise of its discretionary jurisdiction u/Article 226 of the Constitution of India, would not sit in appeal on the discretion exercised by the employer in not offering appointment to the petitioner for suppression of material fact reflecting upon his character and credibility to the post of Sub-Inspector. (Para 15)

Special appeal dismissed. (E-4)

Precedent followed:

1. Avatar Singh Vs U.O.I. & ors., 2016 (8) SCC 471 (Para 6)

2. Satish Chandra Vs U.O.I. & ors., J.T. 2022 (9) SC 513 (Para 12)

3. Pawan Kumar Vs U.O.I., J.T. 2022 (5) SC 109 (Para 12)

4. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. & anr. Vs Anil Kanwariya, J.T. 2021 (9) SC 349 (Para 13)

Present appeal challenges order dated 18.02.2021, passed by an Hon'ble Single Judge dismissing appellant's writ petition, seeking direction to the respondents to send him for training and, thereafter, appoint him on the post of Sub-Inspector, pursuant to joint examination 2011.

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

1. Heard Sri Vinod Kumar Mishra, learned counsel for the appellant / petitioner and Sri Arimardan Singh Rajpoot, learned Chief Standing Counsel for the State.

2. The present intra court appeal is directed against the order dated 18 February, 2021, passed by the learned Single Judge, whereby, the petition filed by the appellant seeking direction to the respondents to sent him for training and, thereafter, appoint him on the post of Sub-Inspector, pursuant to joint examination 2011, came to be dismissed on merit, as well as, on the ground of delay.

3. The second respondent Uttar Pradesh Police Recruitment & Promotion Board, Lucknow (For short 'Board'), issued an advertisement inviting applications for the post of Sub-Inspector in 2011. The appellant/petitioner came to be selected for the post of Sub-Inspector Platoon Commander, pursuant to the select list dated 20 September, 2019, notified by the second respondent. Thereafter, appellant / petitioner appeared for medical examination on 11 November, 2018 and was declared successful. For document verification, petitioner filed a notary affidavit in November, 2018, before the competent authority, wherein, petitioner did not disclose the criminal case that was lodged against the petitioner and that petitioner faced trial in a criminal case.

4. It appears that respondents non-suited the petitioner for having suppressed material information with regard to the criminal cases, that came to be lodged against the petitioner in 2011, though in 2012, petitioner came to be acquitted. The District Magistrate, accordingly, did not verify the character certificate of the petitioner. Petitioner came to be tried in N.C.R. Case No. 3 of 2006, under Sections 323, 504 and 506 I.P.C. The case came to be compromised under Section 320 I.P.C. by the Court of Judicial Magistrate, Court No. 22, Gorakhpur, vide order dated 25.05.2012. In Case Crime No. 1056 of 2010, under Sections 147, 323, 504, 506, 452 I.P.C., petitioner came to be acquitted vide order dated 03.09.2011, by the Judicial Magistrate, Court No. 22, Gorakhpur.

5. Learned Standing Counsel, on the direction of the coordinate Bench of this court has produced the record of the petitioner and submitted that in the affidavit dated 08 November 2019, petitioner did not disclose about the criminal cases which was earlier lodged against him, though, specifically asked for..

6. In this backdrop, learned counsel for the petitioner has placed reliance on the decision rendered by Hon'ble Supreme Court in the case of **Avatar Singh vs. Union of India and others**1. Paragraph no. 38.4.1 and 38.4.2 reads thus :-

"38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.
38.4.2 Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee."

7. It is submitted that since the nature of the offence was trivial and petitioner was acquitted, therefore, the cases were not disclosed on the, bona fide, belief that no such case on the date of affidavit was pending against the petitioner.

8. Attention of the Court has been drawn by learned Standing Counsel to paragraph 38.10 of **Avatar Singh (supra)**, wherein, it is mandated that all the information, which was required is to be specifically, mentioned / disclosed in the attestation / verification form. In such cases, action can be taken on the basis of suppression of submitting false information, as to a fact. Paragraph No. 38.10 is extracted :-

38.10. For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for."

9. Suitability of a candidate for the post of Sub-Inspector is to be considered by the employer. In the opinion of an employer, suppression of criminal cases and filing of false affidavit, may be taken adverse to the candidature of the petitioner.

10. Suppression of material information and making of false statement in the verification form relating to arrest, prosecution, conviction etc., has clear bearing on the character, conduct and antecedents of the employee and his services can be terminated. Even where, employee makes a declaration truthfully and correctly of a concluded trial court, employer still has the right to consider his antecedents and cannot be compelled to appoint the candidate.

11. Acquittal in a criminal case would not automatically entitle the incumbent to appointment and it would be open to the employer to examine the suitability and fitness for appointment, each case should be thoroughly scrutinized by the employer / authority. More so, in case of recruitment

for police Force, since their ability to inspire public confidence is essential for the service and scrutiny of the society .

12. The Supreme Court in **Satish Chandra Yadav vs. Union of India and Ors**.2, considered the position of law post Avatar Singh (supra). The Court noted that the decision of the employer would depend upon the facts and circumstances of each case and the nature of appointment sought by the candidate. In **Pawan Kumar vs. Union of India**3, the appellant therein, had not disclosed the prosecution in their attestation form filled by the petitioner. The appellant was honorably acquitted. The Supreme Court held as follows :-

"13. What emerges from the exposition as laid down by this Court is that by mere suppression of material / false information regardless of the fact whether there is a conviction or acquittal has been recorded, the employee / recruit is not to be discharged / terminated axiomatically from service just by a stroke of pen. ***At the same time, the effect of suppression of material / false information involving in a criminal case, if any, is left for the employer to consider all the relevant facts and circumstances available as to antecedents and keeping in view the objective criteria and the relevant service rules into consideration, while taking appropriate decision regarding continuance / suitability of the employee into service."***

13. Similarly, in **Rajasthan Rajya Vidyut Prasaran Nigam Limited and another vs. Anil Kanwariya**4, the appellant therein came to be convicted in the criminal case under Section 143, 341 and 323 I.P.C., yet the trial court, thought fit to release him on probation. The court in paragraph 14 observe as follows :-

"14. The issue / question may be considered from another angle, from the employer's point of view. The question is not about whether an employee was involved in a dispute of trivial nature and whether he has been subsequently acquitted or not. The question is about the credibility and / or trustworthiness of such an employee who at the initial stage of the employment, i.e., while submitting the declaration / verification and / or applying for a post made false declaration and / or not disclosing and / or suppressing material fact of having involved in a criminal case. *If the correct facts would have been disclosed, the employer might not have appointed him. Then the question is of TRUST. Therefore, in such a situation, where the employer feels that an employee who at the initial stage itself has made a false statement and / or not disclosed the material facts and / or suppressed the material facts and therefore, he cannot be continued in service because such an employee cannot be relied upon even in future, the employer cannot be forced to continue such an employee.* ***At the cost of repetition, it is observed and as observed hereinabove in catena of decision such an employee cannot claim the appointment and / or continue to be in service as a matter of right."***

14. In view of the judicial authorities noted herein above post **Avatar Singh** (supra). The credibility, and / or, trustworthiness of such an employee who at the initial stage of the employment, i.e., while submitting the declaration / verification for a post made false declaration of having not being involved in a criminal case. The employer would be justified in not appointing such candidate, further, the employer cannot be compelled to continue / appoint, such an employee on

the post. The candidate / employee cannot claim appointment, and / or, continue on the post as a matter of right.

15. This Court in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India, would not sit in appeal on the discretion exercised by the employer in not offering appointment to the petitioner for suppression of material fact reflecting upon his character and credibility to the post of Sub-Inspector.

16. Having regard to the facts and circumstances of the case, we are not inclined to take an opinion different from that of learned Single Judge.

17. The appeal being devoid of merit, is accordingly, **dismissed**.

(2023) 6 ILRA 632
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2023

BEFORE

THE HON'BLE AJIT KUMAR, ,J.

Writ-A No. 494 of 2023

Radhika Baghel ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ramesh Chandra Dwivedi

Counsel for the Respondents:
C.S.C.

A. Service Law – Compassionate Appointment - Intermediate Education Act, 1921 - Regulation 103 of Chapter III - U.P. Government Servants (Dying in Harness) Rules, 1974 - The denial of compassionate appointment to the applicant/petitioner in the instant case cannot be justified on the ground that she is a married daughter. Once the St. itself has come to accept the Division Bench judgment of this Court in the case of *Smt. Vimla Srivastava (infra)* so as to amend the U.P. Government Servants (Dying in Harness) Rules, 1974 and later on also vide gazette notification on behalf of Madhyamik Shiksha Parishad amended Rregulation 103 of Chapter III of the Intermediate Education Act, it would be taken that it was always there to be the law and so the St. intended to correct rule/regulation by incorporating a provision to include married daughter within the meaning of word 'family' of dependents of deceased employee looking to the judgment of Division Bench. It has been admitted at the bar that the said judgment of *Smt. Vimla Srivastava (infra)* still holds the field and SLP preferred against which was also dismissed. (Para 13, 15)

B. The petitioner in any manner was not responsible for delay in applying for compassionate appointment. The petitioner has been pursuing the matter since the year 2015 itself. Her late father died in the year 2012 and she came to file writ petition before this Court as early as in the year 2014 being Writ-A No. 37939 of 2014 filed on 14.07.2014. In the order passed by the DISs dated 05.11.2014 he has not taken the ground of delay, if any, caused by the present applicant, while rejecting her claim for compassionate appointment and instead her claim came to be rejected only on account of the fact that Regulation 103 of Chapter III of the Intermediate Education Act did not provide for married daughter to be included within the definition of 'family' of dependents. While the petition being Writ-A No. 4553 of 2015 remained pending before this Court, against the said order, **the *Vimla Srivastava's judgment (infra)* intervened in which married daughter was directed to be included and the relevant provisions not including the married daughter as the member of dependent's 'family' of the deceased was held to be ultra virus.**

After the aforesaid judgement Madhyamik Shiksha Parishad rushed to amend its provision as contained in **Regulation 103 vide gazette notification dated 06.12.2022** which **now uses the word 'daughter' only which would include both married and unmarried daughters undisputedly.** (Para 17, 18, 19)

C. A principle that should be taken as a rule that a married daughter, if married during lifetime of her father or mother in government service, shall always be taken as dependent upon her husband unless and until it could be established that even her husband has not been earning and both were dependents upon the deceased at the time of his death. In Indian concept of 'family' a wife is taken to be dependent upon her husband, if she herself is not employed. So also the first family members are taken to be dependents. Likewise even a married daughter if not having an earning husband may be dependent, and for this above purpose a married daughter would fall within the word 'family' so as not to deny her claim for compassionate appointment. For this purpose, it would be necessary to examine whether husband has been gainfully employed and if not his financial status and the financial status of the married daughter. (Para 20)

D. It is always to be seen whether even after a lapse of considerably long period (like seven years of the death of earning member as in this case), a family still needs service for survival or does the family still need financial help to meet any crisis more especially in the circumstances when the widow may be receiving pension and all the daughters including the petitioner were married prior to the death of the employee. The matter is remitted to the DISs only for the limited purpose to examine the financial status of the petitioner and that of her husband. If it is found that the petitioner's husband is having good financial status in terms of landed property or otherwise which can be said to be sufficient enough for the survival of the family, the petitioner may not be offered compassionate appointment as a rule. (Para 22)

Upon above parameters, if petitioner stands successful, she will be offered compassionate appointment and will not be denied same for any technicality. Petitioner would also be required to disclose the entire property of her husband and also her property that she owns. (Para 23, 25)

Writ petition disposed of. (E-4)

Precedent followed:

1. Smt. Vimla Srivastava Vs St. of U.P. & anr., Writ – C No. 60881 of 2015, decided on 04.12.2015 (Para 5)

2. Seema Gupta Vs St. of U.P. & ors., Writ – A No. 9842 of 2022, decided on 13.07.2022 (Para 5)

3. Isha Tyagi Vs St. of U.P. & ors., Writ – C No. 41279 of 2014, decided on 26.08.2014 (Para 7)

4. The Government of India Vs Venkatesh, decided on 01.03.2019, SLP (C) No. 5810 of 2017 (Para 12)

5. St. of Bengal Vs Devbrat Tiwari & ors., decided on 03.03.2023, Civil Appeal Nos. 8842-8855 of 2022 (Para 12)

Precedent distinguished:

The St. of Mah. & ors. Vs Madhuri Malti Vidhate, Civil Appeal No. 6938 of 2020, decided on 30.12.2022 (Para 11)

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

1. Counter affidavit filed today is taken on record.

2. Learned counsel for the petitioner Sri R.C. Dwivedi submits that he does not want to file rejoinder affidavit.

3. Heard learned counsel for the respective parties.

4. The legal issue that emerges out for consideration relates to the claim of a married daughter for compassionate appointment on the ground that she and her husband were dependents of the deceased father who died in harness while working as Daftari (Class-IV employee) in a recognized aided Institution.

5. The claim of the petitioner when was not being considered by the District Inspector of Schools, she came to file a writ petition being Writ - A No. 37939 of 2014 which was disposed of on 30.07.2014 with a direction to the District Inspector of Schools to take a decision in the matter. The District Inspector of Schools passed order on 05.11.2014 rejecting the claim of the petitioner on the ground that as per regulation 103 of Chapter III of Intermediate Education Act, 1921 a married daughter could not come within the definition of 'family' of dependents. Petitioner again came to this Court vide Writ - A No. 4553 of 2015 which was disposed of with a direction dated 13.09.2022 to decide the claim of the petitioner afresh in the light of judgment of **Smt. Vimla Srivastava v. State of U.P. and another** (Writ - C No. 60881 of 2015 decided on 04.12.2015) and also a judgment passed in identically placed one Seema Gupta, petitioner in **Writ - A No. 9842 of 2022, Seema Gupta v. State of U.P. & 3 Others** (decided on 13.07.2022), the claim of the petitioner has again come to be rejected.

6. The argument advanced by Shri Dwivedi, learned counsel appearing for the petitioner is that in view of the judgment of Division Bench in the case of Smt. Vimla Srivastava (supra), presided over by the Chief Justice Dr. D.Y. Chandrachud (as his Lordship then was), married daughter has been taken to be falling within the definition of the word 'family' on analogy and analysis of the legal principle discussed by the Division Bench as under:

"While assessing the rival submissions, it must be noted at the outset that the definition of the expression "family" in Rule 2 (c) incorporates the categories of heirs of a deceased government servant. Among them are the wife or husband, sons and adopted sons, unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law. Clause (ii) of Rule 2 (c) brings a son as well as an adopted son within the purview of the expression "family" irrespective of marital status. A son who is married continues to be within the ambit of the expression "family" for the purpose of Rule 2 (c). But by the stroke of a legislative definition, a daughter who is married is excluded from the scope and purview of the family of a deceased government servant unless she falls within the category of a widowed daughter. The invidious discrimination that is inherent in Rule 2 (c) lies in the fact that a daughter by reason of her marriage is excluded from the ambit of the expression "family". Her exclusion operates by reason of marriage and, whether or not she was at the time of the death of the deceased government servant dependent on him. Marriage does not exclude a son from the ambit of the expression "family". But marriage excludes a daughter. This is invidious. A married daughter who has separated after marriage and may have been dependent on the deceased would as a result of this discrimination stand excluded. A divorced daughter would similarly stand excluded. Even if she is dependent on her father, she would not be eligible for compassionate appointment only because

of the fact that she is not "unmarried". The only basis of the exclusion is marriage and but for her marriage, a daughter would not be excluded from the definition of the expression "family".

7. The Division Bench also relied upon its earlier judgment in the case of **Isha Tyagi v. State of U.P. & 3 Others,** (Writ - C No. 41279 of 2014, decided on 26.08.2014) wherein, the married daughters of freedom fighter were directed to be considered while providing horizontal reservation in State services and then the Court held thus:

"It would be anachronistic to discriminate against married daughters by confining the benefit of the horizontal reservation in this case only to sons (and their sons) and to unmarried daughters. If the marital status of a son does not make any difference in law to his entitlement or to his eligibility as a descendant, equally in our view, the marital status of a daughter should in terms of constitutional values make no difference. The notion that a married daughter ceases to be a part of the family of her parents upon her marriage must undergo a rethink in contemporary times. The law cannot make an assumption that married sons alone continue to be members of the family of their parents, and that a married daughter ceases to be a member of the family of her parents. Such an assumption is constitutionally impermissible because it is an invidious basis to discriminate against married daughters and their children. A benefit which this social welfare measure grants to a son of a freedom fighter, irrespective of marital status, cannot be denied to a married daughter of a freedom fighter."

8. In view of the above, the Division Bench struck down as ultra vires the word 'unmarried' in Rule 2(C)3 of the Dying in Harness Rules. It is thereafter, that the State Government came to amend the U.P. Government Servants (Dying in Harness) Rules, 1974 vide amendment dated 12.11.2021. The State Government has also issued a gazette notification of the department of Secondary Education vide Madhyamik Shiksha Parishad, U.P., Prayagraj dated 06.12.2022 amending Regulation 103 of Chapter III of Intermediate Education Act, 1921.

9. Now the word 'daughter' has only been provided which would include adopted daughter also. Thus, the word 'daughter' would include naturally a married daughter.

10. The law is well settled that once it comes in the judicial pronouncement of a Constitutional Court of law holding a provision to be ultra vires: A), it would be taken to have never been there; and B) Whatever is void by ultra vires is void ab initio/ non est. I hold accordingly on the same principle as followed in Vimla Srivastava (supra) the similar provisions contained under regulations to be ultra vires as it existed under relevant regulation of Chapter III of Intermediate Education Act, 1921. I find that for these very reasons analogus provision contained under the regulations framed under the Intermediate Education Act, 1921 have also come to be accordingly amended by the State Government. Merely because the regulations did not get amended for want of such action and the action on the part of Madhyamik Shiksha Parishad has taken place after it was held so by a Division Bench of this Court that a married daughter would also be a member of the dependents family within the word 'family', the claim of petitioner as a married daughter should not have been denied.

11. Two arguments have been advanced by learned Standing counsel Sri

Pal, first, the application for compassionate appointment was highly time barred and the second one is that recently the Supreme Court in the case of **The State of Maharashtra & Others v. Madhuri Malti Vidhate** in Civil Appeal No. 6938 of 2020 decided on 30.12.2022 has held that compassionate appointment is an exception to the general rule of appointment in public services in favour of dependents of the deceased employee who died in harness and the consideration is purely humanitarian in nature with an intention to provide source of livelihood to the family who had suddenly landed in financial crisis. So the purpose, it was held is to enable the family to tied over sudden crisis and thus it was held that married daughter cannot be held to be dependent upon the mother for the purposes of compassionate appointment.

12. Learned Standing Counsel has also relied upon the judgment in the case of **The Government of India v. P. Venkatesh** decided on 01.03.2019 being SLP (C) No. 5810 of 2017 and also the judgment in the case of **State of Bengal v. Devbrat Tiwari and others** decided on 03.03.2023 in **Civil Appeal Nos. 8842-8855 of 2022.** Reliance has been placed upon paragraph nos. 7.1 and 8.

13. Having heard learned counsel for the respective parties and their arguments raised across the bar, in my view, the question of denial of compassionate appointment to the applicant/ petitioner in the instant case cannot be justified on the ground that she is a married daughter. Once the State itself has come to accept the Division Bench judgment of this Court in the case of Smt. Vimla Srivastava (supra) so as to amend the U.P. Government Servants (Dying in Harness) Rules, 1974 and later on also vide gazette notification on behalf of Madhyamik Shiksha Parishad amended regulation 103 of Chapter III of the Intermediate Education Act, it would be taken that it was always there to be the law and so the State intended to correct rule/ regulation by incorporating a provision to include married daughter within the meaning of word 'family' of dependents of deceased employee looking to the judgment of Division Bench. It has been admitted at the bar that the said judgment of Smt. Vimla Srivastava (supra) still holds the field and SLP preferred against which was also dismissed.

14. The judgment in the case of State of Maharashtra (supra) would not be applicable being distinguishable on facts because in the present case compassionate appointment is governed by the rules which have stood interpreted so by the Division Bench judgment delivered in the year 2015. Now the rule in the State of U.P. is that married daughter would stand included within the definition of 'family' of dependents of a deceased employee who died in harness for the purposes of compassionate appointment.

15. It can of course, be pleaded and validly so that when the provision under which married daughters have been expressly excluded in the State of Uttar Pradesh has been held to be ultra vires and SLP against such judgment has been dismissed, this should be taken to be law in the State of Uttar Pradesh and now the rules have been amended also suitably. Institutions that receive grant in aid have been also given benefit of compassionate appointment in the State on same analogy and so the regulations have been amended.

16. The plea taken by the State respondents that at the time when late

employee died and petitioner had applied rules were not amended would not hold merit either. In government service or service in an establishment receiving aid from State Government in one State would be governed by same principles of law in so far as beneficial legislation is concerned. Identically placed persons cannot be discriminated against by the same employer or even by instrumentality of State where aid is received from the State. Once division bench held a provision to be ultra vires it would equally apply to analogues provisions framed by the same State or its instrumentalities. So the judgment cited by learned Standing Counsel is distinguishable and would not apply to the case in hand.

17. Coming to the question of delay as involved in the present case, I find that the petitioner has been pursuing the matter since the year 2015 itself. Her late father died in the year 2012 and she came to file writ petition before this Court as early as in the year 2014 being Writ - A No. 37939 of 2014 filed on14.07.2014. In the order passed by the District Inspector of Schools dated 05.11.2014 he has not taken the ground of delay, if any, caused by the present applicant, while rejecting her claim for compassionate appointment and instead her claim for compassionate appointment came to be rejected only on account of the fact that Regulation 103 of Chapter III of the Intermediate Education Act did not provide for married daughter to be included within the definition of 'family' of dependents. While the petition being Writ - A No. 4553 of 2015 remained pending before this Court, against the said order, the Vimla Srivastava's judgment (supra) intervened in which married daughter was directed to be included and the relevant provisions not including the married daughter as the member of dependent's 'family' of the deceased was held to be ultra virus.

18. A concurrent Court applied the principle of Vimla Srivastava's case (supra) in the case of Seema Gupta v. State of U.P. & 3 others in Writ - A No. 9842 of 2022. In the said judgment delivered on 30.07.2022 and thereafter, Madhyamik Shiksha Parishad rushed to amend its provision as contained in Regulation 103 vide gazette notification dated 06.12.2022 which now uses the word 'daughter' only which would include both married and unmarried daughters undisputedly.

19. In this view of the matter, therefore, I am not impressed with the argument that the petitioner in any manner was responsible for delay in applying for compassionate appointment.

20. However, the argument advanced by learned Standing Counsel that a principle that should be taken as a rule that a married daughter, if married during lifetime of her father or mother in government service, shall always be taken as dependent upon her husband unless and until it could be established that even her husband has not been earning and both were dependents upon the deceased at the time of his death, holds substance. In Indian concept of 'family' a wife is taken to be dependent upon her husband, if she herself is not employed. So also the first family members are taken to be dependents. Likewise even a married daughter if not having an earning husband may be dependent, and for this above purpose a married daughter would fall within the word 'family' so as not to deny her claim for compassionate appointment. For this purpose, it would be necessary to examine whether husband has been gainfully employed and if not his

financial status and the financial status of the married daughter.

21. In such above view of the matter, therefore, the order passed by the District Inspector of Schools dated 30.11.2022 impugned in this petition is hereby quashed.

22. The matter is remitted to the District Inspector of School only for the limited purpose to examine the financial status of the petitioner and that of her husband. If it is found that the petitioner's husband is having good financial status in terms of landed property or otherwise which can be said to be sufficient enough for the survival of the family, the petitioner may not be offered compassionate appointment as a rule because it is always to be seen whether even after a lapse of considerably long period like seven years of the death of earning member as in this case, a family still needs service for survival or does the family still need financial help to meet any crisis more especially in the circumstances when the widow may be receiving pension and all the daughters including the petitioner were married prior to the death of the employee.

23. It is made clear that upon above parameters, if petitioner stands successful, she will be offered compassionate appointment and will not be denied same for any technicality.

24. An appropriate decision shall be taken in the light of observations made herein above within a period of two months from the date of production of certified copy of this order.

25. In this view of the matter, petitioner would also be required to disclose the entire property of her husband and also her property that she owns.

26. With the aforesaid observations and directions, this petition stands **disposed of.**

(2023) 6 ILRA 638
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 5196 of 2023

Smt. Vibha Pandey ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Kumar Ojha

Counsel for the Respondents:
C.S.C.

A. Service Law – Assessment - Punishment - The Uttar Pradesh Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 1995 - Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 - There is hardly any ground taken up by the petitioner for challenging the assessment as made by the Reporting Authority, Reviewing Authority as well as Accepting Authority who is the competent authority as defined under the 1995 Rules. (Para 9)

The authorities relied upon by the petitioner are entirely on the different footings and are related to the disciplinary proceedings wherein the punishment has been awarded and the same was not mentioned in the 1991 Rules and the same has been held as illegal. (Para 10)

Whereas the present case is not at all w.r.t. any punishment, it is only assessment of conduct,

behaviour and activities as carried out by the petitioner during that continuation of the currency period of year for which she has been assessed and reported for withholding the integrity i.e. bad in nature and the same was communicated well within time so that the petitioner may exercise the rights available under the 1995 Rules. (Para 8, 11)

Writ petition dismissed. (E-4)

Precedent distinguished:

1. Narendra Singh Yadav Vs St. of U.P. & ors., Writ A No. 25665 of 2012, decided on 23.05.2012 (Para 7, 11)

2. Satya Deo Sharma Vs St. of U.P., Service Single No.1315 of 2023, decided on 02.04.2013 (Para 7, 11)

3. Vijay Singh Vs St. of U.P. & ors., Civil Appeal No. 3550 of 2012, decided on 13.04.2012 (Para 7, 11)

Present petition assails order dated 26.10.2022 & 24.06.2022, passed by The Additional Director General of Police and The Deputy Inspector General of Police, Gorakhpur Range, Gorakhpur, District Gorakhpur, respectively. Also, prays for direction to Respondent authorities to delete punishment of withholding the integrity into service records of the Petition and further consider for promotion if any proposed.

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

1. Heard Sri Ashish Kumar Ojha, learned counsel for the petitioner and Sri Satyendra Kumar Tripathi, learned Standing Counsel.

2. The present petition has been filed seeking the following relief:-

"I. Issue, a writ, or direction in the nature of certiorari, quashing the impugned order dat*ed 26.10.2022 & 24.06.2022 passed by the Respondent No.2 & 3 respectively, The Additional Director General of Police, Gorakhpur Range, Gorakhpur, District Gorakhpur & The Deputy Inspector General of Police, Gorakhpur Range, Gorakhpur, District Gorakhpur, (Annexure -3 & 5 to the Writ Petition)*

II. Issue, a writ, order or direction, in the nature of mandamus, directing the Respondent authorities to delete punishment of withholding the integrity into service records of the Petition and further consider for promotion if any proposed."

3. It is the case of the petitioner that entry of withholding the integrity has been awarded in the Annual Confidential Report of the petitioner by the Reporting Authority vide order dated 20.01.2021 while the petitioner was rendering her services under the capacity of Inspector in Kushi Nagar and the same has been communicated well within time as prescribed under the **1995 Rules**1.

4. Being aggrieved with the entry dated 20.01.2021, the petitioner approached the Reviewing Authority i.e. respondent no.3 vide representation dated 22.10.2021 that was beyond the limitation of 45 days as prescribed under the rules, but the same has been duly considered by way of detailed discussion of the grounds as elaborated by the petitioner and dismissed the same vide order dated 24.06.2022.

5. After availing the statutory remedy prescribed under the Rule 4 of the 1995 Rules, the petitioner preferred a detailed revision before Accepting/Competent Authority on dated 16.09.2022.

6. The order dated 20.01.2021 passed by Reporting Officer as well as order dated

24.06.2022 passed by Reviewing Authority has been upheld by the Accepting/Competent Authority i.e. respondent no.2 vide order dated 26.10.2022 by way of rejecting the entire claim as set out by the petitioner for showing her bonafide over the assessment as drawn by the Reporting Authority.

7. Learned counsel for the petitioner framed his case on the basis that the punishment which has not been mentioned under the **1991 Rules** 2, the same cannot be imposed by any of the authority who is competent under the rules against any employee who is rendering his services in the Department of U.P. Police as a Subordinate Officer. For substantiating his arguments, learned counsel for the petitioner relied upon the judgment passed by a coordinate Bench of this Court in **Narendra Singh Yadav Vs. State of U.P. and others**3, judgment of a Division Bench of this High Court at Lucknow Bench in **Satya Deo Sharma Vs. State of U.P.**4 and judgment passed by Hon'ble Apex Court in **Vijay Singh Vs. State of U.P. and others**5.

8. Per contra, learned Standing Counsel vehemently opposed the prayer as made in the petition by way of elaborating his arguments on the basis that the entry as reported against the petitioner is different to the punishment as mentioned under the 1991 Rules, the punishment as prescribed in the 1991 Rules can only be imposed after adopting the procedure as defined under the statutory provisions specifically mentioned under the 1991 Rules which is applicable in the case of the petitioner but the matter put under challenge by way of filing the instant petition is not the case of punishment, whereas it is the case of entry in the ACR of the petitioner, which has been endorsed by the Reporting Officer after examining the activities, conduct and behaviour of the petitioner in shape of withholding the integrity and assessed the entry of that particular year as bad and communicated the same well within time so that the petitioner may exercise the rights available under the 1995 Rules.

9. Learned Standing Counsel also submitted that there is hardly any ground taken up by the petitioner for challenging the assessment as made by the Reporting Authority, Reviewing Authority as well as Accepting Authority who is the competent authority as defined under the 1995 Rules.

10. By bare perusal of the orders which impugned the present petition along with the judgments cited by learned counsel for the petitioner, it is crystal clearly proved that the pronouncement of this Court as well by Hon'ble the Apex Court as relied upon by learned counsel for the petitioner are entirely on the different footings which is purely the matter which has been denied in the judgment is related to the disciplinary proceedings wherein the punishment has been awarded and the same was not mentioned in the 1991 Rules and the same has been held as illegal.

11. Whereas the matter pertains to the present petition is not at all with regard to any punishment, it is only assessment of conduct, behaviour and activities as carried out by the petitioner during that continuation of the currency period of year for which she has been assessed and reported for withholding the integrity i.e. bad in nature, and as such, there is hardly any bearings of the cases mentioned by learned counsel for the petitioner and the same is having no application in the instant matter.

12. The arguments as raised by learned Standing Counsel seems to be forceful, having agreement with the same, the instant petition is hereby **dismissed.**

13. However, it is made clear that the petitioner is at liberty to approach the appropriate forum of law, if so desires.

(2023) 6 ILRA 641
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.04.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-A No. 19575 of 2022

Chaman Khan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Indal Singh

Counsel for the Respondents:
C.S.C., Sri Jamwant Maurya

A. Service Law – Pension – Retirement Benefits - Uttar Pradesh Nagar Panchayat Non Centralized Services Retirement Benefits Regulations, 1992 - U.P. Qualifying Service for Pension and Validation Act, 2021 – The pensionary provisions must be given a liberal construction as a social welfare measure. This does not imply that something can be given contrary to rules, but the very basis for grant of such pension must be kept in mind i.e. to facilitate a retired government employee to live with dignity in his winter of life and, thus, such benefit should not be unreasonably denied to an employee, more so on technicalities. (Para 8)

Rule 3(8) of the U.P. Retirement Benefits Rules, 1961 was read down to hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. (Para 5)

The word 'post' used in S.2 of the Act of 2021 was diluted to save it from arbitrariness and hence, the word 'post', be it temporary or permanent, was read down as 'services rendered by a government employee, be it of temporary or permanent nature'. (Para 8)

The present Regulations of 1992 are parallel to the Rules of State Government which have been read down by the Supreme Court, being held in violation of Article 14 of the Constitution of India, as they create an artificial categorization of similarly situated employees.

In the present case also an artificial classification is created as admittedly, as the daily wager employees perform the same duties as the regular employees and are throughout treated as the regular employee. They were also regularized in continuation of their daily wage services. (Para 9)

Thus, the impugned order dated 28.08.2020 is set aside and respondents are directed to ensure regular payment of pensionary and other benefits to the petitioner under the Regulations of 1992, treating their entire service to be performed as regular employee of the Nagar Panchayat within a period of three months. However, back pension shall be paid for the last three years only. (Para 10, 11)

Writ petition allowed. (E-4)

Precedent followed:

1. Prem Singh Vs St. of U.P. & ors., (2019) 10 SCC 516 (Para 5)

2. Dr. Shyam Kumar Vs St. of U.P. & ors., Judgment dated 17.02.2023, Writ-A No. 8968 of 2022 (Para 8)

Present petition assails order dated 28.08.2020, whereby the respondent authority has refused to grant him pension and other benefits on retirement which he claims to be entitled.

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

1. Heard learned counsel for petitioner, Shri Jamwant Maurya, learned counsel for respondent no.5 and learned Standing Counsel for the State.

2. Petitioner has approached this Court challenging the order dated 28.08.2020 whereby the respondent authority has refused to grant him pension and other benefits on retirement which he claim to be entitled.

3. The facts of the case are that the petitioner was appointed as daily wager on class IV post as Pump Operator on 07.12.1987. He was regularized on 05.07.2011 and he retired on 31.08.2019.

4. Learned counsel for petitioner submits that he is entitled for pension under Uttar Pradesh Nagar Panchayat Non-Centralized Services Retirement Benefits Regultions, 1992 (hereinafter referred to as Regulations of 1992). Reference is made to Rule 2(da) which reads as follows:-

2(ड) "सहकारी सेवा "का तात्पर्य निम्नलिखित को छोड़कर समय समय पर यथा संशोधित सिविल सर्विसेज रेगुलेशन्स के अनुच्छेद 368, के उपबन्धों के अनुसार पेंशन के लिए अर्हता प्रदान करती है :

एक सम्बद्ध कमेटी के अधीन पेंशन रहित अधिष्ठान में अस्थाई या स्थानापन्न सेवा की अवधि,

(दो) किसी कार्य प्रभारित अधिष्ठान में सेवा की अवधि, और

(तीन) किसी ऐसे पद पर जिसके लिये आकस्मिता निधि से भुगतान किया जाता है, सेवा की अवधि:

परन्तु किसी कमेटी के अधीन निरंतर अस्थाई या स्थानापन्न सेवा की अवधि की गणना सहकारी सेवा के रूप में की जायेगी यदि उसी या किसी अन्य पद पर सेवा के किसी व्यवधान के बिना बाद में उसे स्थाई कर दिया जाय।

टिप्पणी-- यदि किसी पेंशन रहित अधिष्ठान, कार्य प्रभारित अधिष्ठान में या आकस्मिता निधि से भुगतान किये जाने वाले किसी पद पर की गयी सेवा किसी पेंशन योग्य अधिष्ठान में अस्थाई सेवा और स्थाई सेवा की अवधि के बीच पड़ती हो तो वह सेवा का व्यवधान नहीं होगा।

5. Further submission is that similar rules prevailed with regard to employees of the State Government which also provide non-counting of services performed on work charge basis. A three Judge's Bench of Supreme Court on reference in case of **Prem Singh vs. State of U.P. and others, (2019) 10 SCC 516** considered their entitlement for pension. The relevant paragraphs of the said judgment reads:

"8. We first consider the provisions contained in the Uttar Pradesh Retirement Benefits Rules, 1961 (for short ?the 1961 Rules?). Rule 3(8) of the 1961 Rules which contains the provisions in respect of qualifying service is extracted hereunder:

?3. In these rules, unless is anything repugnant in the subject or context

*(1)-(7) * * **

(8) ?Qualifying service? means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except:

(i) periods of temporary or officiating service in a non-pensionable establishment; (ii) periods of service in a work-charged establishment; and

(iii) periods of service in a post paid from contingencies shall also count as qualifying service.

Note. If service rendered in a non-pensionable establishment work-charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service.

9. Regulations 361, 368 and 370 of the Uttar Pradesh Civil Services Regulations are also relevant. They are extracted hereunder:

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions:

First: The service must be under Government.

Second: The employment must be substantive and permanent.

These conditions are fully explained in the following Regulations.

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

370. Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post shall qualify, except:

(i) periods of temporary or officiating service in non-pensionable establishment;

(ii) periods of service in work-charged establishment; and

(iii) periods of service in a post paid from contingencies.?

10. The qualifying service is the one which is in accordance with the provisions of Regulation 368 i.e. holding a substantive post on a permanent establishment. The proviso to Rule 3(8) clarify that continuous, temporary or officiating service followed without interruption by confirmation in the same or any other post is also included in the qualifying service except in the case of periods of temporary and officiating service in a non-pensionable establishment. The service in work-charged establishment and period of service in a post paid from contingencies shall also not count as qualifying service.

11. The Note appended to Rule 3(8) contains a provision that if the service is rendered in a non-pensionable establishment, work-charged establishment or in a post paid from contingencies, falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service. Thus, the Note contains a clear provision to count the qualifying service rendered in work-charged, contingency paid and non-pensionable establishment to be counted towards pensionable service, in the exigencies provided therein.

12. The provisions contained in Regulation 370 of the Civil Services Regulations excludes service in a non-pensionable establishment, work-charged establishment and in a post paid from contingencies from the purview of qualifying service. Under Regulation 361 of the Civil Services Regulations, the services must be under the Government and the employment must be substantive and permanent basis.

.....

30. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work-charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees had been subjected to transfer from one place to another like regular employees as apparent

from documents placed on record. In Narain Dutt Sharma v. State of U.P. [CA No. _____2019 arising out of SLP (C) No. 5775 of 2018] the appellants were allowed to cross efficiency bar, after "8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak with effect from 15-9-1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs 200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs 205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularised time to time by different orders. However, the services of some of the appellants in few petitions/appeals have not been regularised even though they had served for several decades and ultimately reached the age of superannuation.

31. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularised. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

32. In view of the Note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work-charged, contingencies or non-pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

33. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularisation had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in the Note to Rule 3(8) of the 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive

such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

34. As it would be unjust, illegal and impermissible to make aforesaid classification to make Rule 3(8) valid and non-discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

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

36. There are some of the employees who have not been regularised in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularised under the Government instructions and even as per the decision of this Court in State of Karnataka v. Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one-time measure, the services be regularised of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularised. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.

37. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

6. He further submits that since similar rules for pensionary benefits exist in the respondent authority, therefore, the matter is squarely covered by the said judgment and petitioners herein should also

be extended the benefit of the law settled in the case of ***Prem Singh (Supra).***

7. Learned counsel for the respondent Nagarpalika submits that in light of U.P. Qualifying Service for Pension and Validation Act, 2021 (for short 'the Act of 2021') the effect of Prem Singh (supra) judgment has been nullified and, therefore, petitioner cannot claim benefits of the law settled in the case of Prem Singh (supra).

8. So far as Act of 2021 is concerned, the same is applicable only upon the employees of State Government. There is no similar Act which is applicable with regard to employees of the Non-Centralized Services of the Nagar Panchayat. Even otherwise Act of 2021 is already read down by this Court by judgment dated 17.02.2023 passed in ***Writ-A No.8968 of 2022 (Dr. Shyam Kumar Vs. State of U.P. and others)***. Relevant paragraphs of the same reads as:

"9. Therefore, the question now before this Court is whether by bringing Act of 2021, the State Government has done away with the vice pointed out by the Supreme Court in case of Prem Singh (supra). In the said judgment, the Supreme Court found that the State Government has adopted exploitative labour practice by taking work of regular employees from work charge employees on long term basis without any rationale classification while refusing them benefits available to regular employees. Supreme Court specifically held that the State Government can not get involved in corrupt labour practices. On the aforesaid grounds, the Supreme Court read down the provisions of Rule 3(8) of the Rules of 1961 and struck down Regulation 370 of Civil Services Regulations and Para 669 of the Financial Handbook.

10. It is the duty of State to create new temporary or permanent posts as per its needs and make appointments on the same. Law also permits State to appoint daily wagers or work charge employees, but only when the work is for short period or is in a work charge establishment for fixed duration. Law does not permit the State to take work for long period, extending even for the entire working life of a person, on temporary or work charge basis. In such cases, it is the duty of State to create new posts and make appointments, giving all benefits of regular employees. Otherwise, State would be found to be adopting exploitative labour practice. This is the vice pointed out by the Supreme Court in Prem Singh's case (supra), and instead of removing the same, the State by Section 2 of the Act of 2021 has extended the sphere of its illegality. By Section 2 of the Act of 2021, it desires to take benefit of its own failure of creating posts in time and making appointments on the same, by not counting the said period of such service for pensionary benefits. State still fails to explain the rationale on the basis of which it has created this new classification and the manner in which, by the amended provision, it has removed the irrationality.

In case Section 2 of the Act of 2021 is given a literal meaning it would mean that services rendered by a person on a temporary or permanent post alone can be counted for pension. The same would again be an exploitative device and labour malpractice, as by this, the State Government is again attempting to use persons to work for it on long term basis, just like regular employees, without giving them benefits they are entitled to as regular employees. The very vice pointed by the Supreme Court in the judgment of Prem Singh (supra) with regard to work charge employees is, in fact, now made applicable

to even larger number of employees and extended to daily wagers and other persons not working on a temporary or a permanent post including, work charge employees.

In case of V. Sukumaran vs. State of Kerala (2020) 8 SCC 106, the Supreme Court held:

"22. We begin by, once again, emphasising that the pensionary provisions must be given a liberal construction as a social welfare measure. This does not imply that something can be given contrary to rules, but the very basis for grant of such pension must be kept in mind i.e. to facilitate a retired government employee to live with dignity in his winter of life and, thus, such benefit should not be unreasonably denied to an employee, more so on technicalities."

Thus, again to save Section 2 of the Act of 2021 from the vice/arbitrariness, in the spirit of the judgment of Prem Singh (supra), the word 'post' is required to be diluted to save it from arbitrariness and hence, the word 'post' used in Section 2 of the Act of 2021, be it temporary or permanent, has to be read down as 'services rendered by a government employee, be it of temporary or permanent nature'."

9. The present Regulations of 1992 are parallel to the Rules of State Government which have been read down by the Supreme Court, being held in violation of Article 14 of the Constitution of India, as they create an artificial categorization of similarly situated employees. In the present case also an artificial classification is created as admittedly, as the daily wager employees perform the same duties as the regular employees and are throughout treated as the regular employee. They were also regularized in continuation of their daily wage services. Thus, the matter is squarely covered by the law settled in case of ***Prem Singh (Supra)***.

10. Thus, the writ petition is **allowed** and impugned order dated 28.08.2020 is set aside.

11. Respondents are directed to ensure regular payment of pensionary and other benefits to the petitioner under the Regulations of 1992, treating their entire service to be performed as regular employee of the Nagar Panchayat within a period of three months. However, back pension shall be paid for the last three years only.

(2023) 6 ILRA 647
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. 3848 of 2023

Dr. Rakshapal Singh ...Petitioner
Versus
Prof. Chandra Shekhar & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mohammad Aon, Sri Mohd. Parvez, Sri Gopal Krishna

Counsel for the Respondents:
C.S.C., Sri Rizwan Ali Akhtar, Sri Shashi Prakash Rai, Sri Shivendu Ojha, Sri R.K. Ojha (Sr. Advocate), Sri A.K. Singh(Sr. Advocate)

The University Grants Commission Regulations, 2018 - Uttar Pradesh Universities (111th Amendment) 2019 (U.P. Act No.20 of 2019) -writ of Quo

Warranto to declare appointment of the respondent No.1 as interim Vice Chancellor-as void ab-initio –as the appointment of the respondent No.1 is contrary to Para 7.3 of the UGC Regulations, 2018- less than ten years experience as a Professor in a University-Respondent University established under the U.P. Act, 1973 by the Uttar Pradesh Universities (111th Amendment) 2019 (U.P. Act No.20 of 2019)-provided that until the First Statutes of the respondent University are made under Section 50, the Statutes of the University of Dr. Bhim Rao Ambedkar University, Agra, as in force immediately before the establishment of the said University shall apply to it subject to such adaptations and modifications as the St. Government may, by notification, provide - St. Government has not adopted the UGC Regulations, 2018 and instead decided that the provisions of St. Universities Act, 1973 shall remain applicable- Therefore, appointment cannot be said to be an appointment contrary to the statutory provisions.

W.P. dismissed. (E-9)

List of Cases cited:

1. Prof. Narendra Singh Bhandari Vs Ravindra Jugran & ors., 2022 (16) SCALE 410

2. St. of W. B. Vs Anindya Sundar Das & ors., AIR 2022 SC 3902

3. Professor (Dr.) Sreejith P.S. Vs Dr. Rajasree M.S. & ors., 2022 (15) SCALE 377

4. Gambhirdan K. Gadhavi Vs St. of Guj. & ors., (2022) 5 SCC 179

5. Amrit Prasad Vs St. of U.P. & ors., Writ-A No.62753 of 2015

6. Jagdish Prasad Sharma & ors.Vs St. of Bihar & ors., (2013) 8 SCC 633

7. Kalyani Mathivanan Vs K.VS Jeyaraj & ors., (2015) 6 SCC 363

8. Hari Bansh Lal Vs Sahodar Prasad Mahto & ors., (2010) 9 SCC 655

9. B. Srinivasa Reddy Vs Karnataka Urban Water Supply Drainage Board Employees' Assc., (2006) 11 SCC 731 (2)

10. Jagdish Prasad Sharma & ors.Vs St. of Bihar & ors., (2013) 8 SCC 633

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Gopal Krishna, learned counsel for the petitioner, Sri R.K. Ojha, learned Senior Advocate assisted by Sri Shivendu Ojha, learned counsel for the respondent no. 1, Sri A.K. Singh, learned Senior Advocate assisted by Sri Shashi Prakash Rai, learned counsel for respondent no. 2/University, Sri Bharat Pratap Singh, learned Additional Chief Standing Counsel for the respondent no. 3 and Sri Rizwan Ali Akhtar, learned counsel for the respondent No.4/ UGC.

Facts:-

2. Briefly stated facts of the present case are that the respondent No.1 has been appointed as the Interim (first) Vice Chancellor of the respondent No.2-University (a new University), i.e. Raja Mahendra Pratap Singh State University, Aligarh (for short 'RMPSS University') by a Government Order No.600/lRrj-1-2021-16(26)/2019 dated 30.12.2021, issued in exercise of powers conferring under Section 4(1-B) of the Uttar Pradesh State Universities Act, 1973 (hereinafter referred to as 'the U.P. Act, 1973'). The petitioner has filed the present writ petition praying for a relief in the nature of a writ of Quo Warranto to declare appointment of the respondent No.1 as void ab-initio and consequently to quash and set it aside on the ground that the appointment of the respondent No.1 is contrary to Para 7.3 of The University Grants Commission

(Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) Regulations, 2018 (hereinafter referred to as 'the UGC Regulations, 2018').

Submissions on behalf of petitioner:-

3. **Learned counsel for the petitioner submits** as under:

(i) As per Para-7.3 of the University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) Regulations, 2010 (hereinafter referred to as 'the UGC Regulations, 2010'), a person to be appointed as Vice Chancellor, amongst other qualifications, must have a minimum of ten years of experience as Professor in a University system or ten years of experience in an equivalent position in a reputed research and / or academic administrative organization. Since as on the date of appointment, the respondent No.1 was having less than ten years experience as a Professor in a University, therefore, his appointment is void ab-initio.

(ii) Para 1.2 of the UGC Regulations, 2010 provides that it shall apply to every university established or incorporated by or under a Central Act, Provincial Act or a State Act, every institution including a constituent or an affiliated college recognized by the Commission, in consultation with the university concerned under Clause (f) of Section 2 of the University Grants Commission Act, 1956 and every institution deemed to be a university under Section 3 of the said Act. Para 1.3 of the UGC Regulations, 2010 provides that the Regulations shall come into force with immediate effect. Based on the aforesaid two Paras 1.2 and 1.3 of the UGC Regulations, 2010, it is submitted that even if any State Law provides minimum qualification/ experience in conflict with the Regulations, 2010 for the post of Vice Chancellor, then to the extent of conflict, the State Law shall be void and Para 7.3 of the UGC Regulations, 2010 shall prevail in view of the Article 254 of the Constitution of India.

(iii) Para 7.3(1) of The University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) Regulations, 2018 (hereinafter referred to as 'the UGC Regulations, 2018'), is identical to Para 7.3 of the UGC Regulations, 2010 and as such even if the provisions of the UGC Regulations, 2018 are applied, still the appointment of the respondent No.1 would be void ab-initio inasmuch as he does not possess the minimum required qualification for the post of Vice Chancellor.

4. In support of his submissions, learned counsel for the petitioner has relied upon the following judgments of Hon'ble Supreme Court:-

(a) **Prof. Narendra Singh Bhandari vs. Ravindra Jugran and others, 2022 (16) SCALE 410 (Paras-12 and 13)**

(b) **State of West Bengal vs. Anindya Sundar Das and others, AIR 2022 SC 3902 (Paras-52 to 56)**

(c) **Professor (Dr.) Sreejith P.S. vs. Dr. Rajasree M.S. and others, 2022 (15) SCALE 377 (Paras 8.1 to 8.5)**

(d) **Gambhirdan K. Gadhavi vs. State of Gujrat and others, (2022) 5 SCC 179 (Paras-32, 33, 36, 48, 49, 50 and 51)**

Submissions on behalf of respondents:-

5. **Sri R.K. Ojha, learned Senior Advocate appearing for the respondent No.1 submits** as under:

(i) The controversy involved in the present writ petition is squarely covered by **a Division Bench judgment of this Court dated 16.11.2015 in Writ-A No.62753 of 2015 (Amrit Prasad vs. State of U.P. and 5 others)** in which in similar circumstances, a coordinate bench of this court has held that since the Regulations, 2010 have not been adopted by the State Government in the matter of selection of Vice Chancellor, therefore, Para 7.3 of the UGC Regulations, 2010 or the UGC Regulations, 2018 shall not apply.

(ii) The aforesaid judgment in the case of Amrit Prasad (supra) being a judgment of this Court by a bench of equal strength, therefore, it is binding upon this bench and this bench cannot take a different view except that in the event of disagreement, it may refer the matter to a larger bench.

(iii) There is a vast difference between the provisions of UGC Regulations, 2010 and the UGC Regulations, 2018. While Para 1.2 of the UGC Regulations, 2010 made the applicability of the Regulations to every universities etc., Para-1.2 of the UGC Regulations, 2018 framed in supersession in all the earlier Regulations is differently worded as under:

"1.2 Every university or institution deemed to be University, as the case may be, shall as soon as may be, but not later than within six months of the coming into force of these Regulations, take effective steps for the amendment of the statutes, *ordinances or other statutory provisions governing it,* ***so as to bring the same in accordance with these Regulations."***

(iv) Pursuant to the UGC Regulations, 2018 and specifically with reference to Para 1.2 thereof, the **State Government has issued a Government Order No.600/Seventy-1-2019-16(114)/2010 dated 28.06.2019 adopting the UGC Regulations, 2018 to a limited extent.** This GO specifically provides with regard to Vice Chancellor and Pro-Vice Chancellor as under:

"*8- उत्तर* ***प्रदेश राज्य विश्वविद्यालय अधिनियम-1973 में कुलपति एवं प्रति.कुलपति की नियुक्ति की प्रक्रिया का उल्लेख है, जो यथावत लागू रहेंगे।***

11- कोड आफ प्रोफेशनल इथिक्स ₹ सम्बन्धी विनियम विश्वविद्यालय तथा महाविद्यालय के शिक्षक संवर्ग, पुस्तकालय संवर्ग, शारीरिक शिक्षा एवं खेल निदेशकों के सम्बन्ध में लागू होंगे किन्तु प्रति कुलपति एवं कुलपति के सम्बन्ध में उत्तर प्रदेश राज्य विश्वविद्यालय अधिनियम, 1973 के प्राविधान ही प्रभावी होंगे। अतः प्रति कुलपति एवं कुलपति के सम्बन्ध में कोड आफ प्रोफेशनल इथिक्स' सम्बन्धी विनियम को लागू किये जाने पर अध्ययन कर निर्णय लिया जायेगा। "

(v) In the case of **Jagdish Prasad Sharma and others vs. State of Bihar and others, (2013) 8 SCC 633 (Para-72)**, a three judges bench of Hon'ble Supreme Court held as under:

"72. ***As far as the States*** *of Kerala and* ***U.P. are concerned,*** *they have their own problems which are localised and stand on a different footing from the other States, none of whom who appear to have the same problem.* ***Education now being a List III subject, the State Government is at liberty to frame its own laws relating to education in the State and is not, therefore, bound to accept or follow the Regulations framed by the UGC. It is only natural that if they wish to adopt the***

Regulations framed by the Commission under Section 26 of the UGC Act, 1956, the States will have to abide by the conditions as laid down by the Commission."

(vi) Thus, in view of the law laid down by three judges bench of Hon'ble Supreme court in the case of **Jagdish Prasad Sharma and others (supra)**, the State of Uttar Pradesh is at liberty to frame its own laws relating to education in the State or follow the regulations framed by the Commission under Section 26 of the UGC Act, 1956 and if the State of U.P. wishes to adopt it, then it has to abide by the conditions as may be laid down by the Commission. In so far as the appointment of Vice Chancellor and Pro-Vice Chancellor is concerned, State Government has issued the aforesaid government order dated 28.06.2019, therefore, Para 7.3 of the UGC Regulation shall not be applicable for appointment on the post of Vice Chancellor with reference to para 1.2 of the said Regulations.

(vii) In the case of **Kalyani Mathivanan vs. K.V. Jeyaraj and others, (2015) 6 SCC 363 (Paras-62 and 63)**, Hon'ble Supreme Court held as under:

"62. *In view of the discussion as made above, we hold:*

62.1. *To the extent the State legislation is in conflict with Central legislation including sub-ordinate legislation made by the Central legislation under Entry 25 of the Concurrent List shall be repugnant to the Central legislation and would be inoperative.*

62.2.The UGC Regulations being passed by both the Houses of Parliament, though a subordinate legislation has binding effect on the Universities to which it applies.

62.3. UGC Regulations, 2010 are mandatory to teachers and other academic staff in all the Central Universities and Colleges thereunder and the institutions deemed to be Universities whose maintenance expenditure is met by UGC.

62.4. The UGC Regulations, 2010 is directory for the universities, colleges and other higher educational institutions under the purview of the State legislation as the matter has been left to the State Government to adopt and implement the Scheme. Thus, UGC Regulations, 2010 are partly mandatory and is partly directory.

62.5. The UGC Regulations, 2010 having not been adopted by the State of Tamil Nadu, the question of conflict between State legislation and the Statutes framed under Central legislation does not arise. Once they are adopted by the State Government, the State legislation to be amended appropriately. In such case also there shall be no conflict between the State Legislation and the Central legislation.

63. In view of the reasons and finding as recorded above, we uphold the appointment of Dr. Kalyani Mathivanan as Vice-Chancellor, Madurai Kamaraj University as made by the G.O.(1D)No.80, Higher Education (H2) Department, Government of Tamil Nadu dated 9-4-2012 and set aside the impugned common judgment and order dated 26-6-2014 passed by the Division Bench of the Madras High Court, Madurai Bench in K.V. Jeyaraj v. Chancellor of Universities, 2014 SCC OnLine Mad 2701. The appeals are allowed but in the facts and circumstances of the case, there shall be no order as to costs."

(viii) A writ of Quo Warranto lies only when the appointment is made of an ineligible person and in conflict with the relevant rules/ statute. Since the

appointment of the respondent No.1 has been made in accordance with the provisions of the U.P. State Universities Act, 1973 and also since in Section 4(1-B) of the U.P. State Universities Act, 1973, no experience has been provided for appointment of the first Vice Chancellor of the University and the appointment is an interim appointment, therefore, a writ of Quo Warranto shall not lie as the respondent No.1 is the first Vice Chancellor of the University. Reliance is placed upon the judgment in the case of **Hari Bansh Lal vs Sahodar Prasad Mahto & Ors, (2010) 9 SCC 655.**

(ix) Question of repugnancy with reference to proviso to Article 254(2) of the Constitution of India does not come into picture inasmuch as the UGC Regulations, 2018 itself have left the State for adoption of the Regulations. The position also stood clarified by a three judges bench of Hon'ble Supreme Court in the case of **Jagdish Prasad Sharma and others (supra)**. The judgments on the proposition relied by learned counsel for the petitioner is of two judges bench while the judgment in the case of **Jagdish Prasad Sharma and others (supra)** is by a three judges bench of Hon'ble Supreme Court and consequently, it shall have precedence over the aforesaid two judgments on the limited question of repugnancy.

(x) The entire writ petition is based on the UGC Regulations, 2010 while the UGC Regulations, 2018 are in force.

6. **Sri Rizwan Ali Akhtar, learned counsel for the respondent No.4 submits** that the provisions of the UGC Regulations, 2018 being mandatory in nature has to be complied with while making appointment on the post of Vice Chancellor.

7. **Sri Bharat Pratap Singh, learned Additional Chief Standing Counsel for the respondent no. 3 adopts** the aforenoted submissions made by Sri R.K. Ojha, learned Senior Advocate appearing for respondent No.1.

8. **Sri A.K. Singh, learned Senior Advocate appearing for the respondent No.2 also adopts** the submissions made by Sri R.K. Ojha, learned Senior Advocate appearing for respondent No.1 as aforenoted.

9. Learned counsels for the parties have not made any other submissions except those aforenoted.

Discussion and Findings:-

10. Appointment of the respondent No.1 was made by the State Government by the above referred Government Order dated 30.12.2021 in exercise of powers conferred under Section 4(1-B) of the U.P. Act, 1973. For ready reference, Section 4(1-B) of the U.P. State Universities Act, 1973 and the Government Order dated 30.12.2021 for appointment of the petitioner as Interim (First) Vice-Chancellor, are reproduced below:

"Section 4(1-B) of the U.P. State Universities Act, 2013:-

4(1-B) in relation to the Universities to be established under sub-section (1-A) -

(a) the State Government shall appoint interim officers of the Universities (other than the Chancellor) and shall constitute interim authorities of such Universities in such manner as it thinks fit.;

(b) the officers appointed and members of the authorities constituted under clause (a) shall hold office until the appointment of officers or the constitution of the authorities in

accordance with clause (c) or such other earlier date as may be specified by the State Government in this behalf :

Provided that the State Government may, by notification extend the term of the members of such authorities for a period not exceeding one year.

(c) the State Government shall take steps for the appointment of officers and constitution of authorities of such Universities in accordance with the provisions of this Act, so that the same may be completed before the expiry of the respective terms of the interim officers and members under clause (b).

Government Order for appointment of the respondent No.1:-

उत्तर प्रदेश शासन
उच्च शिक्षा अनुभाग–1
संख्या–2344/सत्तर–1–2021–16(26)/2019
लखनऊ : दिनांक 30 दिसम्बर 2021

आदेश

उत्तर प्रदेश राज्य विश्वविद्यालय अधिनियम, 1973 की ***धारा–4 की उप धारा (1–ख) के अन्तर्गत*** *प्रदत्त शक्तियों का प्रयोग करते हुये प्रो0 चन्द्रशेखर, हेड एण्ड डीन फेकेल्टी आफ लॉ, दीनदयाल उपाध्याय गोरखपुर विश्वविद्यालय, गोरखपुर को राजा महेन्द्र प्रताप सिंह राज्य विश्वविद्यालय, अलीगढ़ का* ***अन्तरिम (प्रथम) कुलपति*** *नियुक्त किये जाने की श्री राज्यपाल सहर्ष स्वीकृति प्रदान करते हैं।*

मोनिका एस0 गर्ग
अपर मुख्य सचिव।"

11. The respondent No.2 – University has been established under the U.P. Act, 1973 by the Uttar Pradesh Universities (111th Amendment) 2019 (U.P. Act No.20 of 2019) and it has been provided that until the First Statutes of the respondent No.2-University are made under Section 50, the Statutes of the University of Dr. Bhim Rao Ambedkar University, Agra, as in force immediately before the establishment of the said University shall apply to it subject to such adaptations and modifications as the State Government may, by notification, provide. Similar provisions by amendment regarding first ordinance of the respondent No.2 – University, have been made by the aforesaid Amendment Act.

12. Thus, it is undisputed that the appointment of the respondent No.1 has been made as Interim (First) Vice Chancellor of the respondent No.2 – University by a Government Order dated 30.12.2021 issued by the State Government in exercise of powers conferred under the aforequoted provisions in Section 4(1-B) of the U.P. Act, 1973. Therefore, the aforesaid appointment of the respondent No.1 as Interim (First) Vice Chancellor of the newly created University (respondent No.2) cannot be said to be an appointment contrary to the statutory provisions. Thus, a writ of Quo Warranto cannot be issued.

13. That apart, **B. Srinivasa Reddy vs Karnataka Urban Water Supply Drainage Board Employees' Association, (2006) 11 SCC 731 (2) (Paras-43 and 97(c))**, Hon'ble Supreme Court held as under:

"43. Whether a Writ of Quo Warranto lies to challenge an appointment made "until further orders" on the ground that it is not a regular appointment? Whether the High Court failed to follow the settled law that a Writ of Quo Warranto cannot be issued unless there is a clear violation of law? The order appointing the appellant clearly stated that the appointment is until further orders. ***The terms and conditions of appointment made it clear that the appointment is temporary and is until further orders. In such a situation, the High Court, in our view, erred in law in issuing a Writ of Quo Warranto.*** *The rights*

underArticle 226can be enforced only by an aggrieved person except in the case where the writ prayed for is for Habeas Corpus.

97(c). ***The Writ of quo warranto does not lie if the alleged violation is not of a statutory provision.****"*

(Emphasis supplied)

14. Apart from above, in the case of **Jagdish Prasad Sharma and others vs. State of Bihar an others, (2013) 8 SCC 633 (Para-72)**, Hon'ble Supreme court while considering the provisions of the UGC Regulations framed under Section 26 of the UGC Act, 1956, in the context of the State of Uttar Pradesh observed that State Government shall be bound to accept or follow the Regulations framed by the UGC, if it wishes to adopt the Regulations framed by the Commission under Section 26 of the UGC Act, 1956. Para-72 in the case of **Jagdish Prasad Sharma and others (supra) (SCC),** is reproduced below:

"59. As far as the States of Kerala and U.P. are concerned, they have their own problems which are localised and stand on a different footing from the other States, none of whom who appear to have the same problem. Education now being a List III subject, the State Government is at liberty to frame its own laws relating to education in the State and is not, therefore, bound to accept or follow the Regulations framed by UGC. It is only natural that if they wish to adopt the Regulations framed by the Commission under Section 26 of the UGC Act, 1956, the States will have to abide by the conditions as laid down by the Commission."

15. In Paragraphs-6, 7, 9, 10 and 11 of the counter affidavit filed on behalf of the respondent No.3 (State of Uttar Pradesh), it has been stated as under:

"6. That respondent no. 1 under Section 4(1-b) of the U.P. State Universities Act, 1973 by Government Order dated 30.12.2021 was appointed as the Interim (First) Vice Chancellor of Raja Mahendra Pratap Singh State University, Aligarh (herein after referred as university). A copy of the Government Order dated 30.12.2021 is annexed herewith and marked as ***Annexure No. CA-2*** *of this counter affidavit.*

7. That the U.P. State University Act 1973 in Section 4(1-b) for establishment of new universities and alteration of the area or names of university, provides for Interim appointment of officers to be made by the State Government. A copy of the Section 4(1-b) of the U.P. State University Act, 1973 is annexed herewith and marked as ***Annexure No. C-3*** *of this counter affidavit.*

9. That the provisions of the University Grants Commission Regulation 2010 and 2018 for the appointment of the Vice Chancellor at the Universities not been adopted by the State Government, thus is not applicable either for the interim or regular appointment of the Vice Chancellors of the State Universities governed by the U.P. State Universities Act, 1973.

10. That the Government order dated 28.06.2019 which relates to the adoption of the U.G.C. regulation, 2018 in paragraph no. 2 (8) mentions that provisions for the appointment of Vice Chancellor and Pro Vice Chancellor of the State University shall be the same as mentioned in the U.P. State University Act, 1973. A copy of G.O. dated 28.06.2019 is annexed herewith and marked as **Annexure No. CA- 4** *of this counter affidavit.*

11. That the U.G.C. Regulations for the appointment of the Vice Chancellor not been adopted by the State Government, interim (First) appointment of respondent

no. 1 by the State Government at Raja Mahendra Pratap Singh State University, Aligarh made in provisions of the U.P. State University Act, 1973 being lawful and bonafide deserve to be upheld. The writ petition being devoid of merit and liable to be dismissed."

16. The aforesaid Government Order dated 28.06.2019 was specifically referred and relied by learned counsels for the respondents in their arguments but no reply was submitted by learned counsel for the petitioner in this regard. Thus, so far as the appointment of the respondent No.1 as Interim (First) Vice-Chancellor is concerned, the State Government by the Government Order No.600/lRrj-1-2019-16(114)/2010 dated 28.06.2019, has specifically provided in para-8 thereof that the procedure for appointment of Vice-Chancellor and Pro-Vice Chancellor as provided in the Uttar Pradesh State Universities Act, 1973 shall continue to be applicable. The aforesaid government order was issued with reference to the UGC Regulations, 2018. Thus, so for as the procedure for appointment of Vice-Chancellor and Pro-Vice-Chancellor is concerned, the State Government has not adopted the UGC Regulations, 2018 and instead decided that the provisions of State Universities Act, 1973 shall remain applicable. Similar view has been taken by a coordinate Bench of this Court by judgment dated 16.11.2015 passed in Writ-C No.62753 of 2015 (Amrit Prasad vs. State of U.P. and 5 others) while considering the UGC Regulations, 2010. The aforesaid view also finds support from the three judges bench judgment of Hon'ble Supreme Court in **Jagdish Prasad Sharma and others** (supra).

17. So far as the judgments relied by the petitioner in the case of **Gambhirdan K. Gadhvi vs. State of Gujarat and others, (2022) 5 SCC 179 (paras 2.4 and Para-29), Prof. Narendra Singh Bhandari vs. Ravindra Jugran and others, 2022 (16) SCALE 410 (para-9) and Professor (Dr.) Sreejith P.S. vs. Dr. Rajasree M.S. and others, 2022 (15) SCALE 377 (Paras-2.3 and 8.5)** are concerned, we find that in all these judgments, an important fact was that the concerned State Government have adopted the relevant UGC Regulations, 2010/ 2018.

18. For all the reasons aforestated, the appointment of the respondent No.1 as Interim (First) Vice-Chancellor of the respondent No.2 – University being in terms of the provisions of Section 4(1-B) of the U.P. State Universities 1973, is neither illegal nor contrary to the statutory provisions. Therefore, a writ of Quo Warranto cannot be issued. The writ petition has no merit and is, therefore, **dismissed.**

(2023) 6 ILRA 655
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2023

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 3955 of 2022

Sri Kanhaiya Lal Trust & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Gaurav Singh, Sri Kumar Sreshtha

Counsel for the Respondents:
C.S.C., Sri Kaushal Kishore Mani

Civil Law - Uttar Pradesh Revenue Code, 2006-Petitioner a registered trust-purchased

land by registered sale deed-name mutated-obtained declaration that land used for non-agricultural purpose-but after some time due to constraint failed to establish educational institution –moved Application u/s 82 of the Code, 2006- for cancellation of an earlier declaration made u/s 80 rejected- conditions to be satisfied u/s 82 seeking cancellation of declaration made u/s 80- clearly specified under the section itself-reference made in the order impugned to any other circumstance and on the basis thereof to reject the application of the petitioner, would therefore render the exercise of the discretionary power conferred on the authority as ultra vires and invalid- remitted to the respondent No. 3 for passing a fresh order on the basis of the provisions u/s 82 of the Code, 2006. (E-9)

List of Cases cited:

1. Commissioner of Income Tax, West Bengal, Culcutta Vs Benoy Kumar Sahas Roy, AIR 1957 SC 768

2. Raja Mustafa Ali Khan, Through Special Manager, Court of Wards, Utraula, District Gonda Vs
Commissioner of Income Tax, United Provinces, Ajmer and Ajmer Merwara, AIR 1949 PC 13

3. Commissioner of Income Tax West Bengal, Calcutta Vs Raja Binoy Kumar Sahas Roy, AIR 1957 SC 768

4. Dilworth & ors.Vs The Commissioner of Stamps, (1899) AC 99

5. Ramala Sahkari Chini Mills Ltd. Uttar Pradesh Vs Commissioner, Central Excise, Meerut I, (2010) 14 SCC 744

6. Oswal Fats and Oils Ltd. Vs Additional Commissioner (Administration), Bareilly Division, Bareilly & ors., (2010) 4 SCC 728

7. Bharat Diagnostic Center Vs Commissioner of Custom, 2014 (307) ELT 632

8. South Gujarat Roofing Tiles Manufacturers Association & anr. Vs St. of Gujarat & anr., (1976) 4 SCC 601

9. ESI Corpn. Vs High Land Coffee Works, (1991) 3 SCC 617

10. Commissioner of Income Tax, Andhra Pradesh VsTaj Mahal Hotel, Secunderabad, (1971) 3 SCC 550

11. St. of Bombay & ors.Vs Hospital Mazdoor Sabha & ors., (1960) 2 SCR 866

12. Lord Esher MR in R. Vs St Pancras Vestry, (1890) 24 QBD 371

13. Associated Provincial Picture Houses, Ltd. Vs Wednesbury Corporation, [1947] 2 All ER 680

14. Padfield & ors.Vs Minister of Agriculture, Fisheries And Food & ors., [1968] 1 All ER 694

15. Breen Vs Amalamated Engineering Union & ors., [1971] 2 QB 175

16. Sitaram Vs St. of U.P. & ors., [1968] 1 All ER 694

17. Omwati Vs St. of U.P. & ors., [1971] 2 QB 175

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

1. Heard Sri Gaurav Singh and Sri Kumar Sreshtha, learned counsel for the petitioners; Sri Ajit Kumar Singh, learned Additional Advocate General appearing along with Sri Abhishek Shukla and Sri Amit Manohar, learned Additional Chief Standing Counsel for the State respondents; and Sri Kaushal Kishore Mani, learned counsel for the respondent no.4-Gram Sabha.

2. The present petition has been filed seeking to raise a challenge to an order dated 16.12.2021 passed by the respondent no.2-Sub Divisional Magistrate, Saharanpur whereby the application filed by the petitioners under Section 82 of the Uttar Pradesh Revenue Code, 20061 for

cancellation of an earlier declaration made under Section 80 of the Code, 2006, has been rejected.

3. As per the facts pleaded in the writ petition, the petitioner has asserted itself to be a registered trust having as its aims and objects to improve educational and social awareness in society. The petitioner no. 2 claims to have purchased land by means of a registered sale deed dated 25.04.2017 from its recorded tenure holders and thereafter got itself mutated in the revenue records.

4. The petitioner trust, thereafter, intending to construct an educational institution moved an application dated 14.07.2017 under Section 80 of the Code, 2006 for getting a declaration that the land in question was being used for non-agricultural purpose. The aforestated application was allowed by the respondent no.2 by an order dated 08.09.2017 and declaration was made that the land was being used for non-agricultural purpose.

5. After lapse of some time, due to certain constraints, the petitioners failed to establish the educational institution and therefore, filed an application dated 24.10.2019 under Section 82 of the Code, 2006 before the respondent no.2 seeking cancellation of the declaration obtained earlier. Upon the aforestated application, a report was obtained from the respondent No.3-Tahsildar, Saharanpur which was submitted on 02.03.2020. The report indicated that apart from a boundary wall of height about 4-5 feet, there existed no other construction over the land in question and that the land was not being utilised for any commercial purpose. It was stated that crops of wheat were standing over the land and it was being utilised for agricultural work. A similar report indicating the use of the land for agricultural purpose was submitted by area Lekhpal on 14.08.2020. Since, no orders were passed by the respondent authorities even after obtaining the requisite reports, the petitioner approached this Court by filing **Writ C No. 10252 of 2021 (Shri Kanhaiya Lal Trust and Another vs. State of U.P. and 3 Others)** which was disposed of by an order dated 19.7.2021/26.07.2021 directing the Sub-Divisional Magistrate to decide the application within stipulated time period.

6. The petitioner, at this stage, submitted a fresh application dated 2.8.2021 upon which the area Lekhpal and the Tehsildar submitted their report dated 25.11.2021 wherein it was stated that the spot inspection indicated that apart from a boundary wall of height 4-5 feet, no other construction was existing over the land in question. It was stated that no school had been constructed over the land and commercial work was being carried out by running a nursery of decorative and timber plants.

7. Relying upon the aforesaid report, the Sub-Divisional Magistrate rejected the application of the petitioner seeking cancellation of declaration under Section 82 of the Code, 2006 by the impugned order dated 16.12.2021. This order was passed in compliance of the direction issued by the High Court in Writ C No.-10252 of 2021.

8. Challenging the aforestated order, counsel for the petitioners has primarily based his contention on the argument that Section 4(2) of the Code, 2006 defines 'agriculture' as being inclusive of flower farming and therefore, any activity relating to nursery would be covered within the

meaning of the term 'agriculture'. Reference has also been made to the definition of 'agricultural income' under Section 2(1A) of the Income Tax Act, 1961 to submit that agriculture connotes the entire and integrated activity which is performed on land in order to raise its produce and consists of basic and essential operations requiring human skill and labour such as tilling of soil, sowing of seeds, planting and similar operations and also other subsequent operations. In this regard, reliance is placed on the judgement in the case of **Commissioner of Income Tax, West Bengal, Culcutta vs. Benoy Kumar Sahas Roy**2.

9. Counsel for the petitioners has further pointed out that the land in question is not being put to any commercial use as mentioned in the report which has been relied upon in the order impugned. It is asserted that the activity being carried out by the petitioners falls within the ambit of agricultural operations and therefore, the order rejecting the application under Section 82 of the Code, 2006, is illegally unsustainable.

10. Learned Additional Advocate General appearing for the State respondents has submitted that the cancellation of declaration under Section 82 of the Code, 2006 can be sought in a case where the holding or part thereof, in respect of which a declaration has been obtained under Section 80 is used for any purpose connected with agriculture. It is pointed out that in the instant case, the report having indicated that the use of the land in question was being made for a commercial purpose, the application seeking declaration under Section 82 has been refused. Counsel for the State respondents has also placed reliance upon the Constitution Bench decision of the Supreme Court in the case of **Benoy Kumar Sahas Roy (supra)** in support of his submission.

11. In order to appreciate the rival contentions, the relevant statutory provisions are required to be adverted and the same are as follows:-

"4. Definition.-In this Code,-

(2) *''agriculture'* includes horticulture, animal husbandry, pisciculture, flower farming, bee keeping and poultry farming;

(14) *''land*', except in Chapters VII and VIII and Sections 80, 81 and Section 136, means land held or occupied for purposes connected with agriculture;

80. Use of holding for Industrial, Commercial or Residential purposes.-- Where a bhumidhar with transferable rights uses his holding or part thereof, for industrial, commercial or residential purposes, the Sub Divisional Officer may, suo motu or on an application moved by such bhumidhar, after making such enquiry as may be prescribed, either make a declaration that the land is being used for the purpose not connected with agriculture or reject the application. The Sub-Divisional Officer shall take a decision on the application within forty five working days from the date of receipt of the application. In case the application is rejected, the Sub-Divisional Officer shall state the reasons in writing for such rejection and inform the applicant of his decision.

(2) Where a bhumidhar with transferable rights proposes to use in future his holding or part thereof, for industrial, commercial or residential purposes, the Sub-Divisional Officer may on an application moved by such bhumidhar, after making such enquiry as may be prescribed, either make a declaration that

the land may be used for the purpose not connected with agriculture or reject the application, within forty five working days from the date of receipt of the application. In case the application is rejected, the Sub-Divisional Officer shall state the reasons in writing of such rejection and inform the applicant of his decision :

Provided further that if the bhumidhar fails to start the proposed non-agricultural activity within a period of five years from the date of declaration under this sub-section, then the declaration under sub-section (2) for the holding or part thereof shall lapse :

Provided also that a declaration under this sub-section (2) shall not amount to change of land use and the land shall continue to be treated as agricultural land only. However, the bhumidhar shall be entitled to obtain loan and other necessary permissions, clearances etc. for the activity or project, proposed on the holding or part thereof, for which declaration under this sub-section has been obtained.

(3) A bhumidhar possessing declaration under sub-section (2) for this holding or part thereof, may apply to Sub-Divisional Officer for converting declaration under sub-section (2) to a declaration under sub-section (1), after completion of construction activity or start of the proposed non-agricultural activity, within a period of five years from declaration under sub-section (2). On receipt of such an application, the Sub-Divisonal Officer, after making such enquiry as necessary, shall approve or reject the application within a period of 15 days from the receipt of the application. In case of rejection, he shall record in writing the reasons for such rejection :

Provided that for conversion of declaration under sub-section (2) to a declaration under sub-section (1), the bhumidhar shall be liable to pay only the balance amount of fee payable, calculated at prevailing circle rate, after adjusting the amount already paid by him for declaration under sub-section (2) earlier.

(4) No application for a declaration under sub-section (1) or (2), moved by any co-bhumidhar having undivided interest in bhumidhari land shall be maintainable, unless application is moved by all the co-bhumidhars of such bhumidhari land. In case only one of the co-bhumidhar wants to get a declaration for his share in the land with joint interest, then such an application shall be entertained only after the respective shares of the co-bhumidhars in the land have been divided in accordance with the provisions of law.

(5) The application for declaration under sub-section (1) or sub-section (2) shall contain such particulars and shall be made in such manner as may be prescribed.

(6) Where the application under sub-section (1) or sub-section (2) is made in respect of a part of the holding, the Sub-Divisional Officer may, in the manner prescribed, demarcate such part for purposes of such declaration.

(7) No declaration under this section shall be made by the Sub-Divisional Officer, if he is satisfied that the land or part thereof is being used or is proposed to be used for a purpose which is likely to cause a public nuisance or to affect adversely public order, public health, safety or convenience or which is against the uses proposed in the master plan.

(8) In case the land or part thereof for which a declaration under this section is being sought falls within the area notified under any Urban or Industrial Development Authority, then prior permission of the concerned Development Authority shall be mandatory.

(9) The State Government may fix the scale of fees for declaration under this section and different fees may be fixed for different purposes :

Provided that if the applicant uses the holding or part thereof, for his own residential purpose, no fee shall be charged for the declaration under this section.

81. Consequences of declaration.--Where a declaration has been made under sub-section (1) of Section 80, the following consequences shall, in respect of such holding or part to which it relates ensue :

(a) all restrictions imposed by or under this Chapter in respect of transfer of land shall cease to apply to the Bhumidhar with transferable rights ;

(b) notwithstanding anything contained in Chapter XI, the land shall, with effect from the commencement of the agricultural year following the date of declaration, be exempted from payment of land revenue ;

(c) the Bhumidhar shall, in the matter of devolution be governed by the personal law to which he is subject.

82. Cancellation of declaration.--(1) Whenever any holding or part thereof in respect of which a declaration has been made under Section 80 is used for any purpose connected with agriculture the Sub-Divisional Officer may, of his own motion or on an application made in that behalf and after making such inquiry as may be prescribed, cancel such declaration.

(2) Where a declaration is cancelled under sub-section (1) the following consequences shall, in respect of the holding or part to which it relates ensue namely :

(a) the holding or part shall become subject to all restrictions imposed by or under this Chapter in matters of transfer and devolution;

(b) the holding or part shall become liable to payment of land revenue with effect from the commencement of the agriculture year in which the order for cancellation of the declaration is made :

Provided that until any land revenue is reassessed on such holding or part in accordance with the provisions of this Code, the land revenue payable or deemed to be payable in respect of such holding or part before the grant of declaration under Section 80 shall be deemed to be the land revenue payable in respect of such holding or part.

(c) where the land is in possession of any person other than the Bhumidhar thereof on the basis of a contract or lease, and the terms of such contract or lease are inconsistent with the provisions of this Code, such contract or lease shall to the extent of the inconsistency, become void and the person in possession shall be liable to ejectment on the suit of the Bhumidhar :

Provided that a mortgage with possession existing on the date of the cancellation of the declaration shall, to the extent of the amount due and secured on such land, be deemed to be substituted by a simple mortgage carrying such rates of interest as may be prescribed.

83. Recording of declaration or cancellation.--Every declaration under Section 80 or cancellation under Section 82 shall be recorded in Record of Rights in the manner as may be prescribed and, even after declaration under Section 80, the mutation order on the basis of transfer or succession shall be passed in the manner prescribed.

12. Section 80, as it presently stands, was substituted by Section 8 of the U.P. Revenue Code (Amendment) Act, 2019 [Act No. 7 of 2019] (w.e.f. 10.3.2019).

Prior to its substitution, Section 80 reads as follows:-

"80. Use of holding for Industrial, Commercial or Residential purposes.--(1) Where a Bhumidhar with transferable rights uses his holding or part thereof, for industrial, commercial or residential purposes, the Sub Divisional Officer may, suo motu or on an application moved by such Bhumidhar, after making such inquiry as may be prescribed, either make a declaration that the land is being used for the purpose not connected with agriculture or reject the application. The Sub-Divisional Officer shall state the reasons in writing of such declaration or rejection and inform the applicant of his decision within forty five working days from the date of receipt of the application :

Provided that no such declaration under this section shall be made merely on the ground that the holding or part thereof is surrounded by boundary wall or is "Parti" on the spot :

Provided further that no application for the declaration under this sub-section moved by any co-bhumidhar having undivided interest in Bhumidhari land shall be maintainable, unless application is moved by all the co-bhumidhars of such bhumidhari land or their interests therein are divided in accordance with provisions of law.

(2) The application for declaration under sub-section (1)shall contain such particulars and shall be made in such manner as may be prescribed.

(3) Where the application under sub-section (1) is made in respect of a part of the holding, the Sub-Divisional Officer may, in the manner prescribed, demarcate such part for purposes of such declaration.

(4) No declaration under this section shall be issued by the Sub-Divisional Officer, if he is satisfied that the land is to be used for a purpose which is likely to cause a public nuisance or to affect adversely public order, public health, safety or convenience or against uses proposed in the Master Plan.

(5) The State Government may fix the scale of fees for declaration under this section and different fees may be fixed for different purposes.

Provided that if the applicant uses the holding or part thereof for his own residential purpose, no fee shall be charged for the declaration under this section."

13. The relevant rules, as contained in the U.P. Revenue Code Rules, 20163, relating to the aforestated statutory provisions are also required to be referred and the same are as follows:-

"85. Application for declaration (Section 80).--(1) A bhumidhar with transferable rights using his holding or any part thereof for a purpose not connected with agriculture may apply to the Sub-Divisional Officer for a declaration under Section 80(1) in **R.C. Form-25.**

(2) The applicant shall pay the required amount of declaration fee which shall be one percent of the amount calculated as per the circle rate for agricultural purpose fixed by Collector of the district concerned or as per the rate fixed by State Government from time to time.

(3) On receipt of the application under sub-rule (1), the Sub-Divisional Officer may cause an inquiry to be made through a revenue officer not below the rank of a Revenue Inspector for the purpose of satisfying himself that the holding or part thereof is really being used for a non-

agricultural purpose. The concerned officer shall, after spot verification submit his report to the Sub-Divisional Officer indicating the purpose for which the holding or part thereof is being actually used.

86. Notice to the bhumidhar [Section 80].--Where the proceedings under Section 80(1) has been initiated by the Sub-Divisional Officer on his own motion, he shall issue notice to the bhumidhar concerned, and the inquiry referred to in rule 85(3) shall be held after the reply, if any, of the bhumidhar is submitted.

87. Grant of declaration (Section 80).-- If after scrutinizing the report of the revenue officer, the Sub-Divisional Officer is satisfied :

(a) that the entire holding is being used for a purpose not connected with agriculture; and

(b) that the conditions specified in Section 80(4) are complied with, he may make a declaration under Section 80(1), in respect of such holding.

88. Apportionment of Land Revenue [Section 80].--(1) If only a part of the holding is being used by a bhumidhar with transferable rights for a non-agricultural purpose, and the Sub-Divisional Officer is satisfied that the provisions of the second proviso to Section 80(1) have not been contravened, he may make a declaration only with respect of such part, provided that the cost of demarcation as per sub-rule (2) of the rule 22 is deposited by the bhumidhar before such declaration.

(2) Where the proceeding for declaration in respect of a part of the holding is initiated by the Sub-Divisional Officer suo motu, the cost of such demarcation shall be recovered by the Sub-Divisional Officer as arrears of land revenue.

(3) In every case of declaration under sub-rule (1) or sub-rule (2), the demarcation shall be made on the basis of the existing survey map, and the Sub-Divisional Officer shall apportion the land revenue payable by such bhumidhar.

(4) The Sub-Divisional Officer shall make an endeavor to conclude the proceeding for declaration under sub-section (1) of Section 80 within the period of 45 days from the date of registration of the application and if the proceeding is not concluded within such period the reasons for the same shall be recorded.

89. Cancellation of declaration [Section 82].--Where any holding or any part thereof has been the subject matter of declaration under Section 80 of the Code or Section 143 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, and such holding or part is again used for a purpose connected with agriculture, necessary application for cancellation of such declaration under Section 82 may be submitted to the Sub-Divisional Officer in R.C. Form-26.

90. Inquiry before cancellation [Section 82].--On receipt of the application under rule 89, the Sub-Divisional Officer shall make an inquiry and follow the procedure laid down in rules 85 to 88 before the declaration is cancelled in accordance with Section 82.

91. Mode of declaration and cancellation [Section 83].--(1) Every declaration made under Section 80 and cancellation thereof under Section 82 shall be duly signed by the Sub-Divisional

Officer and shall bear the seal of his Court and shall contain the following particulars:

(a) Section under which it was made.

(b) Number and area of the plot in respect of which it was made.

(c) The land revenue, if any, of the plots in question.

(d) Name of the village and Tahsil and district where the plot was situate.

(e) Name, parentage and address of the bhumidhar in whose favour the declaration was made.

(f) The date of the declaration.

(2) Such a declaration need not be registered under the Registration Act, 1908, but the same shall be recorded in the record of rights.

92. Rate of interest [Section 82].-- When a mortgage with possession is substituted by a simple mortgage under the proviso to clause (c) of Section 82(2), then such simple mortgage shall carry interest at the rate of 4 percent per annum."

14. It would be apposite to refer to the similar provisions relating to declaration under the repealed Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950. The same are as follows:-

143. Use of holding for industrial or residential purposes. - [(1) Where a [bhumidhar with transferable rights] uses his holding or part thereof for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector-in-charge of the sub-division may, suo motu or on an application, after making such enquiry as may be prescribed, make a declaration to that effect.

(1-A) Where a declaration under sub-section (1) has to be made in respect of a part of the holding the Assistant Collector-in-charge of the sub-divisions may in the manner prescribed demarcate such part for the purposes of such declaration.]

(2) Upon the grant of the declaration mentioned in sub-section (1) the provisions of this chapter (other than this section) shall cease to apply to the [bhumidhar with transferable rights] with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject.

[(3) Where a bhumidhar with transferable rights has been granted, before or after the commencement of the Uttar Pradesh Land Laws (Amendment) Act, 1978, any loan by the Uttar Pradesh Financial Corporation or by any other Corporation owned or controlled by the State Government, on the security of any land held by such bhumidhar, the provisions of this Chapter (other than this section) shall cease to apply to such bhumidhar with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject.]

144. Use of land for agricultural purposes.- (1) Whenever any land held by a bhumidhar which is not used for the purposes connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, has become land used for such purposes, the [Assistant Collector-in-charge of the sub-division may suo motu or on an application, after making such enquiry as may be prescribed], make a declaration to that effect and thereupon the bhumidhar shall, as respects the land, be subject to the provisions of this chapter.

(2) Upon the grant of the declaration under sub-section (1) in respect of any land

any person other than the bhumidhar in possession of the plot shall-

(a) if he holds it under any contract or lease which is inconsistent with any of the provisions of this chapter, be deemed to be an occupant liable to ejectment under Section 209; and

(b) if he holds it under any contract or lease which is not inconsistent with any of the provisions of this chapter, be entitled to the rights in the land determined in accordance with the provisions thereof.

(3) Any contract or lease referred to in sub-clause (a) of sub-section (2) which is inconsistent with the provisions of the chapter shall, to the extent of the inconsistency, become void with effect from the date of declaration :

Provided that any mortgage with possession existing on any such land shall, to the extent of the amount due and secured on such land, be deemed to have been substituted by a simple mortgage carrying such rate of interest as may be prescribed.

145. Registration of the declaration granted under Sections 143 and 144. - A copy of every declaration made under Sections 143 and 144 shall be forwarded by the [Assistant Collector-in-charge of the sub-division] to the Sub-Registrar concerned who shall, notwithstanding anything contained in the Indian Registration Act, 1908 (U.P. Act XVI of 1908), register the same free of cost in the manner prescribed.

15. Section 82 of the Code, 2006 relates to cancellation of declaration made under Section 80, and in terms thereof whenever any holding or any part thereof in respect of which a declaration has been made under section 80 is used for 'any purpose connected with agriculture', the Sub Divisional Officer may, of his own motion or on an application made in that behalf and after making such enquiry as may be prescribed, cancel such declaration.

16. The corresponding provision contained under Rule 89 of the Rules, 2016 provides that where any holding or any part thereof has been the subject matter of declaration under Section 80 of the Code or Section 143 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, and such holding or part is again used for a purpose connected with agriculture, necessary application for cancellation of such declaration under Section 82, may be submitted to the Sub Divisional Officer in the prescribed form, whereupon the Sub Divisional Officer shall make an enquiry and follow the procedure laid down in Rules 85 to 88 before the declaration is cancelled in accordance with Section 82.

17. In the case at hand the application filed by the petitioners under Section 82 of the Code, 2006, seeking cancellation of the declaration made earlier under Section 80, has been rejected by assigning a reason that the land in question was being used as 'nursery', which indicates that the land is being used for a commercial purpose and not for an agricultural purpose. The respondent authority on the said basis has drawn an inference that the land use was non-agricultural and commercial, and as a consequence thereof, rejected the application.

18. The term 'agriculture' in its root sense is derived from the Latin *ager* (field) and *colo* (cultivate) signifying, when combined the Latin *agricultura* (field or land tillage). The word agriculture, has come to subsume a very wide spectrum of activities that are integral to agriculture and have various descriptive terms assigned to them.

19. Referring to the dictionary meaning of the term 'agriculture' **The New Lexicon Webster's Dictionary**4 describes it as:-

"the science or practice of large-scale soil cultivation (cf. HORTICULTURE), farming[F]."

20. In **Bouvier's Law Dictionary**5 'agriculture' is defined as:-

"The cultivation of soil for food products or any other useful or valuable growths of the field or garden; tillage, husbandry; also, by extension, farming including any industry practised by a cultivator of the soil in connection with such cultivation, as breeding and rearing of stock, dairying etc. The science that treats of the cultivation of the soil. Stand. Dict. The term refers to the field or farm, with all its wants, appointments and products, as distinguished from horticulture, which refers to the garden, with its less important though varied products: Dillard Vs. Webb, 55 Ala. 468.

A person is actually engaged in agriculture when he derives the support of himself and family in whole or in part from the cultivation of land; it must be something more than a garden, though it may be less than a field, and the uniting of any other business with this is not inconsistent with the pursuit of agriculture; Springer v. Lewis, 22 Pa.193. See Bachelder v. Bickford, 62 Me. 526; Simons v. Lovell, 7 Heisk. (Tenn.) 515.

Within the meaning of an exemption law, one who cultivates a one acre lot and is also a butcher and day laborer is not engaged in agriculture."

21. **Corpus Juris Secundum**6 defines the term 'agriculture' as :-

"(1) Agriculture is a science that treats of the cultivation of the soil.

(2) Agriculture is the art or science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of live stock."

22. The aforesaid meanings ascribed to the term 'agriculture' in various dictionaries indicate that the term has been used both in narrow sense of cultivation of field and wider sense of comprising activities in relation to the land including horticulture, forestry, breeding and rearing of live stock, floriculture etc.

23. The question as to whether the narrower or the wider sense of meaning of the term 'agriculture' is to be adopted in a particular case would depend upon the provision contained in the statute and also upon the facts and circumstances of each case.

24. The term 'agriculture', at one point of time was understood in its primary sense of cultivation of field. However, there was another view which gave to the term 'agriculture' an extended meaning and included within its connotation not only the products raised by the cultivation of land but also allied activities, thus bringing within its compass not only the basic agricultural operations but also the further operations performed on the products of the land.

25. The central idea which emerges is that there should be tillage of land, sowing of seeds or planting or similar work on the land which invests the operation with the characteristic of agricultural operations and

whenever this central idea is fulfilled there is user of land for agricultural purposes. In the wider sense, the term 'agriculture' has been interpreted so as to include all activities in relation to the land, even though they did not comprise these basic agricultural operations.

26. The meaning and connotation of the term 'agriculture' and 'agricultural purposes' came up for consideration before the Privy Council in ***Raja Mustafa Ali Khan, Through Special Manager, Court of Wards, Utraula, District Gonda Vs. Commissioner of Income Tax, United Provinces, Ajmer and Ajmer Merwara***7, in the context of an exemption being sought under Section 2(1) of the Income Tax Act, 1922, and an opinion was expressed that unless there is some measure of cultivation of land and some expenditure of skill and labour upon it, the land cannot be said to be used for agricultural purposes.

27. The term 'agriculture' was thus in effect held to mean some measure of cultivation of land and some skill and labour upon it and unless the operations conformed with this meaning they could not be styled as agricultural operations so as to lead to the inference that the land on which they were performed was being used for agricultural purposes.

28. The test which was laid down for finding out when land is said to be used for agricultural purposes was that there must be some measure of cultivation of land and some expenditure of skill and labour upon it.

29. The meaning of the term 'agriculture' and 'agricultural purposes' was again subject matter of consideration in the context of the definition of term 'agricultural income' under Section 2(1) of the Income Tax Act, in the case of ***Commissioner of Income Tax West Bengal, Calcutta Vs. Raja Binoy Kumar Sahas Roy***8 and after a detailed discussion of the earlier decisions on the point, it was observed as follows:-

"95. We have, therefore, to consider when it can be said that the land is used for agricultural purposes or agricultural operations are performed on it. Agriculture is the basic idea underlying the expressions "agricultural purposes" and "agricultural operations" and it is pertinent therefore to enquire what is the connotation of the term "agriculture".

As we have noted above, the primary sense in which the term agriculture is understood is agar -- field and cultra -- cultivation i.e. the cultivation of the field and if the term is understood only in that sense, agriculture would be restricted only to cultivation of the land in the strict sense of the term meaning thereby, tilling of the land, sowing of the seeds, planting and similar operations on the land.

They would be the basic operations and would require the expenditure of human skill and labour upon the land itself. There are however other operations which have got to be resorted to by the agriculturist and which are absolutely necessary for the purpose of effectively raising the produce from the land.

They are operations to be performed after the produce sprouts from the land e.g. weeding, digging the soil around the growth, removal of undesirable under-growths and all operations which foster the growth and preserve the same not only from insects and pests but also from depradation from outside, tending, pruning, cutting, harvesting, and rendering the produce fit for the market. The latter would

all be agricultural operations when taken in conjunction with the basic operations above described, and it would be futile to urge that they are not agricultural operations at all.

But even though these subsequent operations may be assimilated to agricultural operations, when they are in conjunction with these basic operations, could it be said that even though they are divorced from these basic operations they would nevertheless enjoy the characteristic of agricultural operation? Can one eliminate these basic operations altogether and say that even if these basic operations are not performed in a given case the mere performance of these subsequent operations would be tantamount to the performance of these subsequent operations on the land so as to constitute the income derived by the assessee therefrom agricultural income within the definition of that term?

96. We are of opinion that the mere performance of these subsequent operations on the products of the land, where such products have not been raised on the land by the performance of the basic operations which we have described above would not be enough to character them as agricultural operations. In order to invest them with the character of agricultural operations, these subsequent operations must necessarily be in conjunction with and a continuation of the basic operations which are the effective cause of the products being raised from the land.

It is only if the products are raised from the land by the performance of these basic operations that the subsequent operations attach themselves to the products of the land and acquire the characteristic of agricultural operations. The cultivation of the land does not comprise merely of raising the products of the land in the narrower sense of the term like tilling of the land, sowing of the seeds, planting, and similar work done on the land but also includes the subsequent operations set out above all of which operations, basic as well as subsequent, form one integrated activity of the agriculturist and the term "agriculture" has got to be understood as connoting this integrated activity of the agriculturist.

One cannot dissociate the basic operations from the subsequent operations, and say that the subsequent operations, even though they are divorced from the basic operations can constitute agricultural operations by themselves. If this integrated activity which constitutes agriculture is undertaken and performed integrated to any land that land can be said to have been used for "agricultural purposes" and the income derived therefrom can be said to be "agricultural income" derived from the land by agriculture.

...

101. If the term "agriculture" is thus understood as comprising within its scope the basic as well as subsequent operations in the process of agriculture and the raising on the land of products which have some utility either for consumption or for trade and commerce, it will be seen that the term "agriculture" receives a wider interpretation both in regard to its operations as well as the results of the same.

Nevertheless there is present all throughout the basic idea that there must be at the bottom of it cultivation of land in the sense of tilling of the land, sowing of the seeds, planting, and similar work done on the land itself. This basic conception is the essential sine qua non of any operation performed on the land constituting agricultural operation. If the basic operations are there, the rest of the operations found themselves upon the same.

But if these basic operations are wanting the subsequent operations do not acquire the characteristic of agricultural operations."

30. The legal position, as noted above, indicates that if the products are raised from the land by performance of the basic operations which are necessary for the purpose of effectively raising the produce from the land, the subsequent operations attach themselves to the products of the land and acquire the characteristic of agricultural operations. The cultivation of the land has been held to comprise not merely raising the products of the land in the narrower sense of the term like tilling of land, sowing of seeds, planting and similar work done on the land but would also include the subsequent operations. All these operations -- basic as well as subsequent, would form one integrated activity of the agriculturist and the term 'agriculture' would have to be understood as connoting this integrated activity. In a case where this integrated activity which constitutes agriculture is undertaken and performed in regard to any land, that land can be said to have been used for 'agricultural purposes'.

31. The words used in Section 82 on the basis of which cancellation of declaration made under Section 80 may be sought, are 'any purpose connected with agriculture'. The term 'agriculture' has been defined under Section 4(2) of the Code, 2006 to include horticulture, animal husbandry, pisciculture, flower farming, bee keeping and poultry farming.

32. The word 'includes' has often being seen to be used in definition clauses in order to enlarge the meaning of the words or phrases occurring in the body of a statute. When it is so used these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the definition clause declares that they shall include.

33. In ***Dilworth and Others Vs. The Commissioner of Stamps***,9 it has been observed as follows:-

"...The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. ..."

34. The term 'include' is used in interpretation clauses where it is intended that while the term which is being defined should retain its ordinary meaning, its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative and not exhaustive. When they are so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include.

35. ***Craies***10 in ***Statute Law (7th edition, 1979)*** has opined as follows:-

"There are two forms of interpretation clause. In one, where the word defined is declared to "mean" so and so, the definition

is explanatory and prima facie restrictive. In the other, where the word defined is declared to "include" so and so, the definition is extensive,....."

36. In ***Ramala Sahkari Chini Mills Ltd. Uttar Pradesh Vs. Commissioner, Central Excise, Meerut -I***11, the Supreme Court while considering the use of the expression 'include' in Rule 2(g) of the CENVAT Credit Rules, 2002, held that it should be given a wide interpretation and that the legislative intent in this case was to create an extensive legal fiction and that the legislature did not intend to impart restricted meaning to the definition. It was observed as follows:-

"The word "include" should be given a wide interpretation as by employing the said word, the legislature intends to bring in, by legal fiction, something within the accepted connotation of the substantive part. It is also well settled that in order to determine whether the word "includes" has that enlarging effect, regard must be had to the context in which the said word appears."

37. The ambit of the expression 'includes' occurring in Section 154 of the Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950, came for consideration in ***Oswal Fats and Oils Ltd. Vs. Additional Commissioner (Administration), Bareilly Division, Bareilly and Others***12 and it was stated thus:-

"The word 'includes' is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, those words and phrases must be construed as comprehending not only such things, as they signify according to their nature and import, but also those things which the interpretation clause declares that they shall include."

38. The use of the word 'include' and its scope and intent again came up for consideration in ***Bharat Diagnostic Center Vs. Commissioner of Custom***13, and referring to the earlier decision in ***South Gujarat Roofing Tiles Manufacturers Association and Another Vs. State of Gujarat and Anothe***r14, ***ESI Corpn. Vs. High Land Coffee Works***15, ***Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad***16 and ***State of Bombay and Others Vs. Hospital Mazdoor Sabha and Others***17, it was restated that when the word 'include' is used as such, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import or as per common parlance but also those things which the interpretation or explanation clause declares that they shall include. It was observed as follows:-

"9. While defining or explaining the meaning of a word or phrase in a statute, the word "include' is generally used to enlarge the meaning of those words or phrases. When the word "include' is used as such, those words or phrases must be construed as comprehending not only such things as they signify according to their natural import or as per common parlance, but also those things which the interpretation or explanation clause declares that they shall include. This principle has been enumerated in several decisions of this Court.

10. In the case of South Gujarat Roofing Tiles Manufacturers Assn. v. State of Gujarat, (1976) 4 SCC 601, a three-judge Bench of this Court held that:

"... It is true that "includes" is generally used as a word of extension, but the meaning of a word or phrase is extended when it is said to include things that would not properly fall within its ordinary connotation. We may refer to the often quoted observation of Lord Watson in Dilworth v. Commissioner of Stamps [1899 AC 99, 105-106] that when the word "include" is used in interpretation clauses to enlarge the meaning of words or phrases in the statute:

"these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include." Thus where "includes" has an extending force, it adds to the word or phrase a meaning which does not naturally belong to it. ..."

11. Again, in a three-judge Bench decision in the case of ESI Corpn. v. High Land Coffee Works, (1991) 3 SCC 617, this Court observed that:

"... The word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. The word "include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. [See (i) Stroud's Judicial Dictionary, 5 th edn. Vol. 3, p. 1263 and (ii) C.I.T. v. Taj Mahal Hotel, (1971) 3 SCC 550, (iii) State of Bombay v. Hospital Mazdoor Sabha, (1960) 2 SCR 866.]"

39. It would, therefore, be seen that the word 'include' is generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute and when it is so used, the comprehensive sense is not to be taken as strictly defining what the meaning of the word must be under all circumstances but merely as declaring how it should be comprehended. Where an interpretation clause defines a word to mean a particular thing, the definition would be explanatory and *prima facie* restrictive and where an interpretation clause defines a term to include something, the definition would be extensive.

40. The word 'include' is thus to be taken as a term of extension which imports addition. It adds to the subject matter already comprised in the definition. A broader meaning ought to be given where an interpretation clause uses the word 'includes' keeping in view the scheme, object and purport of the statute.

41. In ordinary parlance the use of the word 'includes' indicates that what follows it comprises or is contained in or is a part of the whole of the word preceding. In the context of Section 4(2) of the Code, 2006, this would mean that the word 'agriculture' would not be restricted to the group of activities that follow but would only emphasize the attribute which is common to the group. The attribute which is common to the group in this case is that all the activities enumerated are allied to the principle activity of agriculture.

42. It is a settled principle of interpretation that words in a statutory provision are to be read in collocation with their companion words. This principle is based on the maxim noscitur a sociis i.e.

meaning of a word should be known from its accompanying or companion words. The import of words used in a cognate sense and in reference to activities of an allied nature can be understood by applying this principle.

43. The rule to be applied for understanding associated words in a common sense, has been stated by **Maxwell**18, in the following manner:-

"Where two or more words which are susceptible of analogous meaning, are coupled together, noscitur a sociis, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general."

44. Applying the aforestated principle that when words of analogous meaning are used together they are to be taken in their cognate sense it would follow that the word 'agriculture' as defined under Section 4(2) of the Code, 2006 would have to be understood as being inclusive of its allied activities and by necessary implication, the 'carrying on of an activity relating to nursery' cannot be held to be excluded.

45. Reverting to the facts of the present case, the application dated 24.10.2019 submitted by the petitioner before the concerned authority under Section 82 of the Code, 2006 seeking cancellation of the declaration made under Section 80, states that consequent to the declaration obtained under Section 80 on 08.09.2017 the petitioners had not raised any construction over the land in question nor did they intend to raise any such construction in the future. It was also stated in the application that the land in question was being used for agriculture and crops of wheat were standing over the same. Accordingly, the earlier declaration that the land was being used for purpose not connected with agriculture, was sought to be cancelled.

46. In support of the aforestated assertion, the petitioners have sought to rely upon the khasra entries indicating that the crops of wheat were standing over the land in question at the relevant point of time. A report dated 02.03.2020 submitted by the Area Lekhpal has also been placed on record wherein it is stated that the crops of wheat were standing over the land in question and the same was being used for agricultural purpose and not for any commercial purpose.

47. Since the application of the petitioner remained pending despite the aforementioned reports, the petitioners aggrieved by the inaction on the part of the respondent authority approached this Court by filing Writ - C No. -10252 of 2021, which was disposed of in terms of a judgment dated 19.07.2021/26.07.2021 directing the respondent authorities to decide the application of the petitioner within a stipulated time period of four months.

48. The petitioner thereafter moved an application dated 02.08.2021 before the respondent No. 2 seeking compliance of the order passed in the writ petition, pursuant to which a report dated 25.11.2021 was submitted by the Area Lekhpal wherein it was stated that upon spot inspection, it was found that apart from the boundary wall of height of 4-5 feet which encloses the land, there existed no construction over the same and the land was being used as a nursery of 'decorative' and 'timber plants'. As per the

report, the same was of a commercial use. On the basis of the aforesaid report, the respondent No. 2 passed the order dated 16.12.2021 rejecting the application made by the petitioners by recording a reason that since the land was being used for the purposes of a nursery which was a commercial use and not for an agricultural purpose, the declaration as sought could not be granted.

49. The principal reason which has thus been assigned for rejecting the application filed under Section 82 of the Code, 2006 seeking cancellation of the declaration is that the land was being used for the purposes of a nursery. This, according to the respondent authority, was a commercial use and the same could not be said to be a purpose connected with agriculture.

50. The definition of the term 'agriculture' under sub-section (2) of Section 4 of the Code, 2006, as noticed above, is of expansive nature and specifically includes 'flower farming'. This together with the legal position, as noted above, that cultivation of land is not to be seen as merely raising the products of land in the narrower sense of the term like tilling of the land, sowing of seeds, planting and other similar works but would also include the subsequent operations, would lead to an inference that the use of the land for the purposes of a nursery in the facts of the present case, cannot be said to be a non-agricultural purpose; rather the same would have to be held to be included under the expression 'purpose connected with agriculture'.

51. This being the factual and the legal position, the reason assigned for rejecting the application under Section 82, would have to be held to be wholly irrelevant for the purposes of consideration of an application seeking cancellation of declaration under Section 80 of the Code, 2006.

52. 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.

53. The 'irrelevant considerations' doctrine was stated by **Lord Esher MR in R. vs. St Pancras Vestry**19 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."

54. 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**20 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."

55. 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**21, 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."

56. 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**22 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."

57. 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.

58. The aforestated legal position has been stated in a recent decision of the Court in **Sitaram Vs. State of U.P. And 2 Others**23 and reiterated in **Omwati Vs. State of U.P. And Others**24.

59. The conditions which are required to be satisfied while considering an application under Section 82 of the Code, 2006 seeking cancellation of declaration

made under Section 80, having been clearly specified under the section itself, the reference made in the order impugned to any other circumstance and on the basis thereof to reject the application of the petitioner, would therefore render the exercise of the discretionary power conferred on the authority as ultra vires and invalid. The order impugned having thus been passed in the absence of consideration of the relevant provisions and being based on wholly irrelevant consideration, is accordingly held to be legally unsustainable and is, therefore, set aside.

60. The matter is remitted to the respondent No. 3 for passing a fresh order on the basis of the provisions contained under Section 82 of the Code, 2006, in the light of the discussions made hereinabove. The respondent authority would be expected to pass an appropriate order on the application of the petitioner under Section 82 seeking cancellation of the declaration under Section 80, after obtaining a fresh report, expeditiously, and preferably within a period of three months from the date of presentation of a certified copy of this order.

61. The writ petition stands **allowed to the extent indicated above.**

(2023) 6 ILRA 674
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-C No. 16743 of 2023

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

Counsel for the Petitioner:
Sri Manoj Kumar Mishra, Tabassum Bano

Counsel for the Respondents:
C.S.C., Sri Mool Chandra Maurya

Civil Law - U.P. Maintenance and Welfare of Parents and Senior Citizens Act 20072 - Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules 2014 - Chapter II and Chapter V of the Act 2007, read with, Rules 2014, operate in different areas and for different purpose, inter alia, pertaining to the property of the senior citizen. 14 of 17 (ii) Chapter II is confined to order of maintenance to be passed by the Tribunal, which includes, provision for residence either for the senior citizen or parent against children/ relatives, but not against minor children or third party. (iii) The Tribunal under Chapter II of the Act 2007, read with, Rules 2014, has sole jurisdiction to order maintenance, inter alia, in regard to provision of residence against children/ relative. The premises/property sought for maintenance (residence) by the senior citizen, Tribunal alone would have jurisdiction. Tribunal while allowing the application of maintenance in respect of residence can order eviction from the said residential property against children/ relatives of the senior citizen. (iv) Chapter V is confined to protection of life and property of the senior citizen alone. Protection of property would also include eviction of the occupant from the tangible property. The power is conferred on the District Magistrate. The occupant could be children/relatives or third party. (v) District Magistrate under Chapter V, however, would lack jurisdiction in respect of property, i.e., maintenance for provision for residence, to order eviction of children/relatives from such property. Though, District Magistrate would have power in respect of any other kind of property of the senior citizen, including, order of eviction therefrom. (vi) Daughter-in-law, being relative of the senior citizen,

can be evicted from the residence sought by the senior citizen for maintenance to satisfy his needs for leading a normal life. But such an order of eviction by the Tribunal is subject to the order passed by the competent Magistrate/civil court in respect of shared household under the Protection of Women from Domestic Violence Act 2005 . The interest of the senior citizen and the daughter-in-law would have to be adjusted by the Tribunal having regard to their competing needs. Daughter-in-law cannot be evicted from the 'shared household' in possession or owned by the senior citizen , though, suitable adjustment can be made by the Tribunal (Para 68)

Allowed. (E-5)

List of Cases cited:

1. Abhishek Tiwari & anr. Vs St. of U.P. & ors. Writ C No. 30835 of 2021, decided on 31 May, 2022

2. Khushboo Shukla Vs District Magistrate, Lucknow & ors. Misc. Single No. 16212 of 2021, decided on 2.11.2021

3. S. Vanitha Vs The Deputy Commissioner, Bangaluru Urban District & ors. [2020] 12 SCR 1057

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

1. Heard Shri Manoj Kumar Mishra, learned counsel for the petitioner, Shri Mool Chandra Maurya, learned counsel appearing for the respondent no. 4 and Shri Mukul Tripathi, learned Standing Counsel for the State-respondent.

2. Petitioner claims to be daughter-in-law of the fourth respondent and sister-in-law of fifth respondent. Fifth respondent is the son of fourth respondent.

3. Petitioner, by the instant writ petition, is challenging the order dated 6 April 2023, passed by the second respondent-District Magistrate, District-Etah and the fact finding communication dated 29 March 2023, issued by the third respondent-Sub-Divisional Magistrate Etah, District-Etah.

4. By the order dated 6 April 2023, based on the fact finding communication dated 29 March 2023, submitted by the Sub-Divisional Magistrate Etah, District-Etah, petitioner has been directed to be evicted from House-A Block, Lodhipuram, Peepal Adda, Etah, Thana-Kotwali Nagar, District-Etah. The order came to be passed on the directions of this Court in a writ petition1, filed by the fourth respondent.

5. Learned counsel for the petitioner, at the outset, has raised a question of law that under the U.P. Maintenance and Welfare of Parents and Senior Citizens Act 20072, read with, Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules 20143, neither, Tribunal nor the District Magistrate, has been conferred power or authority to direct eviction/ejectment from the residence/property. Accordingly, the impugned order is a nullity in the eye of law.

6. It is further submitted that petitioner, admittedly, being the daughter-in-law of the fourth respondent, cannot be evicted from the premises as she has inherited the property after the death of her husband.

7. Learned counsel appearing for the petitioner has placed reliance on the decision rendered by the Single Judge of this Court in **Abhishek Tiwari and**

another vs. State of U.P. and others4, and **Khushboo Shukla vs. District Magistrate, Lucknow and others**5, wherein, it has been categorically held that Tribunal would lack jurisdiction to direct eviction from the residence of the senior citizen. Further, reliance has been placed on **S. Vanitha vs. The Deputy Commissioner, Bangaluru Urban District and others**6.

8. In rebuttal, learned counsel appearing for the State-respondent and the contesting respondent submits that the expression 'maintenance' includes, residence. In the event children/relative of the senior citizen/parent residing in the premises owned/occupied by the senior citizen/parent can seek eviction of their children/relative from the premises in the event they fail to maintain the senior citizen/parent or are subjecting them to harassment due to their old age.

9. It is further submitted that in the expression 'maintenance' and 'property' employed by the Legislature has different connotation. The expression 'property' would not include the expression 'residence' for the purposes of 'maintenance', though the residential accommodation is a property. The jurisdiction in respect of maintenance for residence and property has been conferred on different authorities and for different purpose.

11. Rival submissions fall for consideration.

12. It is not in dispute that several civil suits are pending inter se parties seeking injunction in respect of the premises. The question of title and possession, is also involved in the pending suits.

13. At the outset, before adverting on merits, the question that arises for consideration is as to whether the Maintenance Tribunal, and/or, the District Magistrate has power and authority under the Act 2007, read with, Rules 2014, to direct/order eviction of children/relative of the senior citizen while adjudicating upon the order of maintenance of senior citizens/parents.

14. Act 2007, came to be enacted by the Parliament to provide for more effective provisions for the maintenance and welfare of parents and senior citizens, guaranteed and recognized under the Constitution and for matters connected therewith and incidental thereto. The statement of objects and reasons, notes that traditional norms and values of the Indian society laid stress on providing care for the elderly. However, due to withering of the joint family system, a large number of elderly are not being looked after by their family. Consequently, many older persons, particularly widowed women are now forced to spend their twilight years all alone and are exposed to emotional neglect and to lack of physical financial support. This clearly reveals that ageing has become a major social challenge and there is a need to give more attention to the care and protection for the older persons. In short, despite there being a provision for maintenance under the Code of Criminal Procedure 1973, the Act provides for institutionalization of a suitable mechanism for protection of life and property of older persons. The Act 2007 has overriding effect, notwithstanding anything inconsistent therewith, contained in any enactment other than Act 2007.

15. The Act 2007 is divided into VII chapters. Chapter II provides for

maintenance of parents and senior citizens, whereas, Chapter V deals with the protection of life and property of senior citizens.

16. The question raised in the present writ petition confines to the analysis and interpretation of the provisions, in particular, under Chapter II and Chapter V of Act 2007, read with, the Rules 2014, framed thereunder.

17. Legislature has employed the expression 'senior citizen' and 'parent'. Senior citizen is a person who has attained the age of sixty years or more. [Section 2(4)]. Sub-Clause (d) of Section 2 defines 'parent' which reads thus:

" 'parent' means father or mother whether biological, adoptive or step father or step mother, as the case may be, whether or not the father or the mother is a senior citizen"

18. A parent need not be a senior citizen, but, in case a parent is unable to maintain himself/herself and unable to lead a normal life, he/she is entitled to raise a claim before the Tribunal for maintenance. In other words, a senior citizen includes a 'parent and grand-parent', but parent need not be a senior citizen.

19. Section 4 under Chapter II mandates that a senior citizen, including, parent who is unable to maintain himself from his own earning or out of the property owned by him shall be entitled to make an application under Section 5 against one or more of his children, not being a minor, for maintenance. A childless senior citizen can claim maintenance against his relative.

20. Sub-section (2) of Section 4 casts an obligation on the children or relative, as the case may be, to maintain a senior citizen which extends to the needs of such citizen so that the senior citizen may lead a normal life.

21. Sub-section (3) of Section 4 casts an obligation on the children to maintain his or her parent, i.e., either father or mother or both, as the case may be, so that such parent may lead a normal life.

22. Sub-section (4) of Section 4 provides that any person being a relative of a senior citizen and having sufficient means shall maintain such citizen provided he is in possession of the property of such senior citizen or he would inherit the property of such senior citizen/parent.

23. On careful reading of Section 4, senior citizen can claim maintenance from his children or relatives, as the case may be. A parent, whereas, has to claim maintenance from his children, not from a relative.

24. Sub-Clause (b) of Section 2 defines 'maintenance' which reads thus:

" 'maintenance' includes provision for food, clothing, residence and medical attendance and treatment."

25. The definition is inclusive and not exhaustive and, in particular, includes provision for residence. We will return to the meaning of residence later on. On conjoint reading of Section 4 along with the definition of maintenance, it is explicit that senior citizen/parent is entitled to maintenance from their children or relative, as the case may be, which extends to the needs of such senior citizen/parent so that such senior citizen or parent leads a normal life. It follows that residence is a facet of

maintenance and the senior citizen may claim maintenance from his children/relative, inter alia, only of residence to their exclusion if in the opinion of the senior citizen, it extends to his needs to enable the senior citizen to lead a normal life with dignity, provided, the senior citizen is the owner of the property, whether, self acquired or ancestral. In the event the senior citizen does not own a residence, then in that event his children/relative would have to provide the residence, as the expression 'maintenance' includes residence. In cases where the children/relative are unable to provide residence to the senior citizen, for any reason whatsoever, the senior citizen would be setup in an old age home of the district by the Tribunal.

26. Only those relatives of the senior citizen is called upon to maintain senior citizen provided the relative is in possession of the property of the senior citizen or he would inherit the property of such senior citizen.

27. Relative has been defined in Sub-clause (g) of Section 2 which reads thus:

" 'relative' means any legal heir of the childless senior citizen who is not a minor and is in possession of or would inherit his property after his death"

28. On careful reading of the definition of 'relative', it employs the expression 'means' making the definition exhaustive and restricted to the 'legal heir of a childless senior citizen', in possession or would inherit his property after his death. In other words, to be a relative of a senior citizen:

(i) the senior citizen must be childless;

(ii) relative must not be a minor;

(iii) must be a legal heir of the senior citizen;

(iv) must be in possession or must inherit his property.

29. The expression used is property and not residence being claimed by the senior citizen towards maintenance. In other words, the relative who inherits any kind of property, i.e., tangible or intangible of the senior citizen would be relative of the senior citizen.

30. The senior citizen/parent would have to approach the Tribunal for maintenance by making an application as mandated under Section 5, read with, Rule 5 in Form A.

31. Sub-Clause (j) of Section 2 defines 'Tribunal' which reads thus:

" 'Tribunal' means the Maintenance Tribunal constituted under Section 7."

32. Section 6 of Act 2007, provides for jurisdiction and procedure and Section 7 provides for constitution of Maintenance Tribunal. The State Government is called upon, vide notification in the Official Gazette, to constitute for each Sub-Division one or more Tribunals, as may be specified in the notification, for the purpose of adjudicating and deciding upon the order of maintenance.

33. Section 8 provides for summary procedure. Tribunal shall have powers of a Civil Court for the purposes specified in Sub-section (2) of Section 8.

34. Section 9 provides that the Tribunal shall pass an order for maintenance if children or relative, as the

case may be, neglect or refuse to maintain a senior citizen being unable to maintain himself. The maximum maintenance allowance which may be ordered by the Tribunal shall be such as may be prescribed by the State Government but shall not exceed ten thousand rupees per month. [Section 9(2)/Rule 15]

35. Section 11 provides for enforcement of order of maintenance. A maintenance order made under Act 2007, shall have same force and effect as an order passed under Chapter IX of the Code of Criminal Procedure 1973, and shall be executed in the manner prescribed for the execution of such orders.

36. On bare perusal of the provisions contained in Chapter II, read with the definition of 'maintenance', 'children', 'parent' and 'relative', it is explicitly clear that Tribunal has jurisdiction to pass order for maintenance either against the children of the senior citizen/parent or against a relative of a senior citizen, as the case may be. In other words, Tribunal lacks jurisdiction to pass order in respect of maintenance against third parties, i.e., other than children/relative of the senior citizen for maintenance or in occupation of the property of the senior citizen sought before the Tribunal for residence, or for that matter, income from a property for maintenance.

37. Before we proceed, further, it would be apposite to examine the provisions under Chapter V, of Act 2007, which provides for protection of 'life and property' of a senior citizen. The chapter does not refer either to 'parent' or 'relative'.

38. Section 22 empowers the State Government to confer such powers and impose such duties on the District Magistrate as may be necessary to ensure that the provisions of the Act 2007, is properly carried out.

39. Sub-section (2) mandates the State Government to prescribe a comprehensive action plan for providing protection of life and property of the senior citizen. Sub-Clause (2) of Section 22 is extracted:

"(2) The State Government shall prescribe a comprehensive action plan for providing protection of life and property of senior citizens."

40. Section 23 provides the circumstances under which transfer by way of gift or otherwise of a property made by a senior citizen would be void. The power to declare such transfer void at the option of the transferor has been vested with the Tribunal. In other words, on reading the provisions under Chapter V, District Magistrate has not been conferred explicit power of directing eviction of an occupant from the property of the senior citizen. On the contrary, a senior citizen who desires declaration with regard to transfer of his property being void, has to take recourse before the Tribunal. The jurisdiction of Civil Court has been barred, to which any provision of this Act 2007 applies. No injunction shall be granted by any Civil Court. [Section 27/Rule 26]

41. On the contrary, power has been conferred upon the State Government to prescribe a comprehensive action plan for providing protection of the life and property of the senior citizen. [Section 22 (2)]

42. Chapter V though provides for protection of property and life being dependent on property, amongst other things, that sustain life, but it has been left to the State Government either to make Rules under Section 32 or prescribe action plan/policy as to how and against the persons the property of the senior citizen is to be protected.

43. The expression 'life' is of a very wide connotation to include within its fold all facets, including food, health, medical treatment, clothing, residence, including, property and dignity which sustain life and fulfil the needs of the senior citizen.

44. In this backdrop, the question that arises is as to whether Tribunal or District Magistrate while exercising powers under Section 9/Section 22 under Chapter II/V respectively, and Rules 2014, framed under the Act 2007, would have powers to direct eviction of children/relatives from the premises in occupation of the senior citizen, and/or, against third party occupying the property of the senior citizen.

45. The expression 'property' has been defined under Sub-section (f) of Section 2, which reads thus:

" 'property' means property of any kind, whether movable or immovable, ancestral or self acquired, tangible or intangible and includes ***rights or interests*** *in such property"*

Property has been defined very widely, District Magistrate has been conferred power and authority to protect the property of the senior citizen-tangible or intangible.

46. Whereas, in Chapter II, the expression 'property' has not been employed by the Legislature, rather, in the expression 'maintenance', provision for 'residence' has been included to be part of maintenance. The expression 'residence' would also fall within the ambit of 'property'. In other words, the right to residence of a senior citizen/parent would fall within the ambit of 'maintenance', as well as, 'property'.

47. The expression 'property' would include residential property but District Magistrate lacks power and authority to pass order of maintenance to make provision for residence against children of the senior citizen or order their eviction from such property (residence). Such power has been conferred on the Tribunal under Chapter II. In other words, District Magistrate under Chapter V of Act 2007, has been conferred power and authority to protect the property of the senior citizen other than the residential property being sought by the senior citizen for maintenance. The protection of property of the senior citizen under Chapter V could be exercised against children/grand-children/relative and third party, but certainly would not include provision for residence sought by senior citizen for 'maintenance' to satisfy his needs and to lead a normal and meaningful life with dignity.

48. Before adverting further, it would be apposite to refer to the provisions of Rules 2014, enacted by the State Government in exercise of powers under Section 32 of Act 2007.

49. Sub-Clause (c) of Rule 2 defines blood-relations which reads thus:

" 'Blood Relations", in the context of a male and a female inmate, means father-daughter, mother-son and brother-sister other than cousins."

50. Schedule appended to these Rules provide for various Forms, including, the prescribed format of the application to be moved by the aggrieved senior citizen before the Tribunal under Section 5 of Act 2007, for order of maintenance. Rules 2014, provides for constitution of an Appellate Tribunal and related procedures, including, Form of appeal. The Appellate Tribunal is to be constituted in each District.

51. Chapter IV of the Rules 2014, mandates for providing the scheme for management of old age homes for indigent senior citizens.

52. Chapter V, relevant for the purposes of the instant writ petition, provides for duties and power of the District Magistrates. The relevant portion of Rule 21 of Rules 2014, is extracted:

"21. Duties and Power of the District Magistrate- (1) The District Magsitrate shall perform the duties and exercise the powers mentioned in sub-rules (2) and (3) so as to ensure that the provisions of the Act are properly carried out in his district.

(2) It shall be the duty of the District Magistrate to:

(i) ensure that life and property of senior citizens of the district are protected and they are able to live with security and dignity."

53. On bare perusal the Sub-rule (i) of Sub-rule (2) of Rule 21, it employs the expression 'property' which is referable to the definition of 'property' defined under Sub-clause (f) of Section 2 of Act 2007. In other words, the expression 'residence', has not been employed in the Rules 2014. Though 'property' would include residential property but would certainly not include or mean the residence sought for maintenance by the senior citizen. The provision for residence could include property owned by the senior citizen or that of his children or relative as the case that may be setup by the senior citizen before the Tribunal claiming maintenance.

54. Further, Rules 2014 does not confer on the District Magistrate explicit power of eviction of the occupants from the residence of the senior citizen, though, it confers power upon the District Magistrate to ensure that the 'life and property' of the senior citizen is protected and they are able to live securely with dignity.

55. The State Government vide Government Order dated 21 March 2006, in purported exercise of powers under Sub-section (2) of Section 22 of Act 2007, has framed policy for the senior citizen. The relevant portion reads thus:

"fवषयः उ.प्र. राज्य वरिष्ठ नागरिक नीति के सम्बन्ध में।

महोदय,

उपर्युक्त विषय के सन्दर्भ में यह कहने का निर्देश हुआ है कि प्रदेश के ग्रामीण व शहरी क्षेत्र के वरिष्ठ नागरिकों की समस्याएं अलग–अलग हैं, यथा– स्वास्थ्य सेवाओं की अनुपलब्धता एवं गिरते स्वास्थ्य के कारण दैनिक कार्यों के साथ–साथ जीविकोपार्जन की समस्या परिवार के अन्य सदस्यों के रोजगार हेतु बाहर चले जाने पर उनके स्वयं की देख–भाल करने की समस्या, अधिक आयु एवं शारीरिक असमर्थता के कारण स्वयं की देख–भाल न कर पाने की स्थिति में किसी अन्य के सहायक न होने की समस्या, अधिक उम्र के कारण सक्रियता एवं गतिशीलता कम होने से एकाकीपन की समस्या इत्यादि। वरिष्ठ नागरिकों को विभिन्न सुरक्षा उपायों एवं कार्यक्रमों के माध्यम से शांतिपूर्वक, सुरक्षित एवं सम्मानजनक ढंग से जीवन-यापन का अवसर देने के उद्देश्य से प्रदेश के

शहरी एवं ग्रामीण क्षेत्र के वरिष्ठ नागरिकों हेतु मा. मंत्रिपरिषद के आदेश अशासकीय पत्र संख्या 4/2/3/2016-सी .एक्स . (1), दिनांक 14मार्च के क्रम में उ प्र राज्य वरिष्ठ नागरिक नीति निम्नवत बनायी जाती है -

1. उत्तर प्रदेश राज्य वरिष्ठ नागरिक नीति के उददेश्य निम्नवत होंगे

- *प्रदेश के वरिष्ठ नागरिकों की सुरक्षा की उचित एवं प्रभावी व्यवस्था सुनिश्चित करना।*
- *प्रदेश के वरिष्ठ नागरिकों की आर्थिक सुरक्षा, आवासीय सुविधा, उनके समग्र कल्याण तथा उनकी आवशयकताओं की पूर्ति हेतु यथावश्यक सहयोग की व्यवस्था सुनिश्चित करना।*
- *दुर्व्यवहार एवं शोषण से उनकी रक्षा की व्यवस्था सुनिश्चित करना।"*

56. Paragraph 2.4 of the policy with regard to the 'protection of life and property' reads thus:

"वरिष्ठ नागरिकों को जीवन एवं सम्पत्ति का भय प्रायः तीन तरह के व्यक्तियों यथा–स्वयं के परिवार से, सेवाकारों से तथा अपराधीगण से होता है। *सम्पत्ति की चाह में परिवारीगण से, अकेले रहने की दशा में घरेलू नौकरों से एवं सुनसान अकेले घरों मे रहने के कारण घूमने वाले अपराधियों से वरिष्ठ नागरिक आसानी से शिकार हो जाते हैं। अतः समाज के उक्त श्रेणी के लोगों से वरिष्ठ नागरिक एवं उनकी सम्पत्ति की सुरक्षा किया जाना आवश्यक है। सड़क दुर्घटना भी वरिष्ठ नागरिक के लिए घातक है तथा इससे भी वद्धजनों की सुरक्षा की जानी आवश्यक है। वरिष्ठ नागरिकों के जीवन एवं सम्पत्ति की सुरक्षा हेतु कदम उठाए जाएंगे।"*

57. Most of the senior citizens live with their parents. They face tussle over inheritance or division of property. Elders come under intense pressure to sell off their property or transfer ownership to their sons and are subjected to various forms of abuse if they relent. Senior citizens face harassment and threat from neighbours, encroachment of property, etc.

58. In the event, property of a senior citizen as defined under Sub-clause (f) of Section 2 of Rules 2014, is under threat from any person, District Magistrate has been conferred power to protect the life and property of the senior citizen.

59. Property can be tangible items, viz., homes, cars or appliances or it can refer to intangible items that carry the promise of future worth, such as, stock and bond certificates. Intellectual property refers to idea such as logo, design and patents.

60. Chapter V, in particular, Section 22, read with, Rule 21(2)(i) and the Government action plan/policy framed by the State Government, it mandates and directs the District Magistrate/District Police officers to protect the property of the senior citizen. Protection of property without the power and authority of eviction would render the provision meaningless. Protection of property would certainly include the power to order eviction of the occupant and restoration of the property to the senior citizen.

61. The question that follows is which kind of property and against whom. Any kind of property [Section 2(f)] in the possession or threat of dispossession by the senior citizen from the relatives, family member, helps, service providers or anti social/criminals. Family members would include children of senior citizen. The senior citizen in respect of such property other than covered under maintenance (residence), would have to approach the District Magistrate for protection.

62. In other words, the expression 'property' would not include the property claimed by the senior citizen for

'maintenance' before the Tribunal for provision of residence. Accordingly, a senior citizen seeking maintenance, other than monetary maintenance, i.e., only residence to the exclusion of his children and relative of a property in his possession or otherwise owned by him, the remedy for such property (residence) would lie before the Tribunal.

63. In this backdrop, it follows that protection of 'life and property' would confer implicit power upon the District Magistrate to evict unauthorized occupant of the property, including, children/relative or third party from the property of the senior citizen. However, Tribunal alone would have power to order eviction from the property of a senior citizen/parent on an application claiming maintenance towards residence to the exclusion of his children/grand-children.

64. The senior citizen while making an application (Form A) before the Tribunal may claim only residence as maintenance for his need to enable him to lead a normal and peaceful life, irrespective of the plea that his children/relatives are subjecting the senior citizen to harassment or not. The plea of harassment is not a prerequisite to maintain an application for an order of maintenance for provision for residence. In the event, Tribunal if satisfied on the claim of the senior citizen, it would order maintenance for residence, that would necessarily include eviction of the occupant of the residence being a consequence of the maintenance order. [Rule 14] In other words, Tribunal while exercising powers on an application seeking maintenance of residence by a senior citizen, while making order of maintenance for provision of residence, in consequence can direct eviction of the occupants, i.e., children/relative but not against minor children. An order of residence towards maintenance without passing the consequential order of eviction would render the power and authority of the Tribunal meaningless.

65. It follows that Tribunal has power to deal only with a particular kind of property (residence) sought for maintenance but lacks powers to adjudicate upon any other kind of property of the senior citizen. Such power is vested with the District Magistrate under Chapter V to protect any kind of property, movable or immovable, tangible or intangible against any person, i.e., children/relative or third party, but would not include the property sought by the senior citizen for residence towards maintenance from his children/relatives. Any other interpretation would be conferring power upon the District Magistrate to deal and adjudicate upon property sought by the senior citizen for provision of maintenance, merely for the reason that the power of eviction has to be read exclusively into the expression 'protection' of the property of senior citizen. Tribunal has a limited power while adjudicating the issue of property required only for the maintenance of the senior citizen.

66. Tribunal can be approached by senior citizen or parent, as the case may be, for maintenance. Whereas, senior citizen alone can approach the District Magistrate for protection of his life and property of any kind, other than the property (residence) involved in proceedings before the Tribunal.

67. According to Act 2007, a senior citizen who is mistreated by their children has a right to evict their children/relative

from their residential house. At most, children hold the position of a licensee. The license expires the moment the senior citizen tells their children to leave the property (house). In other words, children do not have legal claim to the residential house owned by a senior citizen. It would be pertinent to argue that the senior citizen has the right to evict his children even if they have not treated him unfairly.

68. Conclusion:

(i) Chapter II and Chapter V of the Act 2007, read with, Rules 2014, operate in different areas and for different purpose, inter alia, pertaining to the property of the senior citizen.

(ii) Chapter II is confined to order of maintenance to be passed by the Tribunal, which includes, provision for residence either for the senior citizen or parent against children/relatives, but not against minor children or third party.

(iii) The Tribunal under Chapter II of the Act 2007, read with, Rules 2014, has sole jurisdiction to order maintenance, inter alia, in regard to provision of residence against children/relative. The premises/property sought for maintenance (residence) by the senior citizen, Tribunal alone would have jurisdiction. Tribunal while allowing the application of maintenance in respect of residence can order eviction from the said residential property against children/relatives of the senior citizen.

(iv) Chapter V is confined to protection of life and property of the senior citizen alone. Protection of property would also include eviction of the occupant from the tangible property. The power is conferred on the District Magistrate. The occupant could be children/relatives or third party.

(v) District Magistrate under Chapter V, however, would lack jurisdiction in respect of property, i.e., maintenance for provision for residence, to order eviction of children/relatives from such property. Though, District Magistrate would have power in respect of any other kind of property of the senior citizen, including, order of eviction therefrom.

(vi) Daughter-in-law, being relative of the senior citizen, can be evicted from the residence sought by the senior citizen for maintenance to satisfy his needs for leading a normal life. But such an order of eviction by the Tribunal is subject to the order passed by the competent Magistrate/civil court in respect of shared household under the Protection of Women from Domestic Violence Act 20057. The interest of the senior citizen and the daughter-in-law would have to be adjusted by the Tribunal having regard to their competing needs. Daughter-in-law cannot be evicted from the 'shared household' in possession or owned by the senior citizen8, though, suitable adjustment can be made by the Tribunal.

69. In view of law that has been held hereinabove, **Abhishek Tiwari** (supra) and **Khushboo Shukla** (supra), is overruled. The decision rendered in any other matter which is in contradiction to the law enunciated hereinabove shall also stand overruled.

70. Reverting to the facts of the case in hand, petitioner, the daughter-in-law of the fourth respondent, has been directed to be evicted from the premises sought by the fourth respondent for maintenance. The petitioner, herein, admittedly has not taken recourse under the Domestic Violence Act. She claims absolute title and ownership of the property in question and not shared household.

71. Tribunal, under Act 2007, can grant such remedies of maintenance as envisaged under Section 2(b), but that would not result in obviating competing remedies under other statues.

72. In the facts of the present writ petition, petitioner claims to be the owner of the property inherited from her husband. It is alleged that the house was owned and constructed by her deceased husband. The fourth respondent in a suit being Suit No. 181 of 2021, has claimed one-fourth part of the property being co-owner. It is alleged that the petitioner wants to sell the entire property to a third party. A contrary claim has been set up by the petitioner in the suit instituted by her.

73. In the circumstances, the second respondent-District Magistrate, District Etah, committed an error directing eviction of the petitioner from the entire property. Accordingly, petitioner could not have been evicted from three-fourth portion of the property, which as per the case of the fourth respondent, before the civil court, is that petitioner is co-owner of the property.

74. Proceedings by a senior citizen before the Tribunal under Act 2007, cannot be made basis for evicting the daughter-in-law or the occupant who has right and title in the property which is subject matter of maintenance.

75. The writ petition is, accordingly, **allowed.**

76. The impugned order dated 06 April 2023, passed by the District Magistrate, District Etah, is set aside and quashed.

77. It is provided that petitioner along with her two daughters shall continue to reside in the property in dispute on three-fourth portion and the fourth respondent would have right and access to one-fourth part of the property.

78. The contesting parties are restraint from creating third party right and interest in the property in dispute during pendency of the civil suit.

79. After decision in the civil suit or any order passed therein, reflecting upon the title and ownership of the suit property, in that event, the fourth respondent can approach the Tribunal for obtaining a fresh order towards provision for residence.

80. No cost.

(2023) 6 ILRA 685
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2023

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Writ-C No. 17072 of 2023

Daya Shankar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kirt Raj Yadav, Sri Abhinav Jaiswal

Counsel for the Respondents:
C.S.C., Sri Rameshwar Prasad Shukla

Civil Law - U.P. Revenue Code, 2006 - U.P. Revenue Code, 2016-Petitioner seeks direction to expedite the proceedings of case u/s 116 of revenue code, 2006-for certain proceedings-legislature has provided time bound

disposal under Code, 2006 or in Rules, 2016-for proceedings having no time frame fixed by the legislature-directions imposed to the Revenue officer to decide them in certain manners-St. further directed to fill up the posts of Sub Divisional Magistrate(Judicial) as required u/s 13 (6) and of Tahsildar (judicial) u/s 14 (1) of Code, 2006 to address the problem of pendency.

W.P. disposed. (E-9)

List of Cases cited:

1. Ayodhya Sahai Vs District Judge, Jaunpur & ors., (1997) 3 UPLBEC 1677

2. Matters under Article 227 No. 2616 of 2012 (Raj Kumar Devi & anr. Vs Civil Judge (J.D.) & ors.)

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

1. Heard learned counsel for the petitioner, Sri Abhinav Jaiswal, learned counsel holding brief of Sri Rameshwar Prasad Shukla, learned counsel for the respondent No.3 and learned Standing Counsel appearing for the State respondents.

2. By means of present petition, the petitioner is seeking direction to decide the proceeding of Case No.03108 of 2020 (Daya Shankar Vs. Tilakdhari and Others), Computerized Case No.T-202015060303108 filed under Section-116 of UP Revenue Code, 2006 (hereinafter referred to as the 'Code, 2006'), pending before respondent no.2.

3. This Court found that number of petitions are being filed in this Court simply for seeking direction to expedite the proceedings pending before the revenue court/Authority.

4. Division Bench of this Court in the case of **Ayodhya Sahai vs. District Judge, Jaunpur and others, (1997) 3 UPLBEC 1677** after considering a similar issue and after taking into account the provision of C.P.C. as well as Cr.P.C. has observed that all suits, criminal trials and other kind of cases must be decided on the basis of a time bound programme and also issued a general mandamus in Paragraph-12 to all the Sub-ordinate Courts and Tribunals in State to decide suits, criminal trials, labour disputes, rent control cases and other cases on the basis of time bound programme fixed by the Court for each case. Paragraph-12 is being quoted as below:-

"12. We also issue a general mandamus to all subordinate Courts and Tribunals in this State to decide suits, criminal trials labour disputes rent control cases and other cases, on basis of a time bound programme fixed by the Court for each case and usually by day-to-day hearing. Parties should not be allowed to deviate from the time schedule and the Court must refuse adjournment sought by counsels of the parties except on rare and exceptional grounds mentioned in Order XVII Rule 1(2) C.P.C On receipt of a copy of this judgment every Court or Tribunal shall fix a time schedule for final disposal of each case in presence of parties, and learned counsel shall be informed that they shall not be allowed to deviate from the time schedule fixed. The exercise must start from the next date after receipt of this judgment. The learned District Judges and other Presiding Officers shall be personally responsible for strict compliance of the directions contained in this order."

5. Similarly, Single Bench of this Court in **Matters under Article 227 No. 2616 of 2012 (Raj Kumar Devi and**

another vs. Civil Judge (J.D.) and others) after taking into account the aforesaid judgement of **Ayodhya Sahai (supra)** again issued direction on 10.12.2022 permitting the petitioner to make an application for expeditious disposal to the court concerned and the court was directed to look into the matter in the light of general mandamus of Ayodhya Sahai (supra) case and to dispose of the same.

6. Section 214 of the Code, 2006 existing at present came into effect on 11.02.2016, provides that unless otherwise expressly provided under the Code, 2006, the provision of C.P.C. shall apply to every suit, application or proceeding under this Code, and thereafter, Rule 186 of U.P. Revenue Code Rules, 2016 (hereinafter referred to as the 'Rules, 2016') clarifies, the Section 214 of the Code and mandates that provision of the Code of Civil Procedure, 1908 shall not be applicable to the summary proceeding under the Code or these Rules but the principle enshrined in the Code of Civil Procedure and principles of natural justice shall be observed in the disposal of such proceedings. Therefore, from Section 214 of the Code, 2006 as well as from Rule 186 of the Rules, 2016 it is clear that even in summary proceeding, the principle of Code of Civil Procedure will be applicable.

7. Proviso of Order XVII Rule 1(2) of Code of Civil Procedure also provides expeditious disposal of cases and same is quoted as under:-

"Costs of adjournment.?In every such case the Court shall fix a day for the further hearing of the suit, and [shall make such orders as to costs occasioned by the adjournment or such higher costs as the court deems fit]:

[Provided that,-

(a) when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds that for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary.

(b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party,

c) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment,

d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time,

e) where a witness is present in Court but a party or his pleader is not present or the party or his pleader, though present in Court, is not ready to examine or cross-examine the witness, the Court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid.]"

8. From the above quoted provision, it is also clear that there is a specific mandate of Code of Civil Procedure to decide the suit or other proceedings under the Code, 2006 expeditiously.

9. From the perusal of the entire Code, 2006 as well as Rules, 2016 framed therein, it is clear that the legislation itself

provides time bound disposal for most of the proceedings, even then, proceedings under the Code, 2006 are not being decided in a time bound manner as directed by the legislature itself and this is causing frustration among the litigants, most of them are poor farmers, who have to waste their time to attend the proceedings in Tehsil, Collectorate and Commissionerate at the cost of leaving their farming for particular days.

10. For delay in disposal of proceedings under the Code, not only the Presiding Officers but also the local Bar which remains on strike on petty issues are also responsible, though the same is neither in the interest of Members of Bar nor in the interest of litigants (farmers), and this pendency also results the creation of room for corruption at the lower level. Therefore, it would be appropriate to frame timelines and direct the authorities concerned to dispose of the pending suits, applications and revisions in a time bound manner. .

11. Most of the writ petitions are being filed in the High Court for expeditious disposal of the proceedings which arise out of dispute regarding boundaries (Section 24), rights of way and other easements (Section 25), removal of the obstacle from public road, path, land (Section 26), mutation proceedings (Section 35), correction of record (Section 38), the dispute regarding property like public roads, lanes, trees (Section 58), the application for delivery of possession of allotted land from an unauthorized person (Section 65), application for cancelling illegal allotment of abadi sites (Section 66), proceeding to prevent damage, misappropriation and wrongful occupation of property of Gram Panchayat (Section 67), application under Section 98 for permission to transfer land belonging to scheduled caste, suit for division of holding (Section 116), application for execution of the final decree passed under Section-116 (by demarcation of kurra on spot), proceeding for cancellation of irregular allotment of agricultural land (Section 128), suit of declaration as bhumidhar/asami (Section 144).

12. For the proceeding mentioned above, the legislature has provided time bound disposal for some of the proceedings but despite specific time fixed by the Code, 2006 proceeding could not be decided for a number of reasons and in most of the cases due to negligence on the part of presiding officers or due to the absence of sufficient number of presiding officers as well as the continuous strike of bar in Tehsil or Collectorate. The following provisions of Code, 2006 provide a specific time for deciding the proceedings as follows:-

(i) Dispute regarding boundaries by Sub-Divisional Officer is to be decided within three months from the date of the application as per Section 24(3) of Code, 2006 which is quoted as below:-

"24(3). Every proceeding under this section shall, as far as possible, be concluded by the Sub-Divisional Officer within three months from the date of the application."

(ii) Mutation proceedings u/s 35 of Code, 2006 is to be decided within 45 days if mutation is undisputed and within 90 days if mutation is disputed as per Rule 34(7) of Rules, 2016 which is quoted as below:-

"34(7). The Tahsildar shall make an endeavour to decide the undisputed case of mutation within the period of 45 days from the date of the registration of the case and the disputed case of mutation within the

period of 90 days and if the proceeding is not concluded within such period the reason for the same shall be recorded"

(iii) Proceeding for correction of record as per Section 38 of Code, 2006 is to be decided within 45 days from the date of receiving application with the report as per Rule 36(6) of Rules, 2016 which is quoted as below:-

"36(6). An endeavour shall be made to conclude the proceeding for correction under section 38 within the period of 45 days from the date of receiving the application with the report and if the proceeding is not concluded within such period the reasons for the same shall be recorded."

(iv) Application for cancellation of irregular allotment of abadi side u/s 66 should be decided within six months as per Rule 65(10) of Rules, 2016 which is quoted as below:-

*"65(10). The Collector shall make an endeavour to conclude the inquiry within the period not exceeding six months from the date of registration of the case and if the inquiry is n*ot concluded within the period aforesaid the reason for the same shall be recorded."

(v) Proceeding to prevent wrongful occupation and damage of Gram Sabha property u/s 67 is to be decided within the period of 90 days as required by Rule 67(6) of Rule, 2016 which is quoted as under:-

"67(6). The Assistant Collector shall make an endeavour to conclude the proceeding under section 67 of the Code within the period of ninety days from the date of issuance of the show cause notice and if the proceeding is not concluded within such period the reasons for the same shall be recorded."

(vi) Proceeding for granting permission to transfer the land of schedule caste under Section-98 should be completed within period of 15 days as per Rule 99(11) and which is quoted as under:

"99(11). The Collector shall make an endeavour 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."*

(vii) For division of holding under Section 116 of the Code, 2006 is to be decided within a period of six months as provided by Rule 109(10) of Rules, 2016 which is quoted as under:-

"109(10). The Sub-Divisional Officer shall make an endeavour to decide the suit within the period of six months and if the suit is not decided within such period, the reason shall be recorded."

(viii) Proceeding for cancellation of irregular allotment of agricultural land u/s 128 should be completed within a period of three months as per Rules 126(6) of Rules, 2016 which is quoted as under:-

"126(6). The Collector shall endeavour to conclude the enquiry within the period of three months from the date of issuance of notice and if the enquiry is not concluded within the period of three months, the reasons for the delay shall be recorded."

13. Apart from the above proceeding for which specific time frame was fixed by the legislature in the Code, 2006 or in the Rules, 2016 there are other proceedings for which no time frame has been fixed either in Code, 2006 or in Rules, 2016 therefore, the concerned presiding officer or the revenue officer should make endeavour to decide these proceedings in following manner :- .

(i) Application for right of way and other easement u/s 25 should be decided within a period of one month and if the same could not be concluded then reason for the same should be recorded.

(ii) Application for removal of obstacle from public road, path or common land of village u/s 26 should endeavour to be decided within a period of one month and if the same could not be concluded then reason for the same should be recorded;

(iii) Application u/s 58 to decide the dispute regarding property mentioned in Sections 54, 56 and 57 should be decided preferably within a period of three months from the date of application and if the same could not be decided then reason for the same should be recorded;

(iv) Application u/s 65 for delivery of possession of allotted land from unauthorized person should be decided preferably within a period of three months and if the same could not be concluded then reason for the same should be recorded;

(v) Application for the execution of the final decree passed u/s 116 of Code, 2006 by demarcation of Kurra on site should be decided within a period of one month and if the same could not be concluded then reason for the same should be recorded;

(vi) A suit for declaration as bhumidhar/asami under Section-144 of the Code, 2006 should be decided within a period of the six months and if the same could not be concluded then the reason for the same should be recorded;

(vii) Any other application referable to any provision of Code, 2006 should also be decided within the period prescribed by Code, 2006 or Rules, 2016, if no time is prescribed by Code, 2006 or by Rules, 2016 then same should be decided within a period of one month and if same is not decided within aforesaid period then reason should be recorded.

14. If the proceedings mentioned above are appealable or revisable or subject to second appeal as per the provision of Code, 2006 and if no time is prescribed by the Code, 2006 then these proceedings should also be decided within a period of six months up to the level of Commissioner and within a period of one year by the Board of Revenue, and if not decided within the said period then the reason for the same should be recorded.

15. While calculating the period mentioned above as directed by this Court for deciding different proceedings under Code, 2006, the date on which there was a strike of Bar as well as the dates on which the person seeking benefit of this order take adjournment should be excluded.

16. If any stay application, recall application or any other miscellaneous application is filed during above mentioned proceedings, then same should be decided within a period of one month and if same is not decided within aforesaid time, then reason should be recorded. It is made clear **that during the pendency of recall application or stay application, no coercive action be taken against the applicant.**

17. For the violation of direction mentioned above by any revenue officer including the Collector and Commissioner and as well as Board of Revenue, they would be liable for contempt of this Court for not following the direction in deciding the proceedings as mentioned above (including pending proceeding in corresponding provision of Uttar Pradesh

Zamindari Abolition And Land Reforms Act, 1950 and as Uttar Pradesh Land Revenue Act, 1901).

18. The litigant, whose proceeding are mentioned above was not decided despite his application relying upon this judgement within the time fixed by this court, then litigant instead of filing writ petition for expeditious disposal may directly approach this Court by filing contempt proceedings against the concerned officer.

19. It is made clear that if the State Government by issuing notification or by making amendments prescribes time for deciding the proceedings for which this Court has a fixed period for deciding the proceedings, then that period will be substituted in place of the period specified by this Court.

20. The State is further directed to fill up the posts of Sub Divisional Magistrate (Judicial) as required by Section 13(6) of Code, 2006 as well as posts of Tehsildar (Judicial) as required by Section 14(1) of Code, 2006 so as to address the problem of pendency of proceedings under Code, 2006 as early as possible preferably within a period of one year from today.

21. This Court also found that despite repeal of Uttar Pradesh Zamindari Abolition And Land Reforms Act, 1950 as well as Uttar Pradesh Land Revenue Act, 1901 on 11.02.2016, Revenue Authority/Court still mentioning provision of above repealed Act in new proceeding initiated after the repeal, therefore, all revenue authority are directed to mention provisions of Code, 2006 in the aforesaid proceedings.

22. With the aforesaid direction the petition is disposed of.

23. Let a copy of this order be sent to Chief Secretary, U.P. who will further circulate the same to Divisional Commissioner as well as District Collector with the direction that District Collector will further inform to all his subordinate officers including the concerned bar association.

24. Registrar (Compliance) is directed to send a copy of this order to the Chief Secretary, U.P. for necessary compliance.

(2023) 6 ILRA 691
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 21933 of 2017

Indian Overseas Bank & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ved Prakash Singh, Sri Akhillesh Kalra (Sr. Adv.), Sri Avinash Chandra

Counsel for the Respondents:
A.S.G.I., Sri Anil Kumar, Sri Gaurav Srivastava, Sri P.S. Chauhan, S.C., Sri Sudarshan Singh

Civil Law - Payment of Gratuity Act, 1972- Respondent employee retired but termination order passed after his retirement-Respondent sought release of terminal benefits u/s 4 of Payment of gratuity Act-objected by the Petitioner Bank-granted maximum gratuity-impugned-Appeal dismissed-impugned-forfeiture of gratuity is permissible only if termination is for misconduct which constitutes an offence involving moral turpitude and convicted by competent court-not proof of misconduct will do-no error in the impugned orders-Bank directed to release the gratuity.

W.P. dismissed. (E-9)

List of Cases cited:

1. U.O.I. & ors.Vs C.G. Ajay Babu & anr., 2018 (158) FLR 948.

2. Jaswant Singh Gill Vs Bharat Coking Coal Ltd. reported in (2007) 1 SCC 663

3. St. of Guj. & ors.Vs Utility Unser's Welfare Association & ors., reported in (2018) 6 SCC 21

4. Western Coal Fields bs Manohar Govinda Fulzele & anr., SLP (C) 10088/2022

5. UCO Bank & ors.Vs Rajendra Shankar Shukla, reported in 2018 (157) FLR 482

6. M/s Hindalco Industries Ltd. Vs Appellate Authority, Under the Payment of Gratuity Act, Kanpur & ors., reported in 2004 (101 FLR 1063

7. J.B. Micheal D'souza Vs Appellate Authority Under Payment of Gratuity Act, Bangalore & ors., reported in 2002 (92) FLR 1200

8. Manager, Western Coalfields Ltd. Vs Prayag Modi, reported in 2018 (157) FLR 323

9. Permali Wallance Ltd. Vs St. of M.P. & ors., reported in 1996 (72) FLR 748 (MP)

10. Krishnaveni Textile Ltd. Vs Assistant Labour Commissioner reported in 2002 (95) FLR 1164 (Mad.)

11. Bharat Gold Mines Ltd. Vs Regional Labour Commissioner, reported in ILR 1986 KAR 2755

12. G.M.D.C. Co-operative Bank Vs Deendaya Gaud, reported in 2013 (1) MPLJ 301,

13. Baru Ram Vs Prasanni, reported in AIR 1959 SC 93

14. Commissioner of Income Tax, Mumbai Vs Anjum M.H. Ghaswala, reported in 2002 (1) SCC 633

15. United St.s Vs Wunderlich, reported in 342 US 98 (1951)

16. R. Vs Wilkes, reported in 1770 (4) Burr 2527 Burr at page 2539

17. Natural Resources Allocation, In Reference Special Reference No. 1 of 2012, reported in 2012 (10) SCC 1

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Akhilesh Kalra, learned Senior Advocate assisted by Shri Avinash Chandra as well Shri Ved Prakash Singh, learned counsel for the petitioners through video conferencing mode and Shri Gaurav Srivastava, learned counsel representing the respondent No. 4.

2. The respondent No. 4 (herein-after referred to as the "employee") was appointed on the post of Shroff/ Godown Keeper on 09.08.1978 in the petitioner-Bank. He was dismissed from service in the year 1995 and remained out of service till 2000, whereafter certain proceedings were held before the Central Government Industrial Tribunal, Lucknow, which set aside the termination order imposing a condition that the period during which the employee remained suspended would be treated as "no work no pay" period. The said order was confirmed by this Court in Writ C No. 49519 of 2004. On 03.02.2009, the employee was placed under suspension in contemplation of the disciplinary enquiry on the charge of embezzlement and misappropriation of funds. A charge sheet was issued to the employee on 08.05.2009 containing charges of misappropriation of amount.

3. The employee challenged the charge sheet by filing writ petition and, thereafter, various miscellaneous and other proceedings were held, which are not necessary to be stated as the issue involved in the present writ petition is as to whether

withholding of gratuity payable to the employee is according to law or not. However, it is relevant that pursuant to the disciplinary proceedings, a final order of punishment was passed on 29.09.2015 dismissing the respondent No. 4 from services in terms of clause 6 (a) of the Memorandum of Settlement dated 10.04.2002 and it was held that since the charges had been proved in the enquiry and were grave in nature and reveal moral turpitude, the period spent by the employee under suspension would be treated as "one not spent on duty" and he would not be entitled to any monetary or other benefits other than the subsistence allowance, already paid to him.

4. It is alleged that the respondent-employee filed a writ petition being Writ A No. 56257 of 2015 (Satya Prakash Tripathi vs The Chairman, Indian Overseas Bank and 3 others) praying for a writ of mandamus directing the Bank to release the retiral benefits, however during the course of hearing, it was informed to the Court that the respondent-employee had been dismissed from services on 29.09.2015 and, consequently, the writ petition was dismissed as withdrawn by this Court by order dated 02.11.2015, granting liberty to the employee to file a fresh writ petition challenging the termination order dated 29.09.2015. There is no dispute about the fact that no writ petition was filed challenging the order dated 29.09.2015, which became final.

5. In the meantime, the respondent-employee was issued a notice dated 31.07.2015 informing him that his retirement was due on 31.07.2015 on completion of 60 years as the age of superannuation and insofar as the disciplinary proceedings were concerned, it was informed that the said proceedings were pending at the enquiry stage and that the employee would be deemed to be in service for the purpose of completion of disciplinary proceedings after the date of his age of superannuation i.e. 31.07.2015. Admittedly, the respondent-employee retired on 31.07.2015 and termination order was passed after his retirement on 29.09.2015. The respondent-employee submitted an application dated 13.08.2015 seeking release of terminal benefits and also filed an application under section 4 of the Payment of Gratuity Act, 1972 (herein-after referred to as the "Act of 1972") before the Controlling Authority on 16.11.2015, which was objected to by the petitioner-Bank by filing written submissions/objections dated 10.02.2016.

6. The Controlling Authority vide order dated 29.09.2016, directed payment of maximum amount of gratuity amounting to Rs. 10,00,000/- (rupees ten lac) to the employee along with 10% simple interest w.e.f. 01.08.2015. The petitioner-Bank challenged the order dated 29.09.2016 by preferring a statutory appeal before the Appellate Authority under section 7 of the Act of 1972. The appeal was dismissed by order dated 10.04.2017.

7. This writ petition has been filed challenging the aforesaid orders dated 29.09.2016 and 10.04.2017. A consequential order was also passed on 03.05.2017 directing release of an amount of Rs. 11,33,699/- (rupees eleven lac thirty three thousand six hundred ninety nine) in favour of respondent-employee, which was also challenged by seeking amendment in the writ petition. Hence, three orders are under challenge in the present writ petition.

8. I have heard the learned counsel for the parties and perused the record.

9. Shri Akhilesh Kalra, learned Senior Advocate appearing on behalf of the petitioner-Bank has raised the following contentions:

(i) In view of the fact that termination order dated 29.09.2015 was not challenged by the respondent-employee, despite the fact that he was granted liberty by this Court while dismissing Writ A No. 56257 of 2015 (Satya Prakash Tripathi vs The Chairman, Indian Overseas Bank and 3 others), the employee was not entitled to gratuity, inasmuch as the termination/dismissal order clearly provided that the period spent by the employee under suspension would be treated as "**one not spent on duty**" and he would not be entitled to any monetary or other benefits other than the subsistence allowance, already paid to him.

(ii) In view of section 4(6)(b) of the Act of 1972, the petitioner-Bank was fully justified in withholding the gratuity as the services of respondent No. 4 had been terminated for an act which constitutes an offence involving moral turpitude, which offence was committed by him during the course of his employment.

(iii) The Appellate Authority has committed gross error of facts and law while dismissing the appeal under section 7 of the Act of 1972 as barred by limitation by misinterpreting the provisions of section 7(7) of the Act as the appeal was filed within time and though it was returned to the petitioner-Bank for certain defects, it was re-presented within time and, therefore, the dismissal of appeal as barred by limitation is illegal.

(iv) The orders impugned are against the provisions of Rule 8 of the Payment of Gratuity (Central) Rules, 1972 (herein-after referred to as the "Rules of 1972") as the requirement of notice was fulfilled by the Bank in the case when no amount of gratuity was admitted to be paid by the Bank.

(v) The Controlling Authority had no competence to deal with the merits of the termination order dated 29.09.2015 as it was dealing with a case for withholding of gratuity.

10. Per contra, Shri Gaurav Srivastava, learned counsel for the respondent-employee has vehemently opposed the writ petition contending that gratuity could not be withheld for any reason whatsoever including on the ground of section 4(6)(b) of the Act of 1972, inasmuch as no offence was found to be have been committed by the employee and there is no decision of any court of criminal jurisdiction holding the employee as guilty of offence of moral turpitude and, therefore, merely because the Bank was alleging the act or alleged misconduct of the employee as "**moral turpitude**", for withholding any amount of gratuity invoking section 4(6)(b) of the Act of 1972, there has to be evidence in terms of the judgement of conviction of the employee on the ground of offence involving moral turpitude, but there being no such evidence on record, except that a letter was sent by the Central Bureau of Investigation that gratuity be withheld until finalization of case, the argument advanced on behalf of the petitioner-Bank has no force. Regarding other submissions raised by the learned Senior Advocate appearing for the petitioner-Bank, it is argued by Shri Gaurav Srivastava that the things have to be examined in their entirety that the services were governed by the Memorandum of Settlement, clause 12.2 whereof contained in Chapter XII, clearly provides that there will be no forfeiture of gratuity for dismissal on account of misconduct, except

in cases where such misconduct causes financial loss to the Bank and in that cases also to that extent only. It has been argued that the loss allegedly occurred to the Bank was only to the extent of Rs. 1,500/- (rupees one thousand five hundred only) or Rs. 9,000/- (rupees nine thousand only), and even if, the findings recorded in the termination order are treated to be final, it would be a case where, at the most, gratuity to the extent of aforesaid financial loss occurred to the Bank could be withheld, but remaining amount was bound to be paid to the employee. However, regarding bar of limitation, learned counsel for the respondent-employee has argued that the order of Appellate Authority was on merits also and since everything is established on record, no error has been committed by the Appellate Authority in confirming the order of the Controlling Authority.

11. I have considered the rival submissions made at the bar and I deal with the same one by one.

Analysis of first and second contentions

12. Insofar as the effect of termination/dismissal order dated 29.09.2015 is concerned, though it is true that the same became final, despite liberty granted by this Court while dismissing Writ A No. 56257 of 2015, the Court has to see as to whether finality attached to the termination order could be a ground for forfeiture of gratuity.

13. Section 4 of the Act of 1972 is a provision for making payment of gratuity and insofar as the power of employer to withhold gratuity, either wholly or in part, is concerned, sub section (6) of section 4 of the Act of 1972 provides as follows:

"4. Payment of gratuity.-

(1) to (5) ……..

(6) Notwithstanding anything contained in sub-section (1),-

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee "[may be wholly or partially forfeited]-

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

14. Shri Kalra has vehemently argued that since the employee had committed embezzlement and misappropriation of funds, his act was an offence involving moral turpitude and, therefore, as per section 4(6)(b)(ii) of the Act of 1972, the Bank was justified in withholding gratuity.

15. I am not inclined to accept the said submission of learned counsel for the petitioner-Bank as the said issue is not res-integra and has been dealt with by the Supreme Court in the case of ***Union Bank of India and others vs C.G. Ajay Babu and another,*** reported in 2018 (158) FLR 948. In paragraph 16 of the judgement, it was held that under sub-section (6)(a), also the gratuity can be forfeited to only to the extent of damage or loss caused to the Bank. In case, the termination of the

employee is for any act or wilful omission or negligence causing any damage or loss to the employer or destruction of property belonging to the employer, the loss can be recovered from the gratuity by way of forfeiture. Whereas under sub- Clause (b) of sub-section (6), the forfeiture of gratuity, either wholly or partially, is permissible under two situations- (i) in case the termination of an employee is on account of riotous or disorderly conduct or any other act of violence on his part, (ii) if the termination is for any act which constitutes an offence involving moral turpitude and the offence is committed by the employee in the course of his employment. Thus, sub-clause (a) and sub-Clause (b) of sub-section (6) of section 4 of the Act operate in different fields and in different circumstances. Under sub-clause (a), the forfeiture is to the extent of damage or loss caused on account of the misconduct of the employee whereas under sub-clause (b), forfeiture is permissible either wholly or partially in totally different circumstances. Sub-clause (b) operates either when the termination is on account of- (i) riotous or (ii) disorderly or (iii) any other act of violence on the part of the employee, and under sub-clause (ii) of sub-section (6)(b) when the termination is on account any act which constitutes an offence involving moral turpitude committed during the course of employment.

16. In relation to sub-section (6)(b)(ii) of section 4 of the Act of 1972, the Supreme Court referred to the definition of "offence" as per the General Clauses Act, 1897 to mean "any act or omission made punishable by any law for the time being enforce", and held that it is not the conduct of a person involving moral turpitude that is required for forfeiture of gratuity but the conduct or the act should constitute an offence involving moral turpitude. To be an offence, the act should be made punishable under law. That is absolutely in the realm of criminal law. It is not for the Bank to decide whether an offence has been committed. It is for the Court. Under sub-section (6)(b)(ii) of the Act, forfeiture of gratuity is permissible only if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and he is convicted accordingly by a Court of competent jurisdiction.

17. In the present case, learned Senior Advocate for the petitioner-Bank has not been able to establish that the respondent-employee was punished by any competent court of criminal jurisdiction for the alleged offence of moral turpitude. Therefore, this Court cannot take a different view what has been taken by the Supreme Court in the case of ***Union Bank of India*** (supra), where the Supreme Court emphasized that the requirement of the statute is not the proof of misconduct of acts involving the moral turpitude, but the acts should constitute an offence involving moral turpitude and such offence should be duly established in a court of law.

18. Shri Kalra, with reference to the judgment of Apex Court in the case of ***Union Bank of India and others*** (supra), has argued that the said judgment/opinion is not a binding precedent and that the aforesaid judgment has been passed relying on an earlier judgment in the case of ***Jaswant Singh Gill vs Bharat Coking Coal Ltd. reported in (2007) 1 SCC 663,*** and is an obiter dicta, which is not binding on this Court. It is further argued that the observation made in the aforesaid judgment cannot be said to be the ratio decidendi, as the question involved in this case did not

squarely arise for determination before the Supreme Court in those cases. Further submission is that in view of the law laid down by the Hon'ble Supreme Court in the case of ***State of Gujrat and Others vs Utility Unser's Welfare Association and Others***, reported in (2018) 6 SCC 21, which prescribes the norms for deciding the ratio decidendi of a judgment, the opinion of the Hon'ble Supreme Court would be binding on the High Courts in India if the opinion was on a question that arose for determination before the Hon'ble Supreme Court. Further argument is that the issue before the Hon'ble Supreme Court was whether the forfeiture of gratuity would be automatic or not; as such the opinion expressed by the Hon'ble Supreme Court will not form the binding precedent.

19. It has further been argued that after ***Union Bank of India and Others*** (supra) the direct issue as to whether the services of an employee whose services have been terminated on the ground of misconduct, which may also amount of offence of moral turpitude is pending before the Hon'ble Supreme Court in ***SLP (C) 10088/2022 "Western Coal Fields bs Manohar Govinda Fulzele and Another".***

20. I am not convinced by the interpretation made by Shri Kalra as regard to the judgment of Supreme Court in the case of ***Union Bank of India and Others (supra)*** in view of the clear ratio laid down in the said authority. In the opinion of the Court, the judgment passed in the said case is not obiter, but a clear ratio and, therefore, the submission of Shri Kalra to this effect is hereby discarded. Though, Shri Kalra has referred to the aspect that the matter was being examined by the Central Bureau of Investigation, nothing has been brought on record that Central Bureau of Investigation submitted any report before any court or that any court ever passed any order of punishment of the employee, rather, specific case of respondent-employee is that he was not punished by Central Bureau of Investigation or by any court of law and that alleged offence was not established nor did it result into conviction of the employee. In this view of the matter, the first and second contentions of Shri Kalra have no force.

Analysis of third contention

21. As regards **third** contention regarding dismissal of the appeal as barred by limitation, Shri Kalra has referred to section 7(7) of the Act of 1972, which reads as follows:

7. Determination of the amount of gratuity.-

(1) to (6) ……..

x x x x x x x x x x

"(7) Any person aggrieved by an order under sub-section (4) may, ***within sixty days from the date of the receipt of the order, prefer an appeal*** *to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:*

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, ***extend the said period by a further period of sixty days.***

[Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity

required to be deposited under sub-section (4), or deposits with the appellate authority such amount.]

22. Submission of Shri Kalra is that the termination/dismissal order was passed on 29.09.2016 and the appeal under section 7 of the Act of 1972 was preferred within a period of 60 days, i.e. on 01.12.2016, however since there were certain defects in presentation of the appeal, an order was passed by the Appellate Authority on 07.12.2016 (annexure No. 4 to the writ petition) pointing out certain defects and it was observed that the appeal was not maintainable with a further observation that if the defects were removed by the management of the Bank and the appeal was re-submitted within the prescribed time, opportunity of hearing would be provided under the provisions of section 7(7) of the Act of 1972. With this observation, the appeal was returned to the petitioner-Bank.

23. Shri Kalra has argued that the aforesaid order dated 07.12.2016 was received in the Bank on 17.12.2016 as endorsed on the first page of order itself, which is reflected at page 75 of the paper book of the writ petition. Shri Kalra has further argued that after removal of defects pointed out in the order dated 07.12.2016, the appeal was re-submitted on 26.12.2016, and was well within time and, therefore, dismissal of appeal as barred by limitation is contrary to the order dated 07.12.2016.

24. In this regard, I have perused the order impugned dated 10.04.2017 and I find that while interpreting the order dated 07.12.2016, the Appellate Authority has observed that no application seeking condonation of delay was preferred by the Bank and in absence of any such application, the delay cannot be condoned suo-moto. Here, I find that the Appellate Authority has utterly failed to understand the language used in first proviso attached to sub-section (7) of section 7 of the Act of 1972, which does not contain any requirement of moving any application by the appellant for condonation of delay. Rather, the said proviso is an enabling provision empowering the Appellate Authority to extend the initial period of 60 days for a further period of 60 days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the first period of 60 days.

25. In the present case, since certain defects were pointed out in the order dated 07.12.2016, and the Appellate Authority permitted removal of the defects and while returning the appeal to the Bank, re-submission was permitted within the prescribed time, I find that re-submission of appeal on 26.12.2016 would be treated as within time as per conjoint reading of section 7 (7) of the Act of 1972 read with its proviso. Therefore, the finding that appeal was barred by limitation is incorrect and the argument of Shri Kalra is accepted to this extent.

26. However, I find that apart from dismissal of appeal as barred by limitation, the Appellate Authority has discussed the merits of the entire matter and after discussing the same, dismissed the appeal on the ground of limitation as well as on merits. Therefore, even if, I ignore the dismissal of appeal as barred by limitation in view of the aforesaid finding in favour of the petitioner-Bank, even then the Court has to satisfy itself as to whether affirmation of the order of Controlling Authority by the Appellate Authority was according to law or not.

27. I do not find any error in the view taken by the Appellate Authority on merits in relation to the issue of withholding of gratuity except that at one place the Appellate Authority has misunderstood the admissibility or non-admissibility of deposit of amount by the employer, but that will not affect the merits of the case of respondent-employee, even if I accept the contention of the petitioner-Bank that no amount was admitted to be paid or deposited by the Bank. Therefore, when the law supports the claim of respondent-employee and irrespective of finality attached to the termination order dated 29.09.2015, I have already discussed that withholding of gratuity as per section 4(6)(b)(ii) of the Act of 1972 was not justified in view of the law laid down by the Supreme Court in the case of ***Union Bank of India*** (supra), I find that the order of Appellate Authority cannot be set aside merely on the ground that it contains certain observations, which are contrary to the record, but the overall view affirming the order of Controlling Authority is found to be in consonance with the law laid down by the Supreme Court and the provisions of the Act itself. Therefore, third contention raised by Shri Kalra is answered accordingly.

Analysis of fourth contention

28. As regards **fourth** contention of Shri Kalra with reference to Rule 8 of the Rules of 1972, the submission is that action of the Bank should not have been turned down for want of issuance of notice to the employee as it was a case where the Bank had not admitted any amount payable as gratuity to the employee and, therefore, whatever information was given to the employee, was in consonance with the provisions of Rule 8 of the Rules of 1972. There may be a dispute regarding issuance or non-issuance of notice in the present case, however, and same would not affect the merits of the submissions of either side, particularly when there is no dispute about the fact that the Bank never admitted its liability to pay gratuity and proceeded throughout against the employee not only by terminating his services, but also by taking advantage of the operative portion of the termination order, whereby it was provided that the period spent by the employee under suspension would be treated as **"one not spent on duty"** and he would not be entitled to any monetary or other benefits other than the subsistence allowance, already paid to him. Therefore, issuance or non-issuance of notice in one or other other forms prescribed under the Rules would not be adverse to the case of the petitioner-Bank at least on this score and, hence, I hold that the action of the Bank could not be deprecated on the point of alleged failure to comply with Rule 8 of the Rules of 1972. The fourth contention to this effect is answered accordingly.

Analysis of fifth contention

29. Insofar as **fifth** contention to the effect that the Controlling Authority was not justified in either interfering with or interpreting the termination order dated 29.09.2015, I find that the Controlling Authority has observed that the termination order nowhere speaks about forfeiture of amount of gratuity payable to the employee and that the charge of moral turpitude has also not been mentioned in the charge sheet. The Controlling Authority has observed that as regards letter of Central Bureau of Investigation directing the Bank that gratuity may not be released until finalization of the case pending with it. I do not find any error in approach of

Controlling Authority on this ground. Once the Bank agitated the issue that the dismissal/termination order dated 29.09.2015 had become final and, even otherwise, it mentioned that the employee would not be entitled for any sum, the Controlling Authority was well within its power to deal with competence of and justification on the part of the Bank to withhold gratuity as provisions of Act of 1972 specifically deal with every situation under which gratuity is payable or can be withheld. Therefore, if the Controlling Authority perused the termination order and made certain observations as regards to its contents, the same, in the opinion of the Court, cannot be taken as interference in the termination order. Accordingly, the contention of Shri Kalra to this effect is not acceptable so as to warrant interference in the order of the Controlling Authority.

30. As regards submission of learned counsel for respondent-employee in connection with the Memorandum of Settlement, I find that the allegation against the employee was that he had embezzled or misappropriated Rs. 1500/- (rupees one thousand five hundred) and/or Rs. 9000/- (rupees nine thousand) and, therefore, I find that as per clause 12.2 of Memorandum of Settlement, at the most gratuity to the extent of aforesaid sum could be withheld, but not the entire amount.

31. Learned counsel for the respondent-employee has placed reliance upon the judgement of the Supreme Court in the case of ***UCO Bank and others vs Rajendra Shankar Shukla***, reported in 2018 (157) FLR 482 and argued that punishment of dismissal could not have been imposed after superannuation of the employee. However, I find that respondent would not get any advantage of the said authority as this Court is not deciding the validity of the termination order dated 29.09.2015, which admittedly became final in absence of challenge made by the employee. The writ petition is being dealt with and decided in relation to the issue of payment vis-a-vis withholding of gratuity and, hence, judgement in the case of ***UCO Bank and others (supra)*** has no application in the facts and circumstances of the case.

32. Learned counsel for the respondent-employee has placed strong reliance upon judgement of this Court in the case of ***M/s Hindalco Industries Ltd. vs. Appellate Authority, Under the Payment of Gratuity Act, Kanpur and others***, reported in 2004 (101 FLR 1063. This Court in the said case has held that the Payment of Gratuity Act, 1972 gives a statutory right to an employee for payment of gratuity on his superannuation, retirement or resignation, or on his death or disablement due to accident or disease. Section 4(6) (a) of the Act provides that the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused. Sub-section 6 (b), provides that the gratuity payable to an employee may be wholly or partially forfeited: (i) if the services of such employee have been terminated for his riotous or disorderly conduct, or any other act of violence on his part or, (ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

33. It has further been held that the scheme of the Act and the provisions of section 4 (6) (a) and (b) show that for depriving an employee his statutory right to receive gratuity, an order must be passed forfeiting the gratuity, and conscious decision to be taken with regard to reasons specified in sub-section (a) and to damage or loss so caused. The sub-section (b) after its amendment by Act No. 26 of 1984 (with effect from 11.2.1981) to the effect that gratuity may be wholly or in part forfeited, gives discretion to the employer and thus postulates application of mind and recording of reasons.

34. Shri Gaurav Srivastava, learned counsel for the respondent-employee has also placed reliance upon the judgment of Karnataka High Court in the case of ***J.B. Micheal D'souza vs. Appellate Authority Under Payment of Gratuity Act, Bangalore and others***, reported in 2002 (92) FLR 1200, in which requirement of issuance of notice to the employee was dealt with. I have already dealt with the said aspect of the matter in the light of Rule 8 of the Rules of 1972 and, therefore, the judgement of Karnataka High Court in the case of ***.B. Micheal D'souza*** (supra) is of no much help to the respondent-employee.

35. Learned counsel for the respondent-employee has further placed reliance on the judgement of Madhya Pradesh High Court in the case of ***Manager, Western Coalfields Ltd. vs. Prayag Modi***, reported in 2018 (157) FLR 323, wherein it has been held that various High Courts have taken constant view regarding applicability of principles of natural justice in the matter of forfeiture of gratuity. Apart from M.P. High Court in ***Permali Wallance Ltd. Vs State of M.P. and others***, reported in 1996 (72) FLR 748 (MP), the same view was taken in the matter of ***Krishnaveni Textile Ltd. v. Assistant Labour Commissioner*** reported in 2002 (95) FLR 1164 (Mad.). The Karnataka High Court in ***Bharat Gold Mines Ltd. v. Regional Labour Commissioner***, reported in ILR 1986 KAR 2755, took the same view. Similar is the view of Division Bench of Gujarat High Court in the case of ***Regional Manager v. Nilaben Suresh Sanghvi***. Pertinently, in this case, the High Court opined that in absence of a specific order forfeiting the gratuity, the action of withholding the gratuity cannot be countenanced. The Madhya Pradesh High Court in in the case of ***G.M.D.C. Co-operative Bank v. Deendaya Gaud***, reported in 2013 (1) MPLJ 301, opined that the amount of gratuity was quantified without providing any break up and behind the back of the employee and, therefore, said amount cannot be recovered under section 4 of the Gratuity Act.

36. The ratio of the authorities cited by learned counsel for the respondent-employee is that the gratuity of an employee can be withheld only as per the procedure prescribed under the Gratuity Act and to the extent such withholding/forfeiture of gratuity is permissible. The employer does not have any unfettered discretion in withholding the gratuity as per the whims and fancies. This is trite law that if a law prescribes a thing to be done in a particular manner, it has to be done in the same manner and other methods are forbidden. [See ***Baru Ram v. Prasanni***, reported in AIR 1959 SC 93 and ***Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala***, reported in 2002 (1) SCC 633]. The Supreme Court held that Law has reached its fine moments, stated Douglas, J. in ***United States v. Wunderlich,*** reported in 342 US 98 (1951), 'when it has

freed man from the unlimited discretion of some ruler.....Where discretion is absolute, man has always suffered.' It is in this sence that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in ***R. vs. Wilkes,*** reported in 1770 (4) Burr 2527 Burr at page 2539 'means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful.' This principle is followed by Supreme Court in ***Natural Resources Allocation, In Reference Special Reference No. 1 of 2012***, reported in 2012 (10) SCC 1.

37. The contention of learned counsel for the respondent-employee is also to the effect that respondent-employee had completed qualifying service so as to entitle him to get payment of gratuity. Learned Senior Advocate for the petitioner-Bank has not been able to dispute the said contention and, therefore, I find that the irrespective of termination/dismissal of the services of respondent-employee, once he became entitled for payment of gratuity in the light of completion of qualifying period of services, withholding of gratuity could be only in connection with section 4(6)(b)(ii) of the Act of 1972 and not otherwise.

38. In view of above discussions of facts and law, I find that action of the Bank in withholding the gratuity payable to respondent-employee was contrary to the provisions and spirit of the Payment of Gratuity Act, 1972 as explained by the Apex Court and other courts in the aforesaid authorities and, therefore, I do not find any error in the orders impugned so as to warrant interference in extraordinary jurisdiction under Article 226 of Constitution of India.

39. The writ petition fails and is, accordingly, **dismissed** with the aforesaid observations.

40. The petitioner-Bank is directed to release the entire amount of gratuity in terms of the order dated 29.09.2015 passed by the Controlling Authority by making calculations including the interest awarded upto date. The amount so computed shall be released in favour of respondent-employee within a period of **two months** from the date a certified copy of this order is produced before the Bank along with application.

41. In this case, an interim order was passed on 29.05.2017 directing the petitioner-Bank to deposit a sum of Rs. 11,00,000/-(rupees eleven lac only) before the Prescribed Authority and a sum of Rs. 5,00,000/-(rupees five lac only) was directed to be released in favour of respondent-employee against the security of Rs. 2,00,000/- (rupees two lac only) to be furnished by the said respondent with a further direction that balance amount of Rs. 6,00,000/- (rupees six lac only) shall be invested in an interest bearing term deposit scheme in a nationalized Bank, which shall abide by the final order to be passed in the present writ petition.

42. In view of above, while making computation of the amount payable and making payment to respondent-employee, adjustment of the aforesaid amount shall be made and the concerned Bank where the amount is lying invested and deposited in terms of the interim order passed by this Court, shall release it in favour of respondent-employee within the aforesaid period of **two months.**

43. **Dismissed** with the aforesaid observations.

(2023) 6 ILRA 703
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 24763 of 2017

Dr. Vaibhav Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Avanish Mishra, Sri Anurag Sharma

Counsel for the Respondents:
C.S.C., Sri Nipun Singh

Civil Law - Limitation Act, 1963-Section 17 (c)-Petitioner took admission in the M.B.B.S. course and deposit the fees as per structure-64 students identically placed – claimed refund of excess fees in reference to certain Government orders, etc. by filing Writ-allowed-two special appeals were filed against the said order in connected matters which were dismissed-filed Special leave petitions by the College-dismissed in 2016-present petition filed in 2017 immediately after dismissal of SLPs-cannot be said to be filed with inordinate delaylitigation began in 2004 and finally ended up in 2016 –W.P. filed in 2017-cannot be treated as barred by laches to deny interference-Limitation Act has no application in exercise of Writ Jurisdiction-Bona fide mistake pleaded-covered u/s 17 (C) of the Limitation Act-mandamus issued to refund excess amount of fees.

W.P. allowed in part. (E-9)

List of Cases cited:

Tukaram Kana Joshi & ors. Vs Maharashtra Industrial Development, (2013) 1 SCC 353

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Anurag Sharma, learned Advocate, holding brief of Shri Avanish Mishra, learned counsel for the petitioner, learned Standing Counsel appearing for State-respondent and Shri Nipun Singh, learned counsel appearing on behalf of respondents 2 and 3.

2. The petitioner took admission in the M.B.B.S. Course run by the respondent-college in the academic year 2002-03 and deposited the fees as per the structure laid down by the college. It appears that 64 students, identically placed as that of the petitioner, claimed refund of excess fees deposited by them in reference to the certain Government orders, etc. When the fees was not refunded by the college, the said 64 students filed Writ-C No.12333 of 2004 (Abhishek Kadian and others vs. State of UP and others). Learned Single Judge of this Court, by a very detailed judgment, allowed the writ petition along with connected matter with following directions:

"Both the writ petitions are consequently allowed. The Subharti KKB Charitable Trust Meerut and Subharti Medical College, Meerut are held entitled to charge the college fees of payment seats of the student admitted in 2002-03 academic session and for all subsequent years of the same batch @ 1,26,500/- per month as fixed by the Government Order dated 8.1.2003. The Trust and the College will refund the entire excess amount collected from all the 64 students admitted on the payment seats of 2002-03 batch, and for subsequent years for the same batch, within one month. The 17 petitioners in writ petition No.38368 of 2006 will be allowed to appear in 4th professional examination in the next examinations to be held by the University. They will be allowed

to adjust the excess fees paid by them in the three years and will only pay the differences, (sic) any @ Rs.1,26,500/- per annum. This judgment will be confined only to the students admitted on payment seats to the MBBS Course of the academic session 2002-03 and in subsequent years for the same batch. The College will pay Rs.10,000/- as costs of these petitions to the students by depositing it in the students' welfare fund of the College."

3. Two special appeals were filed against the said order in connected matters. However, the same were dismissed by a Division Bench of this Court by a detailed judgment dated 29.9.2010. The matter was carried by the college to the Hon'ble Supreme Court in which an interim order was passed on 10.12.2010 directing the college to deposit Rs.4 crores in the Registry within a period of three months. Later on, special leave petitions were dismissed on 8.5.2015. Certain curative petitions and review petitions were filed by the college, however, the same were also dismissed on 13.7.2016.

4. The present writ petition was filed in the year 2017 with a prayer that a writ of mandamus be issued to respondents 2 and 3 to refund the entire excess amount of fees realized from the petitioner in violation of the Government Order dated 8.1.2003 along with interest @ 12% per annum on the excess amount.

5. Counter and rejoinder affidavits have been exchanged between the parties and the writ petition is being finally decided.

6. The contention of learned counsel for the petitioner is that since identically placed students have already been refunded the amount of excess fees, the petitioner is also entitled for the same relief.

7. Per contra, Shri Nipun Singh, learned counsel for the college, has vehemently argued that the petitioner is not entitled to claim any benefit of the orders passed by the Writ Court or Special Appellate Bench or the Apex Court as the 64 students had agitated their claim in the year 2004 whereas the petitioner has approached this Court in 2017 and his claim is barred by laches. Learned counsel has further argued that limitation for claiming refund of any amount is three years as per the Limitation Act, 1963 and, therefore, the petitioner cannot claim refund of excess fees. He has also argued that since the petitioner had given an undertaking before the college at the time of taking admission that he would pay the fees as per the fee-structure and that the fees once paid would not be refunded in any circumstances, the petitioner is estopped from claiming any relief.

8. To this argument of learned counsel for the college, it has been argued by learned counsel for the petitioner that Limitation Act, 1963, would not apply in exercise of powers under Article 226 of the Constitution of India and whenever fundamental right is denied to a litigant or where demand for justice is so compelling, delay in approaching the High Court would not defeat the grant of relief as it is within the discretion of the Court to exercise jurisdiction fairly and justly so as to promote justice and not to defeat it. In support of his submission, learned counsel for the petitioner has placed reliance upon a decision of the Supreme Court in the case of ***Tukaram Kana Joshi and others vs. Maharashtra Industrial Development, (2013) 1 SCC 353*** with reference to

paragraphs 13 and 14 of the same, which are reproduced as follows:

"13. The question of condonation of delay is one of discretion and has to be decided on the basis of the facts of the case at hand, as the same vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose. It is not that there is any period of limitation for the courts to exercise their powers under Article 226, nor is it that there can never be a case where the courts cannot interfere in a matter, after the passage of a certain length of time. There may be a case where the demand for justice is so compelling, that the High Court would be inclined to interfere in spite of delay. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as to promote justice and not defeat it. The validity of the party's defence must be tried upon principles substantially equitable.

14. No hard-and-fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the even that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of anon-deliberate delay. The court should not harm innocent parties if their rights have in fact emerged by delay on the part of the petitioners."

9. Having heard learned counsel for the parties, I find that the order of Writ Court passed in the case of Abhishek Kadian (supra) is in declaratory form whereby it has been declared that the colleges are held entitled to charge the college fees as fixed by the Government Order dated 8.1.2003. Meaning thereby that the colleges are not entitled to claim fees, over and above, what has been decided by this Court. As far as the delay aspect is concerned, though the writ petitions were filed in the year 2004 and decided in the year 2007, the college carried it to the Special Appellate Bench where the special appeals were dismissed in 2010 and then the matter was carried to the Apex Court where an interim order was passed in the year 2010, but the special leave petitions were dismissed in 2015 and curative and review petitions were dismissed in 2016.

10. The present writ petition having been filed in the year 2017, immediately after dismissal of the special leave petition, cannot be said to have been filed with inordinate delay particularly when all the students were defending the matter up to the Supreme Court where even an interim order was passed in 2010, which remained operative till 2015-16 with no benefits to the said students.

11. Even otherwise, insofar as limitation aspect is concerned, it is well-settled that Limitation Act, 1963, has no application in exercise of jurisdiction under Article 226 of the Constitution of India. Even if by any stretch of imagination, Limitation Act, 1963 or its principles are said to be applicable in writ jurisdiction, insofar as the controversy covered by the

present case is concerned, reference to Section 17 of the Limitation Act, 1963 is required to be made. Section 17 of the said Act reads as follows :

*"**17. Effect of fraud or mistake.?***

(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,?

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

*(c) the suit or application is for relief from the **CONSEQUENCE OF MISTAKE; or***

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him.

The period of limitation shall not begin to run until plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production."

12. I find that in case any suit or application is for relief from the consequences of a **MISTAKE**, Section 17 (c) of the Limitation Act, 1963 would come for the rescue of the person seeking relief and in such matters, the period of limitation shall not begin to learn until the applicant has discovered the mistake or could, with reasonable diligence, had discovered it.

13. In the present case, it has been pleaded in paragraphs No.22 and 23 of the writ petition that since various students had approached this Court and the receipts of fees of the petitioner were also annexed along with Writ-C No.12333 of 2004 filed by Abhishek Kadian and others, the petitioner was under a **BONA FIDE MISTAKE** or belief that his cause was also being agitated before this Court. However, the said **MISTAKE STOOD REVEALED** when the petitioner came to file contempt application, but he was informed that he was not a party in Writ-C No.12333 of 2004 and, therefore, he could not file a contempt application on account of violation of the order passed by the learned Single Judge.

14. Insofar as the averments made in paragraphs 22 and 23 of the writ petition, I find that in paragraph-9 of the counter affidavit, it has been stated that the judgment of this Court could be applicable only in respect of the petitioners of the writ petition being Writ-C No.12333 of 2004 and in the connected matters and insofar as the mistake or belief of the petitioner as pleaded in paragraphs No.22 and 23 of the writ petition, it has not been denied specifically and only this much has been stated that even counsel for the students had informed the petitioner that he was not amongst those who had filed Writ-C No.12333 of 2004.

15. Therefore, on the point of alleged delay, the case is not only covered by the decision of Hon'ble Supreme Court in the case of Tukaram Kana Joshi (supra), but also applicability of the principle enshrined under Section 17 (c) of the Limitation Act, 1963.

16. Even otherwise, if I ignore the aforesaid provisions, I find that the litigation began in 2004 and finally ended

in 2016 with dismissal of the curative and review petitions and, therefore, if the writ petitioner filed writ petition in 2017, the same cannot be treated as barred by laches so as to deny interference in the matter.

17. Insofar as the argument of Shri Nipun Singh, learned counsel for the college, to the effect that the petitioners had given an undertaking at the time of taking admission that fees deposited shall not be refunded under any circumstances, I find that the said aspect has already been dealt with by Special Appellate Court in its judgment dated 29.9.2010 in special appeals and I cannot take a contrary view. The said decision of Division Bench has been affirmed even up to the Hon'ble Apex Court.

18. Even otherwise, the said undertaking is in the form of affidavit in a printed proforma forming part of supplementary counter affidavit as Annexure SCA-1 and such an affidavit was designed and framed by the officers of the University and college itself and considering the plight of a student, who comes to the college to take admission, filling up all documents of this nature cannot be said to operate as estoppel against him while seeking any relief that the law permits in the facts and circumstances of a particular case.

19. In the present case, once this Court as well as the Apex Court have already examined the entitlement of the college to charge excess fees and has decided the issue against the college and once other students have already been refunded the excess amount of fees pursuant to the aforesaid judgments, I do not find any ground to deny the same relief to the petitioner on the principles of equity, equality as well as Constitutional parity enshrined under Article 14 of the Constitution of India.

20. Even otherwise denying relief to the petitioner would amount to undue enrichment of the college by withholding the amount of fees, which it is not entitled as learned Single Judge had passed the order declaring entitlement of the college to charge fees as per the Government Order dated 8.1.2003 and not beyond that.

21. For all the aforesaid reasons, the writ petition succeeds and is **allowed in part.**

22. A writ of mandamus is issued to the respondents 2 and 3 to refund the excess amount of fees realized from the petitioner by following the judgment of this Court dated 14.8.2007 passed in Writ-C No.12333 of 2004 (Abhishek Kadian and others vs. State of UP and others) within a period of **three months** from the date, a certified copy of this order is produced before the said respondents.

23. Relief of cost of Rs.10,000/- as awarded under the order dated 14.8.2007 is denied to the petitioner. Further, the petitioner shall not be entitled to any interest on the excess amount, which is lying with the respondents.

(2023) 6 ILRA 707
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. 66886 of 2006

Vijay Pal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri A.D. Saunders, Sri Akhilesh Tripathi, Sri Anoop Trivedi, Sri S.P.S. Rajput, Shilpa Ahuja, Sri Shivam Yadav

Counsel for the Respondents:
C.S.C., Sri Anuj Srivastava, Sri Siddharth Varma, Sri Siddharth Verma, Sri Varad Nath, Sri H.N. Singh (Sr. Advocate)

Writ Petition filed to de-notify the notification of the acquisition -on the ground that the petitioner is still in possession of the part of the land-his hotel is running over it- possession of the land was taken by the St. and on the same date, the same was handed over to U.P.S.I.D.C. for developing industrial plots- no evidence that possession was not taken from them - possession of the acquired land was taken as per existing procedure which was also approved by the Hon'ble Supreme Court- possession supported by possession certificate and thereafter establishing the factory of respondent no.4 on major part of the acquired land proof that possession of the acquired land was taken and the same was also utilized by the beneficiary-petition itself is barred by serious laches- However open to respondent no.3- to consider the request of the petitioner to allot or lease out the land on which Hotel of the petitioner is existing- business of Hotel also comes within the definition of industry and equity also demand that instead of demolishing the building .

W.P. dismissed. (E-9)

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/1457/202

4. Dinesh Kumar & ors.Vs St. of U.P. & ors., 2018 (5) ADJ 297

5. A.P. Industrial Infrastructure Corporation Ltd. Vs Chinthamaneni Narasimha Rao & ors., AIR 2011 SC 3558

6. Aflatoon & ors.Vs Lt. Governor of Delhi and other, AIR 1974 SC 2077

7. Mahaveer Vs St. of U.P. & ors.reported in 2018(6) ADJ 529

8. Land and Building Department through Secretary & ors.Vs Attro Devi & ors.reported in Manu/SC/0621/2023

9. Indore Development Authority Vs Manohar Lal & ors.reported in 2020(8) SCC 129

10. Banda Development Authority, Banda Vs Moti Lal Agarwal reported in 2011 AIR SCW 2835

11. Balwant Narayan Bhagde Vs M.D., Bhagwat reported in 1976(1) SCC 700

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

1. Heard Sri Akhilesh Tripathi, learned counsel and Sri Shivam Yadav, learned counsel for the petitioner, 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.4.

2. Present writ petition has been filed by the petitioner basically for the prayer to de-notify the notification of the acquisition dated 16.06.1976 in respect of plot No.199M, total area 1.20 acres situated at Mauja Bhanpur Khalsa, Pargana Hasanpur, District Moradabad on the ground that the petitioner is still in possession of the part of the land of Plot No.199M though the same was acquired by notification dated 16.06.1976 and his hotel is running over it since 1984.

The factual matrix of the case is as follows:-

3 (a). The petitioner was the tenure holder of Plot No.199M of area 1.91 acre situated in Mauja Bhanpur Khalsa, Pargana Hasanpur, District Moradabad.

3(b). State Government issued a notification dated 16.06.1976 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.199M area 1.20 acre was also proposed to be acquired. This notification was followed by another notification dated 17.06.1976 under Section 6 of 'Act, 1894'. The award in the aforesaid notification was also declared on 07.05.1989. The present petitioner after receiving the compensation as declared by award dated 07.05.1985 also filed reference under Section 18 of Act, 1894 before the District Judge, Moradabad bearing Reference No.268 of 1988, and same was also allowed on 01.04.2022 and compensation for acquired land was enhanced. 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 order 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 16.06.1976 including the acquired land of the petitioner, 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.4 which was allowed by this Court vide order dated 01.05.2019 and was permitted to be impleaded as respondent no.4. Thereafter counter affidavit was also filed on behalf of the respondent no.4.

3(d). Petitioner has filed one amendment application dated 07.03.2010 to add the prayer for quashing the notification dated 16.06.1976 as well as notification dated 17.06.1976 issued under Sections 4 and 6 of the Act, 1894 respectively. This amendment application was rejected by separate order on the ground of serious latches in challenging the notification of 1976 (after almost 34 years).

4. Contention of learned counsel for the petitioner is that possession of his acquired land was not taken by the respondents and he is still in possession over that land. State has not produced any evidence despite order dated 13.03.2019 of this Court, showing that possession was taken from him and Hotel namely Basant Hotel has been existing over it even today and for running this Hotel, required permission was also granted by the office of the Collector. The contention regarding the possession of the petitioner over his acquired land in Plot No.199M is based on the report dated 30.01.2006 of the District

Magistrate, Jyotiba Phule Nagar. Report dated 30.01.2006 of District Magistrate, Jyotiba Phule Nagar shows that in the part of the acquired land in Gata No.199M, Basant Hotel is exiting and remaining land is vacant which is being used for agricultural purpose and same is in possession of the petitioner. It appears that above report dated 30.01.2006 was submitted by the District Magistrate, Jyotiba Phule Nagar to Government of U.P. in pursuance of letter dated 08.12.2005 on receiving the representation of petitioner to de-notify his land on the ground that possession was not taken from him.

5. On the basis of report dated 30.01.2006, the petitioner has again submitted representation dated 17.02.2006 to de-notify his acquired land in Gata No.199M or allot the same in his favour but the aforesaid request regarding allotment was turned down by Chief Manager, Industrial Area, Lucknow vide letter dated 03.06.2006, thereafter the petitioner moved an application dated 18.09.2006 before respondent no.1 to issue direction to U.P.S.I.D.C to review the order dated 03.06.2006 of Chief Manager, Industrial Area, Lucknow for consideration his prayer to allot the acquired land in Gata No.199M. It appears that the said application is still pending. Nothing on record that petitioner's prayer regarding de-notification of his acquired land was rejected.

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 petitioner in pursuance of the notification dated 17.06.1976 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 possession mentioned above 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.4 had also filed a 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 area 34.76 acres was handed over by U.P.S.I.D.C. to respondent no.4 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 the report dated 30.01.2006 of the District Magistrate itself, contrary to thepossession certificate and lease deeds executed in favour of respondent no.4 by the U.P.S.I.D.C. and it was lastly contended by respondent no.4 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.4 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 possession of the same, then same cannot be divested. Therefore the same cannot be denotified 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 the possession of the land taken after the process of acquisition is completed. Therefore, even if it is admitted fact that Hotel was constructed in the year 1984 by the petitioner, that is illegal constructions 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. Learned counsel for the petitioner, after argument of counsel for the respondents also contended that the land on which Hotel is situated may be allotted to him by U.P.S.I.D.C. and in place of that, he is ready to surrender equivalent land adjacent to the acquired land in Gata no.199M .

12. 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.

13. From the record, it is clearly established that notification under Sections 4 and 6 of the 'Act, 1894' issued on 16.06.1976 and 17.06.1976 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 plots. 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 a total area 34.76 acres was leased out/ allotted to respondent no.4 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 a constructed boundary wall and established a factory over the allotted land. It is admitted case of the petitioner that they got permission to run hotel in the year 1984, and they have also obtained compensation in pursuance of the award dated 07.05.1985 and thereafter petitioner had also filed reference under Section 18 of the Act, 1894 against the compensation awarded by 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 grounds 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 petitioner as question herein is possession of land in dispute.

14. 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. Though in the report dated 30.01.2006, it is mentioned that in part of the acquired land in Gata No.199M, Basant Hotel of the petitioner exists.

15. 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 the 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 drawns 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."

16. 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.

17. Paragraphs 34 and 35 of the **Banda Devleopment 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."

18. 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 not 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;

"BHAGWATI, 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 theLand Acquistition 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 Actcontemplates as a necessary condition of vesting of the]And in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the natureof the land. Such possession would have to be taken as the natureof 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 'pot 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 ingoing 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."

19. In the present case, possession of the acquired land was taken in 1976 as per existing procedure which was also approved by the 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 establishing the factory of respondent no.4 on major part of the acquired land proof that possession of the acquired land was taken and the same was also utilised by the beneficiary.

20. In the present case, notification dated 17.06.1976 was not challenged while filing the present case and only prayer was made that application of the petitioner for de-notifying his land under Section 48 may be considered.

21. Section 48 itself does not give any right to original tenure holder to compel the State to withdraw from the acquisition. This Section is only an enabling provision which enables the State to withdraw from acquisition when possession of the acquired land was not taken 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.4 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."

22. The present petition itself is barred by serious laches because the petitioner has 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.4 in the year 1976 and 1977.

23. In view of the fact, the petitioner could not make out any case for considering his representation under Section 48 of the 'Act, 1894' de-notifying the notification dated 17.06.1976 regarding the acquired land of the petitioner in Gata No.199M situated at Mauja Bhanpur Khalsa, Pargana Hasanpur, District Moradabad therefore petition fails and is **dismissed.** However, it is open to respondent no.3 to consider the request of the petitioner to allot or lease out the land on which Hotel of the petitioner is existing because the business of Hotel also comes within the definition of industry and equity also demand that instead of demolishing the building of running Hotel, land underneath the Hotel Building may be allotted to the petitioner as per the terms and conditions to be decided by U.P.S.I.D.C., in case the aforesaid land is part of the acquired land.

Case :- WRIT - C No. - 66886 of 2006

Petitioner :- Vijay Pal Singh

Respondent :- State Of U.P. Thru Principal Secry. Indus. Devlp. And Ors.

Counsel for Petitioner :- A.D. Saunders, ,Akhilesh Tripathi,Anoop Trivedi,S.P.S. Rajput,Shilpa Ahuja

Counsel for Respondent :- C.S.C.,Anuj Srivastava,Siddharth Varma,Siddharth Verma,Varad Nath

Hon'ble Salil Kumar Rai, J.

Hon'ble Arun Kumar Singh Deshwal,J.

Order on amendment application

1. Present amendment application has been filed to include the prayer challenging the notification dated 16.06.1976 under Section 4/17(1)(4) as well as notification dated 17.06.1976 under Section 6/17(1)(4) of Land Acquisition Act, 1894.

2. As the prayer, the petitioner wants to include quashing the notification is highly belated i.e. after 24 years. Hon'ble Supreme Court in the cases **(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 Rajsthan and (iii) AIR 2011 SC 3558 (A.P. Industrial Infrastructure Corporation Ltd. Vs Chinthamaneni Narasimha Rao and Ors) and (iv) AIR 1974 SC 2077 (Aflatoon and others vs. Lt. Governor of Delhi and other)** clearly held that the acquisition notification cannot be quashed after considerable delay of many years. Therefore, the prayer for quashing the notifications which the petitioner wants to add by impleadment application is serious barred by laches, therefore, present amendment application is rejected.

(2023) 6 ILRA 716
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Matters Under Article 227 No. 9954 of 2022

Bakar Ali Khan & Ors. ...Petitioners
Versus
State Of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Arvind Srivastava III

Counsel for the Respondents:
G.A., Sri Brijesh Kumar Yadav

(A) Constitution of India - Article 227 - The Code of Criminal Procedure, 1973 - Section 145 – procedure where dispute concerning land or water is likely to cause breach of peace , Section 146 - Power to attach subject of dispute and to appoint reciever - Once the Civil Court is seized of the matter, it goes without saying that the proceedings under Section 145/146 Cr.P.C. cannot proceed and must come to an end - In a proceeding under Section 145/146 Cr.P.C., Executive Magistrate is not empowered to decide the question of title and legality of possession claimed by any other parties - parties' rights regarding title or possession are eventually determined by the Civil Court. (Para - 9,11)

Both sides filed civil suits - for cancellation of sale deed/injunction - where question of right, title or interest of party are to be attached - on basis of evidence adduced by parties - Magistrate passed an injunction order against petitioners - who were first party in the dispute - not issued any attachment order with regard to property in dispute.**(Para - 11)**

HELD:-Magistrate has not issued an attachment order for property in dispute, but instead passed an injunction against the second party. Order is beyond the powers of the Executive Magistrate under Section 145/146 Cr.P.C., making it unsustainable and deserved to be set aside. Parties are directed to maintain status quo for three months to access remedies before the Civil Court, preserving property in dispute and allowing for further action.**(Para -11, 13)**

Petition allowed. (E-7)

List of Cases cited:

Mohd. Abid Vs Ravi Naresh, SLP (Crl.) No(s).5444/2022

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

1. Heard learned counsel for the petitioners, learned counsel for the respondents, learned AGA for the State and perused the material placed on record.

2. Present petition under Article 227 of Constitution of India has been filed by the petitioner challenging the order dated 6.10.2022 passed by the Additional Session Jduge (Fast Track Court- II), Rampur in Criminal Revision No.78 of 2022 as well as the order dated 28.2.2022 passed by Sub Divisional Magistrate, Rampur in Case No.23 of 2022, under Section 145 of Cr.P.C. Vide order dated 6.10.2022, the order dated 28.2.2022, passed by Sub Divisional Magistrate, Rampur has been affirmed and the criminal revision filed by the present petitioners has been dismissed.

3. The factual matrix of the case relevant for the purpose of present petition are that the proceeding under Section 145 Cr.P.C. began before the Court of Up Zila Magistrate, Tehsil Sadar, Rampur on report of Tehsildar Sadar dated 3.1.2022, in which it was informed that a fact finding inquiry was conducted regarding Khatauni/Khata No.10 and 11 situated at Village Madaiyan Nadar Bagh, Tehsil Sadar. According to the order of then S.D.M. Dated 4.3.1975, the land measuring of 13 bigha, situatted at Village Madaiya, Nadar Bagh, which is a part of Khevat No.6 was divided among the heirs of Late Ashraf Ali Khan, in which his sons namely Ishrat Ali Khan, Afsar Ali Khan and Murshad Ali Khan have got 11193 sq. yards each and daughter Akhtari Begum got 5596.5 sq. yards land. Afsar Ali Khan and Murshad Ali Khan executed total 4 sale deed of their share of land measuring 13140 sq. yards on different dates. Afsar Ali Khan sold entire 11193 sq. yards, which was obtained by him through succession in favour of different persons and through different sale deeds and therefore, no share of him remain in Khatauni/Khata Nos.10 and 11. Other heirs of Asharaf Ali Khan also sold lands coming to their share in favour of different persons. As Afsar Ali Khan had already sold 11193 sq. yards land, which came to his share after death of his father, his sons had no right to execute sale deed dated 24.1.2020 in regard to plot Nos. 178-179 in favour of Parvej Akhtar Khan, son of Qamar Akhtar Khan by projecting the land through boundary. The land sold to Parvej Akhtar was mutated in the name of purchaser Parvej Akhtar Khan but a restoration application was filed by the applicant Mohd. Suleman Siddiqui (present respondent No.2) and mutation application was restored and the matter of mutation still pending before Tehsildar. The disputed plot was lying vacant, on which Bakar Ali Khan as well as Parvej Akhtar Khan were trying to raise construction with a view to grab the land on 14.12.2021. They also constructed a gate and partial boundary, which was stopped by Tehsildar Sadar on

visiting the spot. He also stated that there is apprehension of breach of peace on the spot. The case was registered and notice was issued to opposite party (Bakar Ali Khan and others) but they failed to appear and did not filed any objection. The disputed land was initially in the nature of groove but in course of time, it converted into abadi and several commercial and residential buildings were constructed on said plot. The case of first party Suleman Siddiqui was that he has acquired the disputed plot by a registered gift deed executed from his real 'bua' Smt. Sageera Yusuf on 3.9.2017, who had purchased this plot through registered sale deed dated 24.7.2009 from Mukarram Hussain Siddiqui. The case of the first party was that he was continuing in possession of said land from the date of prilimanary order under Section 145 Cr.P.C. and prior to two months therefrom. The colored map was also prepared wherein when the entire 13 bigha land was partitioned amonst the heirs of Asharf Ali Khan. The portion of land allotted to each of the heirs of Ashraf Ali Khan was demarcated in colored map. A copy thereof was filed by the first party before the court of Up Zila Magistrate. Ishrat Ali Khan, one of the heirs of original owner Ashraf Ali Khan, had sold a portion of his share of land through two registered sale deeds in favour of 21 persons, who had partitioned purchased land by giving a pathway amonst them, on which 12 shops connected with Rahe Murtaza were constructed and sold to 12 purchasers through sale deed dated 28.7.1983, total area of 12 shops consisted of 2 biswa, 10 biswansi by earmarking the same through boundary marks. Ishrat Ali Khan also sold the land i.e. 1 bigha, 17 biswa, 11 biswansi land lying behind 12 shops to 21 persons through two sale deeds dated 28.7.1983 covering 4 biswa, 605 sq. yards land and the purchasers had constructed their respective houses thereon. The case of first party Suleman Siddiqui was that his name has been mutated in revenue records on the basis of gift deed dated 13.9.2017 executed by his Bua Smt. Sageera Yusuf whereas mutation order passed in favour of Bakar Ali Khan and others has been cancelled vide order dated 25.1.2022 passed by the Tehsildar Sadar and they are no longer recorded tenure holder in Khatauni. Bakar Ali Khan had executed a sham sale deed in favour of Parvej Akhtar on 20/24.1.2020 taking benefit of his name lying in Khatauni. As no land was lying in his name, the boundary shown in the sale deed was of no value. A mutation order passed in favour of Parvej Akhtar on the basis of said sale deed vide order dated 13.12.2021. The first party has also filed a civil Suit No.404 of 2020 (Mohd. Suleman Siddiqui vs. Parvej Akhtar and others), for cancellation of sale deed, which is pending in the court of Civil Judge (J.D.), Ramgarh. The opposite party Bakar Ali Khan and others did not appeared in proceedings before Up Zila Adhikari. Parvej Akhtar appeared but he did not file objection and Bakar Ali Khan and others did not appear in spite of fact that service/process was held to be sufficient on therm. After hearing submissions of first party and on the basis of record, the Up Zila Magistrate vide order dated 28.2.2022 directed the second party Bakar Ali Khan and Parvej Akhtar Khan and others were directed to refrain from interfering in possession of disputed land lying in possession of first party and a copy of the order was sent to S.H.O. and Tehsildar concerned for necessary action.

4. A criminal revision was preferred against impugned order by present petitioners, which was dismissed by

learned Sessions Judge vide impugned order dated 6.10.2022 passed in Criminal Revision No.78 of 2022. The criminal revision was dismissed by the impugned order and order of Up Zila Magistrate was affirmed. Learned Revisional Court observed that dispute was with regard to one shop measuring 24 sq. yards land only.

5. Feeling aggrieved by the impugned orders passed by the courts below, the opposite party Bakar Ali Khan and others filed present petition, in which they have stated that they are co-sharers in plot Nos.169, 170, 171, 173, 177, 178, 180, 167, 172, 179 situated at Village Madaiyan Nagar Bagh, Tehsil Sadar, District Rampur and are still in possession on said plots. The petitioners admitted the fact that the property in question, in its entirety initially belonged to Ashraf Ali Khan and after his death, it devolved on his three sons and one daughter namely Akhtari Begum. The petitioners are heirs of Afsar Ali Khan. They are in possession of their respective share in the property left by their father Afsar Ali Khan. The impugned order passed by SDM is an ex-parte order and in fact no notice was served on them. The petitioners had executed a sale deed dated 24.1.2020, area 24 sq. yards in favour of the respondent No.3 and his name has also been mutated alongwith petitioners. Sub Divisional Magistrate dealt with the case as he decided the issue of tile among the contesting parties, whereas he was not empowered for the same. Several disputes are pending before the courts regarding the property, out of which one case is pending before the Civil Judge (J.D.), Rampur, being Original Suit No.547 of 2021, filed by one Naim Akhtar and another against petitioners for cancellation of sale deed and permanent injunction. The subject matter of dispute is also relating to same land. The petitioners have also filed civil suit in the court of Civil Judge (Senior Division), Rampur as O.S. No.344 of 2020 against respondent Nos.2 and others for permanent injunction. Respondent No.2 has also filed a Civil Suit for cancellation of sale deed dated 20.1.2020 executed by the petitioners in favour of the respondent No.3 bearing Case No.404 of 2020. All the suits are pending in different civil courts at Rampur District Judgeship. As the civil litigations pending between the parties is still going on, the proceedings under Section 145 Cr.P.C. are not maintainable. The impugned order dated 28.2.2022 passed by learned Magistrate is an ex-parte order. Notice was not duly served on petitioners.

6. Learned counsel for the petitioners placed reliance on pleadings made in present writ petition. He submitted that the impugned order passed by both courts below are absolutely illegal and perverse as firstly no police report was called for by SDM to ascertain the genuineness of breach of peace between the parties over the land in question. The SDM committed legal error while passing impugned order inasmuch as he had no authority in law in proceeding under Section 145/146 Cr.P.C. to adjudicate on the right and title of the parties. He could only look into the apprehension of breach of peace as well as possession over the land in dispute within two months next before the date on which the report of the police officers or on any other information was received by the Magistrate. He could not act as a civil court as in proceeding under Section 145/146 Cr.P.C. He lasly submitted that learned courts below have failed to consider this aspect of the matter that respondent No.2 had only 24 sq. yards of land but not on the land of petitioners. Respondent No.4 is not a recorded tenure holder inasmuch as his

name was never recorded in revenue record. Learned revisional court failed to examine the correctness and legality of the order passed by the learned Up Zila Magistrate, merely because somebody is claiming possession over land in dispute, no presumption of apprehension of breach of peace can be made. Complainant/respondent No.2 is not recorded tenure holder of the disputed property, Sub Divisional Magistrate committed error while presuming his possession over disputed property. No independent evidence was taken by learned Magistrate to determine question of possession on disputed land. The order of S.D.M. was initially stayed by Session Court vide order dated 21.5.2022, passed in Criminal Revision No.78 of 2022.

7. Learned counsel for the petitioners cited a judgement of Hon'ble Apex Court in Ranveer Singh vs. Dalbir Singh, 2002 Cr.L.J. 2017, wherein the Apex Court considered the legality of order of High Court of Delhi in Criminal Revision No.540 of 2000 dated 16.7.2001 whereby the order of Executive Magistrate under Section 146(1) was set aside. Hon'ble Apex Court observed that the Court, while dealing with a proceeding under Section 145 Cr.P.C., is mainly concerned with possession of the property in dispute on the date of the preliminary order and dispossession, if any, within two months prior to that date; the Court is not required to decide either title to the property or right of possession of the same. The question for determination before the High Court in the present case was one relating to the validity or otherwise of the preliminary order passed by the learned Sub-Divisional Magistrate under Section 145(1) Cr.P.C. and sustainability of the order of attachment passed under Section 146(1) Cr.P.C. For deciding the questions it was neither necessary nor relevant for the High Court to have considered the matters relating to title to and right of possession of the property. Further, both the parties in the case have filed suits seeking decree of permanent injunction against each other and in the suit filed by the appellant an order of interim injunction has been passed and an objection petition has been filed by respondent no.1. The suits and the interim order are pending further consideration before the civil court.

8. Learned counsel appearing on behalf of the respondent Nos.2 and 3 laid emphasis on impugned orders and submitted that the impugned orders passed by the courts below are very elaborate and reasoned orders which are based on material placed on record and no interference is warranted in impugned orders.

9. In the present case, on perusal of final impugned order passed by learned Up Zila Magistrate under Section 145 Cr.P.C., it appears that he has not given any finding therein regarding apprehension of breach of peace regarding disputed land. He has only placed reliance on the report of Tehsildar, who apprehended breach of peace in his inquiry report submitted to Zila Magistrate. He has also not given specific finding regarding possession of any party to the case and gave a finding regarding possession of respondent No.2 Mohd. Suleman Siddiqui on disputed land in operative order of the Court. In a proceeding under Section 145/146 Cr.P.C., Executive Magistrate is not empowered to decide the question of title and legality of possession claimed by any other parties. In such proceedings, the Magistrate is concerned only with the actual physical

possession. If he is unable to satisfy himself as to which of the parties was in such possession or if he decides that none of the parties was in such possession, or if there is an emergency, it is open to him to attach the subject matter of dispute. An order of attachment if made without one or other of these findings, is not sustainable. In present case, the Magistrate has not given a finding while passing the impugned order that the case is one of emergency.

10. Civil Suit No.404 of 2020 had filed by the present respondent No.2 Mohd. Suleman Siddiqui against respondent No.3-Parvej Akhtar, who has purchased the disputed property from petitioners for cancellation of sale deed and injunction before the Civil Court. Another O.S. No.344 of 2020 has been filed by the present petitioners against respondent No.2 and others for permanent injunction relating to disputed land. A suit for cancellation of sale deed and permanent injunction is also pending as O.S. No.547 of 2021 between one Naim Akhtar and another vs. present petitioners for cancellation of sale deed as well as for permanent injunction, for which right, title and interest of the party regarding disputed property is to be decided by the competent court, as envisaged under Sub Section (1) of Section 146 Cr.P.C. In O.S. No.344 of 2020, present petitioners have prayed for permanent injunction against respondent No.2, who are present respondent No.2 and others, with regard to 4895.65 sq. yards land, which they claimed to have acquired from their father through succession whereas the case of present respondent No.2 is that their father had already sold his entire 1/3rd share of groove land acquired through inheritance from his father and nothing remained with present petitioners, which they could transfer to any person. In Civil Suit No.344 of 2020, present respondent No.2 had sought relief of cancellation of sale deed and permanent injunction with regard to the land which they claimed to have acquired through registered gift deed dated 13.9.2017 from his Bua Smt. Sageera Yusuf. In this suit the main dispute with regard to plot and question of having area 0.278 hectare, 0.147 hectare, 0.425 hectare, which are equivalent to 5082.95 sq. yards, which is demarcated by boundary marks. In this suit the sale deed executed by present petitioners in faovur of the respondent No.3 has been challenged on the ground that the vendors were not owner in possession of this property. In operative portion of the impugned order, learned Up Zila Magistrate has observed that the first party Mohd. Suleman Siddiqui was in possession of the disputed property but he has not referred to any evidence on the basis of which he has reached this finding except the report of Tehsildar, on which the proceeding under Section 145 Cr.P.C. were initiated. He has not referred any evidence or police investigation report with regard to finding that there was apprehension of breach of peace on the spot, which required initiation of proceeding under Section 145/146 Cr.P.C. In proceeding under Section 145 Cr.P.C., the Executive Magistrate may treat a party in possession who has been wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub- section (1) of Section 145 Cr.P.C., where dispute concerning land or water is likely to cause breach of peace. Under Section 146 Cr.P.C., the Magistrate at any time after making the order under sub- section (1) of section 145 considers the case to be one of

emergency, or if he decides that none of the parties was then in such possession as is referred to in section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof: Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.

11. In present case, the Magistrate has not issued any attachment order with regard to property in dispute instead he has passed an injunction order in favour of the first party against second party, who are petitioners before this Court and such type of order is beyond purview of the powers exercisable by Executive Magistrate in proceeding under Section 145/146 Cr.P.C. and therefore, the impugned order is not sustainable under law and deserves to be set aside, on this ground also. In a recent Judgement in the case of **Mohd. Abid vs Ravi Naresh,** arising out of **Special Leave to Appeal (Crl.) No(s).5444/2022,** Hon'ble Apex Court vide judgement dated 1.11.2022 held that it was an admitted fact that the petitioners have already filed a suit for injunction in which ex-parte ad- interim injunction has been granted by the Civil Court, Faizabad, Uttar Pradesh on 05.12.2020. Once the Civil Court is seized of the matter, it goes without saying that the proceedings under Section 145/146 Cr.P.C. cannot proceed and must come to an end. The inter- se rights of the parties regarding title or possession are eventually to be determined by the Civil Court. In present case also, according to the pleadings of the parties, both sides have filed civil suits for cancellation of sale deed/injunction before civil court where the question of right, title or interest of the party are to be attached on the basis of evidence adduced by the parties. Therefore, the impugned order dated 28.2.2022 passed by learned Up Zila Magistrate is not found within the four corners of the law and consequently it is set aside. Consequently, the impugned order dated 6.10.2022 passed by Revisional Court affirming order of Magistrate is also set aside.

12. Accordingly, the petition stands **allowed**.

13. The parties are relegated to avail their remedies available before Civil Court, in respect of their respective suits filed by them. With a view to preserve the property in dispute to enable the parties to avail the remedy before the civil court, the parties are directed to maintain status quo of the disputed party for a period of three months from today, which will automatically stands vacated, thereafter.

(2023) 6 ILRA 722
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:LUCKNOW 30.05.2023

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 267 of 1983

Karuna Shanker & Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Rajesh Tiwari

Counsel for the Opposite Party:

Ms. Smiti Sahay, A.G.A.

Criminal Law - appeal against conviction - Indian Penal Code, 1860 - Section 302/34 – murder - F.I.R. not an encyclopedia to mention every fact about the incident - When there is ample ocular evidence corroborated by medical evidence , mere non-recovery of weapon from the appellant would not materially affect the case of the prosecution - If the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or natural contradictions have appeared into his testimony - where there is direct evidence of the crime then motive looses its importance.(Para - 20, 21, 23)

(B) Evidence Law - related witness - testimony of the related witness cannot be discarded merely on the ground that he is a related witness - person whose close relative is killed will never spare the real culprit just to implicate the others falsely - no proposition in law that relatives are to be treated as untruthful witnesses.(Para - 24)

Broad day light murder - F.I.R. was lodged promptly - incident proved by direct evidence of P.W. 1 and P.W. 2 - supported by medical evidence - inquest was conducted on same night - statement of complainant recorded on same day - statement of another witness recorded on next day. **(Para - 27)**

HELD:-Eye witnesses proved case of prosecution beyond all reasonable doubts. No reason to doubt the testimony of eye witnesses. Murder of deceased was committed by convicts/appellants in association with two unknown miscreants. Trial Court rightly held accused persons guilty. No ground or reason for interference in the conviction and sentence.**(Para -27)**

Criminal Appeal dismissed. (E-7)

List of Cases cited:

1. Mekala Sivaiah Vs St. of A.P., (2022) 8 SCC 253

2. Kalua @ Koshal Kishore Vs St. of Raj., (2019) 16 SCC 683

3. Surinder Singh Vs St. (Union Territory of Chandigarh), 2021 SCC Online SC 1135

4. Rahul Vs St. of Har., (2021) 11 SCC 149

(Delivered by Hon'ble Hon'ble Mrs. Saroj Yadav, J.)

1. This criminal appeal has been filed by the convicts/appellants namely Karuna Shankar alias Pappu and Rajkishore alias Kallu (herein after referred to as Karuna Shankar and Rajkishore) against the judgment and order dated 15.04.1983 passed in Sessions Trial No. 562 of 1982 by IVth Additional Sessions Judge, Unnao wherein convicts/appellants were convicted and sentenced under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short I.P.C.) for life imprisonment.

2. The facts necessary for disposal of this appeal are as under:-

A first information report (in short F.I.R.) was registered as Case Crime No.126 of 1982, under Section 302 read with Section 34 of IPC at Police Station Achalganj, District Unnao at about 7.30 pm on 17.06.1982, on the basis of a written report presented by the complainant namely Ashok Kumar. It was stated in the written report (Exhibit Ka-1) that about four years ahead of the incident, some miscreants committed loot in his house. After sometime he came to know that the incident of loot was got committed by Rajkishore alias Kallu and Rajnarayan alias Munna, resident of his own (complainant's) village. For that reason, they developed

animosity and were not on talking terms. In October 1981, one Vijay Bajpai, resident of Village Badarka purchased one orchard and some land consisting of 8-9 Bighas from one Satyanarayan belonging to the family of Rajkishore and that was being looked after by Gaurishankar alias Badri Prasad, father of the complainant. Rajkishore asked many times, father of the complainant not to look after the said land and also warned him with dire consequences but he (deceased) did not care. For that reason Rajkishore became more inimical towards him (deceased). Due to this enmity on the day of incident i.e. 17.06.1982 when the complainant, his father and maternal brother Ram Kumar son of Baijnath, resident of Mawaiya, Police Station Chakeri, District Kanpur were coming back to home from 'Anta Banthar' Market, at about 5.30 pm they reached near the field of Banshlal Dixit, then Karuna Shankar armed with gun, Rajkishore armed with Katta (country-made pistol) and their two associates, one armed with Farsa (Spade) and another with Kulhari (Axe) who were hidden there. Rajkishore asked his associates to kill the father of the complainant so as to teach a lesson for taking the land of others. On this, they (complainant, his father and cousin) took turn to run away. At the sametime Rajkishore fired a shot with Katta (country made pistol) on his father which hit him (deceased) on right side of abdomen. On it they all three i.e. complainant, father and cousin ran shouting/crying. Hearing their voice/cry, Sri Ram son of Lallaunu Lodh and Pusu Raidas resident of Badarka, who were present in their orchards came running and they challenged Rajkishore and his associates but they (complainant and the people gathered there) did not go nearby out of fear. Rajkishore and his associates chased his father (deceased) while running and in the orchard of Lallan Dixit Karunashankar and Rajkishore fired one shot each by gun and country made pistol with which they were armed. His father fell down, then their two associates assaulted his father with 'Kulhari' (Axe) and Farsa (Spade). Thereafter, all the four miscreants ran to assault towards the complainant and his cousin but could not do so seeing many people coming after hearing the sound of fires and cry of the complainant side and they ran away towards the village Supasi. Thereafter the complainant and others reached near the deceased in the orchard of Lallan Dixit and complainant found his father dead. The right hand of the deceased was cut apart from wrist. He recognized the miscreants Rajkishore and Karunashankar very well but did not know the names of other two miscreants. The dead body of the deceased was lying at the spot.

3. After registration of the F.I.R., investigation started. The panchayatnama of the body of the deceased was conducted on the same day in the night. The body was sent for post mortem examination. The post mortem examination was conducted on the cadaver of the deceased. Site plan of the place of incident was prepared by the Investigating Officer. The accused persons surrendered before the concerned Court.

4. After completing the investigation the Investigating Officer found the involvement of both the convicts/appellants in the crime and submitted charge-sheet against them under Sections 302/34 IPC. On the charge-sheet so submitted learned Magistrate concerned took the cognizance and committed the case to the Court of Sessions for trial. The Court of Sessions framed the charges under Sections 302/34 IPC against the convicts/appellants namely

Karunashankar and Rajkishore. Both the convicts/appellants denied the charges and claimed to be tried.

5. In order to prove its case the prosecution examined the following witnesses:-

P.W. 1- Ashok Kumar (complainant, an eye witness);

P.W. 2- Radhey Lal (an eye witness);

P.W. 3- Dr. J.N. Bajpai, who conducted post mortem examination of the deceased;

P.W. 4- Sub-Inspector Hardeo Singh, Investigating Officer;

P.W. 5- Head constable Amir Singh, who registered the F.I.R.

Apart from above oral evidence relevant documents have also been proved by the prosecution, which are as under:-

Exhibit Ka 1- Written report;

Exhibit Ka 2- Post mortem examination report;

Exhibit Ka 3- Inquest report;

Exhibit Ka 4- Police Form No. 379;

Exhibit Ka 5- Police Form No. 13;

Exhibit Ka 6- Letter to Reserved Inspector, Police Lines, Unnao for getting the post mortem conducted;

Exhibit Ka 7- Letter to Medical Officer In-charge, Post mortem duty, Unnao for getting the post mortem conducted and sending the clothes of the deceased found on the body in a sealed bundle;

Exhibit Ka 8- Recovery memo of empty cartridges recovered from the place of occurrence;

Exhibit Ka 9- Recovery memo of collection of blood soaked and plain soil from the place of occurrence;

Exhibit Ka 10- Recovery memo of shoes of the deceased recovered from nearby spots to the place of occurrence;

Exhibit Ka 11- Site plan of the place of occurrence;

Exhibit Ka 12- Charge sheet;

Exhibit Ka 13- Chik F.I.R.;

Exhibit Ka-14- Copy of concerned General Diary.

6. After completion of evidence of prosecution, statements of convicts/appellants under Section 313 of the Code of Criminal Procedure 1973 (in short Cr.P.C.) were recorded. Both the convicts/appellants in their statements admitted that Gauri Shankar (deceased) was the father of the complainant (Ashok Kumar) and also admitted that Rajkishore and Rajnarayan were the real brothers but denied that any dacoity was got committed by them as stated by P.W. 1. Both the convicts/appellants denied any enmity with the complainant. They denied the incident being committed by them as has been alleged and stated by the witnesses. They also denied the place of occurrence. Further they stated that they have falsely been implicated in the crime. They have stated

that both the eye witnesses are the man of one Vijay Bajpai of Village Badarka and they have deposed under the influence of Vijay Bajpai. They further stated that they had no reason to commit murder of Gauri Shankar. It has also been stated by convict/appellant Rajkishore that Vijay Bajpai was the man of criminal character and he was challaned under the Goonda Act and he (accused Rajkishore) and his father did Pairvi in that case, for that reason Vijay Bajpai was inimical against him. He further stated that he filed a suit against Vijay Bajpai. Both the convicts/appellants further stated that witnesses have deposed falsely as they are the man of Vijay Bajpai. The accused persons filed some documentary evidence in support of their contentions. No witness was produced in defence by the convicts/appellants though opportunity was given by the trial Court.

7. Learned trial Court after completion of evidence heard the arguments of both sides. After analyzing the evidences available on record, the trial Court relied upon the evidence of witnesses P.W. 1- Ashok Kumar (complainant) and P.W. 2- Radhey supported by medical evidence and other evidence and came to the conclusion that the case of the prosecution has been proved by the witnesses P.W 1 and P.W. 2 though there are contradiction in the evidence of P.W. 1 and P.W. 2 but of minor nature. What has been written in the FIR and stated by the P.W. 1 (complainant) has been supported by the medical evidence of medical witness P.W. 3, who conducted the post mortem examination. The F.I.R. was lodged promptly. It was a broad day light murder as the same was committed at 5.30 pm in the month of June. In day light incident can be witnessed from a distance also. Learned trial Court found the evidence of P.W. 1 and P.W. 2, witnesses of facts/eye witnesses reliable. Three empty cartridges were also recovered from the place of occurrence. The shoes of the deceased were recovered by the Investigating Officer from the nearby places where the incident was committed after chasing the deceased. Hence learned trial Court came to the conclusion that the prosecution has proved its case beyond all reasonable doubts and held the convicts/appellants guilty under Section 302/34 IPC and sentenced them with imprisonment for life. Being aggrieved of this conviction and sentence this criminal appeal has been preferred.

8. Heard Sri Rajesh Tiwari, learned counsel for the convicts/appellants, Sri Ashu Dubey, learned counsel for the complainant and Ms. Smiti Sahay, learned Additional Government Advocate for the State respondent.

9. Learned counsel for the convicts/appellants submitted that impugned judgment and order is erroneous and not sustainable in the eyes of law because there was mention of two more unknown persons in the FIR but those unknown persons could not be traced by the Investigating Officer. No weapon allegedly used in the crime was recovered by the Investigating Officer. Only eye witness Ashok Kumar (P.W. 1) has been examined before the Court below. Though P.W. 2 has been presented as eye witness but his name was not there in the FIR as an eye witness. Hence his evidence cannot be relied upon. His presence on the spot is highly doubtful. He further submitted that motive which has been alleged for committing the crime is not sufficient because the land was purchased by Vijay Bajpai and not by the deceased. The deceased was allegedly looking after the

land/orchard so purchased. The factum of enmity due to dacoity has also not been proved by the prosecution. He further submitted that injury suffered by the deceased on his right side of abdomen could not have occurred as per the version of witness that he turned on the other side. Furthermore, after receiving injury in the abdomen the deceased could not have run the distance where he was finally killed. He further submitted that P.W. 2 Radhey is a servant of Vijay Bajpai, hence his testimony is not reliable as he is an interested witness. He further submitted that prosecution has failed to prove the case against the convicts/appellants beyond all reasonable doubt, therefore, impugned judgment and order should be set aside.

10. Contrary to it, learned A.G.A. appearing on behalf of the State respondent as well as learned counsel for the complainant submitted that in the present case the incident occurred in a broad day light i.e. at 5.30 pm in the month of June. The F.I.R was lodged promptly i.e. at 7.30 pm on the same day. The inquest was conducted without any delay. In the FIR out of four miscreants two were named and those are the convicts/appellants and two were unknown whom the complainant did not recognize as they were unknown persons but he has written in the FIR that he can recognize them if they are brought before him. The injuries are in corroboration to what has been mentioned in the FIR. It is further submitted that recovery of weapon is not necessary for convicting the accused if direct evidence is there. Learned A.G.A. further submitted that to prove the motive is also not necessary if there is eye witness account of the incident. She further submitted that it differs from person to person and depends upon the capacity, will power and courage of the person how long he could run after receiving injuries. Even Doctor has not stated with certainty that he could have run only 6-7 paces. Hence the arguments advanced by the learned counsel for the convicts/appellants have no force and the appeal should be dismissed.

11. Considered the rival submissions advanced by the learned counsel for the parties and perused the original record as well as record of the appeal.

12. The evidence available on record as well as perusal of the impugned judgment shows that there is no dispute regarding day of occurrence and date and time of lodging the F.I.R. The F.I.R. of the case was lodged against two named persons (appellants/convicts) and two unknown persons alleging that the complainant, his father and his maternal brother were coming back to home from 'Anta Banthar' market, at about 5.30 pm they reached near the field of Vanshlal Dixit, then Karuna Shankar armed with gun and Rajkishore armed with Katta (country made pistol) and their two associates were armed with Farsa (spade) and another with Kulhari (axe) all of sudden came there. Appellant Rajkishore exhorted his associates to kill the father of the complainant so as to teach him a lesson for taking the lands of others. Thereupon they (complainant, his father and cousin) took a turn to run away. At the sametime Rajkishore fired a shot with Katta (country made pistol) on his father which hit him (deceased) on the right side of abdomen. On it they all three i.e. complainant, father and cousin ran crying. Hearing their voice/cry, Sri Ram son of Lallaunu Lodh and Pusu Raidas resident of Badarka, who were present in their orchards came running and they challenged Rajkishore and his associates but they (complainant

and the people gathered there) did not go nearby out of fear. Rajkishore and his associates chased his father (deceased) while running and in the orchard of Lallan Dixit Karunashankar and Rajkishore fired one shot each by gun and country made pistol with which they were armed. His father fell down, then their two associates assaulted his father with 'Kulhari' (Axe) and Farsa (Spade). Thereafter, all the four miscreants ran to assault towards the complainant and his cousin but could not do so seeing many people coming after hearing the sound of fires and cry of the complainant side and they ran away towards the village Supasi. Thereafter the complainant and others reached near the deceased in the orchard of Lallan Dixit and complainant found his father dead.

13. The complainant Ashok Kumar has been examined as P.W. 1. He in his examination-in-chief has stated that his father Gauri Shankar was killed. He was also known as Badri Prasad. About 4-5 years ahead of the murder of his father, some loot was committed in his house. After some time it was revealed that loot was got committed by Ramnarayan alias Munna and Rajkishore alias Kallu. He identified Rajkishore in the Court. He further stated that Ramnarayan is real elder brother of Rajkishore. Karunashankar, who is present in the Court has friendship with Rajkishore. When it came to the knowledge of the complainant side that in the loot committed in the house of complainant was got committed by Rajkishore then Rajkishore developed animosity towards him. Before the murder of father of the complainant one person Vijay resident of Badarka purchased 8-9 Bighas of land from one Satyanarayan belonging to the family of Rajkishore. The land so purchased was looked after by the father of the complainant. Rajkishore asked his father not to look after the said land otherwise he (deceased) will have to face dire consequences but the father of the complainant did not yield. For this reason, they (appellant Rajkishore and family) became more inimical.

14. The incident took place on 17.06.1982. On that day he (complainant), his father and his son of maternal uncle Ram Kumar went to the market of Anta Banthar. They started back from the market at about 2.30 pm. They reached near the field of Vanshlal Dixit of Badarka . At about 5.30 pm his father was ahead and they (he and his cousin) were behind them by 8.-10 paces. In the way Rajkishore, Karunashankar and two unknown persons came out, who were hidden there. Karunashankar armed with gun, Rajkishore armed with Katta (country-made pistol) and two unknown persons, one armed with Farsa (Spade) and other with 'Kulhari' (Axe). Rajkishore challenged his father and asked his associates to kill him so as to teach a lesson for taking the property of others. His father took a turn to run away but at the same time Rajkishore fired a shot at his father, which hit him on right side of the abdomen. On this his father took turn on the left side and ran towards north but the miscreants chased his father and surrounded him in the orchard of Lallan Dixit. Rajkishore and Karunashankar fired one shot each on his father with country made pistol and gun respectively. His father fell down then both unknown miscreants assaulted his father with 'Farsa' (spade) and 'Kulhari' (Axe). When the miscreants chased his father then the complainant and his cousin ran crying. Near the orchard of Maithali Sharan, Radhey and Pusu resident of Village Badarka met them and they all witnessed

the incident but did not go near out of fear. Upon their cry many people of village Badarka reached there and accused persons and their associates ran away towards the Village Supasi. He further stated that after running away of the accused persons the complainant and others went near his father and found him dead. The blood was oozing from his wounds. He asked the persons present at the spot to take care of the dead-body and he went to his home and narrated the incident to his mother and wrote the report. This witness proved the written report Ext. Ka-1 in his hand-writing. He further stated that he went along with Chowkidar to the Police Station to lodge the report. He handed over the written report to Head Moharrir in the Police Station and he (head moharrir) prepared the chik FIR and gave to him. Thereafter the Investigating Officer recorded his statement.

15. P.W. 2-Radhey Lal is another eye witness, whose name does not figure in the F.I.R. as witness but he came to depose as an eye witness of the incident. He in his examination in chief has stated that he knew Gauri Shankar (deceased) before the incident. The incident took place about six months ahead at 5-5.30 pm. At the time of incident he was in the orchard of Lallan Dixit. He reached in the orchard of Lallan Dixit from the orchard of Maithali Sharan. At that time, he was plucking mangoes in the orchard of Maithali Sharan along with Pusu. Pusu is resident of his village. He heard the sound of fire and cry when he was in the field of Maithali Sharan. On this he reached in the orchard of Lallan Dixit and saw four persons were chasing Gauri Shankar among whom Rajkishore and Karunashankar and two other unknown persons were there. Karunashankar was armed with gun, Rajkishore was armed with Katta (country-made pistol) and out of two other unknown persons, one armed with 'Kulhari' (Axe) and another with 'Farsa' (spade). All the four persons surrounded Gauri Shankar in the orchard of Lallan Dixit. After surrounding him Rajkishore and Karunashankar fired upon Gauri Shankar. After being fired Gauri Shankar fell down. Thereafter two unknown persons assaulted him with Kulhari and Farsa. At the place where he (P.W. 2) was standing at the same place Ashok and one of his relative were also standing. Pusu was also standing near him. All these persons witnessed the incident. After hearing the cry and noise other people of village Mawaiya and Badarka came there then accused persons ran away towards the village Supasi. When the accused persons ran away then they saw Gauri Shankar and found him dead. He further stated that blood came out on the spot from the injury of Gauri Shankar. He remained at the spot for 5-7 minutes thereafter went to his home. On the next day of incident the Investigating Officer recorded his statement.

16. P.W. 3 is Dr. J.N. Bajpai, Radiologist, who conducted the post mortem examination on the cadaver of the deceased. He has stated before the Court that on 18.06.1982 he conducted the post mortem examination of the deceased Gauri Shankar, whose body was identified by Constable Police 523 Ram Swaroop of Police Station Achalganj. He found following ante mortem injuries on the body of the deceased:-

(i) Gun shot wound of entry 1/2" X 1/2" X abdominal cavity deep, on the left side of abdomen 2" below right costral margin, blackening and tattooing was present.

(ii) Multiple gun shot of entry 1/5" X 1/5" each spread in an area 5" X 3" on the middle of chest.

(iii) Incised wound 3-1/2" X 1" X bone deep on the front of right fore arm lower part, front of right wrist and front of right hand. Both radius and ulna bones were cut out on their lower part.

(iv) Incised wound 3-1/2" X 1/2" X bone deep on the right side of back of head 1" above and behind right ear.

(v) Incised wound 4" X 1" X bone deep in the back of neck upper part.

(vi) Incised wound 2-1/2" X 1/5" X muscle deep on the front of right arm.

(vii) Incised wound 2-1/4" X 1/5" X skin deep on the outer middle part of right arm.

(viii) Incised wound 2-1/2" X 2" X bone deep on the lower part of right fore arm along with amputation of right hand at the wrist joint. The bones of the wrist joint were cut.

(ix) Incised wound 3/4" X1/3" X bone deep on the back of right hand.

(x) Multiple gun shot wound of entry 1/3" X 1/3" each spread in an area 11" X 8" on the right side of abdomen.

According to the Doctor (P.W. 3), death of the deceased might have occurred on 17.06.1982 at about 5.30 pm. Gun shot injuries might have occurred with gun and pistol. There is little possibility that incised wound would have come with Axe and Spade but might have come with a small axe. He further stated that injury no. 8 would have occurred with spade. He proved post mortem report Exhibit Ka-2 as prepared by him and written in his hand-writing and signed by him at the time of post mortem examination.

17. P.W. 4 is the Investigating Officer. He has stated in his examination in chief that even on 17.06.1982, he was posted at Police Station Achalganj as Sub-Inspector. On that day, investigation of this case was handed over to him. He recorded the statement of the complainant at the Police Station, thereafter went to the spot. The body of the deceased was lying in the orchard of Lallan Dixit. He took the dead body in his possession and prepared inquest after nominating Panches. He prepared Panchayatnama, Khaka Lash and Challan lash (Exhibit Ka3 to Ka 5) in his own hand writing and signed them. Thereafter dead body got sealed and sent for post mortem examination. He wrote letter to Reserved Inspector (R.I.) (Exhibit Ka-6) and to Medical Officer (Exhibit Ka-7). He also inspected the place of incident on the same day. He recovered three empty cartridges from the spot, collected blood soaked and plain soil from the spot and prepared the recovery memos (Exhibit Ka-8 and Ka-9). He also recovered shoes of the deceased from the nearby places to the spot, which fell down while running and prepared the recovery memo (Exhibit Ka-7) He further deposed that he prepared the site plan (Exhibit Ka-11) and site plan so prepared is correct. Thereafter he recorded the statement of Panches and other witnesses of recovery memos. He has further submitted that on 18.06.1982, he recorded the statement of witnesses namely Ram Kumar, Radhey Lal and others. He made search for the accused persons but he could

not find them. The accused persons surrendered in the Court where he recorded the statement of accused persons in 'Hawalat' (police lock-up). After investigation he submitted the charge sheet (Exhibit Ka-12) against the accused persons on 31.07.1982.

18. P.W. 5 is Head Constable Amir Singh, who has proved Chik FIR (Exhibit Ka-13) and relevant General Diary (GD) (Exhibit Ka-14). He registered the FIR and wrote Chik FIR and handed over the investigation to Sub-Inspector Hardeo Singh.

19. Both the eye witnesses i.e. P.W. 1 and P.W. 2 have been cross-examined at length by the defence side but nothing material could be brought out in their cross examination as to make their statements unreliable. Both the eye witnesses have proved the incident giving narration step by step. P.W. 1-complainant has proved what he has written in the first information report about the incident. P.W. 2 has also proved what was witnessed by him when the incident was being committed by the accused persons. Though some contradictions are there in the statements of P.W. 1 and P.W. 2 but these contradictions are of minor nature and may occur.

20. Learned counsel for the convicts/appellants argued that name of P.W. 2-Radhey Lal was not there in the F.I.R. Had he witnessed the incident the complainant had mentioned the name of Radhey Lal in the F.I.R., hence he could not be relied upon. This arguments advanced by the defence was not tenable because the statement of witness Radhey Lal was recorded on the next day of incident by the Investigating Officer. The Investigating Officer P.W. 4 has stated in his statement about it. Non mentioning of name of the P.W. 2 in the FIR in such circumstances is immaterial. Merely non mentioning of the name of P.W. 2 in the FIR did not make his testimony unreliable. Further it is settled law that F.I.R. is not an encyclopedia to mention every fact about the incident. The evidence of both eye witnesses P.W. 1 and P.W. 2 proves the incident and their narration of facts is very well being supported by the medical evidence given by the Doctor P.W. 3. Ante mortem injuries found on the body of the deceased corroborates the facts what has been stated in the F.I.R. and also proved by P.W. 1 and P.W. 2. There is no reason to doubt the testimony of P.W. 1 and P.W. 2.

21. Learned counsel for the convicts/appellants argued that two unknown persons could not be traced and identified by the Investigating Officer, as such, the incident narrated by the complainant could not be believed. This argument advanced by the learned counsel for the convicts/appellants is baseless because it is up to the Investigating Officer to trace them but if they remained untraced, it cannot be presumed that whole incident is false. He further argued that no weapon used in the crime was recovered by the Investigating Officer neither fire arm nor 'Farsa' (Spade) or Kulhari (Axe), as such, the incident could not be deemed proved. This argument of the appellants' counsel also not tenable because to prove the case of prosecution recovery of weapon is not always necessary specially if eye witness account is there. In the present matter, two witnesses have proved the incident who witnessed the incident. Mere non recovery of weapon cannot demolish the case of prosecution. Recently in ***Mekala Sivaiah Versus State of Andhra Pradesh (2022) 8***

Supreme Court Cases 253, Hon'ble Apex Court in this regard as held as follows:-

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

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

22. In ***Kalua alias Koshal Kishore Versus State of Rajasthan (2019) 16 Supreme Court Cases 683*** also Hon'ble Apex Court held that ***"Non recovery of weapon would not materially affect the prosecution case."***

23. Learned counsel for the convicts/appellants also argued that the motive for commission of murder though alleged but has not been proved and the motive is not sufficient for committing the murder of the deceased by the accused persons. This argument put-forth by the learned counsel for the convicts/appellants has no force because where there is direct evidence of the crime then motive looses its importance. Though generally there remains a motive for commission of a crime but that motive remains hidden in the mind of the miscreants. In the present matter the incident has been proved by direct evidence of P.W. 1 and P.W. 2 supported by medical evidence of P.W. 3. In ***Surinder Singh Versus State (Union Territory of Chandigarh) 2021 SCC Online SC 1135***, Hon'ble Apex Court in this regard has held as under:-

"We are thus of the considered opinion that whilst motive is infallibly a crucial factor, and is a substantial aid for evincing the commission of an offence but the absence thereof is, however, not such a quintessential component which can be construed as fatal to the case of the prosecution, especially when all other factors point towards the guilt of the accused and testaments of eyewitnesses to the occurrence of a malfeasance are on record."

24. Learned counsel for the convicts/appellants further argued that P.W. 1 is a related witness being the son of the deceased, so his testimony could not be relied upon. This argument of the learned counsel for the appellants did not carry weight because it is well settled law that the testimony of the related witness cannot be discarded merely on the ground that he is a related witness. A person whose close relative is killed will never spare the real culprit just to implicate the others falsely. In ***Rahul Versus State of Haryana (2021) 11 Supreme Court Cases 149,*** Hon'ble Apex Court has held as under:-

" While rejecting the plea that the witnesses were in close relation to the deceased, in the case of Ram Chander & Ors. v. State of Haryana this Court has held as under:

"33. The submission of the learned counsel for the appellants that since Guddi (PW 9) was in close relation with the deceased persons, she should not be believed for want of evidence of any indeperndent witness, deserves to be rejected in the light of the law laid down

by this Court in Dalbir Kaur v. State of Punjab (1976) 4 SCC 158 and

Harbans Kaur v. State of Haryana (2005) 9 SCC 195, which lays down the following proposition (Harbans Kaur case, SCC p.198, para 7).

"7. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses have reason to shield the actual culprit and falsely implicate the accused." " While rejecting the plea that the witnesses were in close relation to the deceased, in the case of Ram Chander & Ors. v. State of Haryana this Court has held as under:

"33. The submission of the learned counsel for the appellants that since Guddi (PW 9) was in close relation with the deceased persons, she should not be believed for want of evidence of any indeperndent witness, deserves to be rejected in the light of the law laid down

by this Court in Dalbir Kaur v. State of Punjab (1976) 4 SCC 158 and Harbans Kaur v. State of Haryana (2005) 9 SCC 195, which lays down the following proposition (Harbans Kaur case, SCC p.198, para 7).

25. Learned counsel for the convicts/appellants further argued that the presence of the P.W. 2 on the spot is not reliable because at the time of incident he has no reason to be there but this argument is also of no help to the accused appellants because the P.W. 2 in his cross-examination has stated that he was there as he was plucking mangoes in the orchard of Maithali Sharan from whom he purchased the crop of mangoes, hence his presence at the spot cannot be deemed doubtful.

26. Learned counsel for the accused appellants also argued that the deceased could not have run after receiving fire arm injury which was shot at him initially, to cover a distance of 60-65 paces as he was finally allegedly killed in the orchard of Vanshlal Dixit. Learned counsel for the accused appellants further referred the statement of P.W. 3 (Doctor) wherein he has stated that after getting the injury of fire arm wound the deceased could not have run more than 6-7 paces. This argument of the learned counsel for the accused appellants also does not carry weight because it differs from person to person depending upon strength, will power and courage of a particular person that how one reacts after receiving the injuries. Even Doctor P.W. 3 has stated that he cannot say so with certainty.

27. From the above discussion it is established that in the present matter the incident occurred in a broad day light i.e. 5.30 pm in the month of June. The F.I.R. was lodged promptly at 7.30 pm. The inquest was conducted on the same night. The statement of the complainant was recorded on the same day. The statement of another witness Radhey Lal was recorded on the next day by the Investigating Officer as has been stated by the Investigating Officer. Eye witnesses have proved the case of the prosecution beyond all reasonable doubts. There is no reason to doubt the testimony of eye witnesses. Hence it is well established from the evidence on record that murder of the deceased was committed by the convicts/appellants namely Karuna Shankar and Rajkishore in association with two unknown miscreants. Hence the trial Court has rightly held the accused persons guilty and sentenced them accordingly with imprisonment for life. There appears no

ground or reason for interference in the conviction and sentence recorded by the trial Court.

28. Hence, the present appeal deserves to be dismissed and is **dismissed** accordingly.

29. The convicts/appellants Karuna Shankar and Rajkishore are on bail. They are directed to surrender before the trial Court within ten days to serve out the sentence awarded to them.

30. In this case learned trial Court has not imposed any fine on the convicts/appellants though the fine is mandatory under Section 302 of IPC. Considering the fact that the present appeal is old enough and pending since 1982, it appears just to impose a nominal find of Rs.1000/- each in addition to the life imprisonment awarded by the trial Court. With this addition the impugned judgment and order is hereby upheld.

31. Office is directed to send a copy of this order along with the lower Court record to the trial Court concerned for necessary information and compliance forthwith.

(2023) 6 ILRA 734
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD 31.05.2023

BEFORE

THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Appeal No. 797 of 1982

Kadam Singh & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Umesh Narain Misra, Sri Akhilesh Kumar Pandey, Sri Sukesh Kumar, Sri U.C. Mishra

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

(A) Criminal Law - appeal against conviction - Indian Penal Code, 1860 - Sections 147, 148, 149, 307 - minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false - sense of observation differs from person to person.(Para -19)

(B) Indian Evidence Act,1872 - Section 134 - Court can and may act on the testimony of a single witness provided he/she is wholly reliable - evidence has to be weighed and not counted - Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise. (Para - 22,23)

(C) Criminal Law - The Code of Criminal Procedure, 1973 - Punishment - appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence - manner in which it was executed or committed - measure of punishment should be proportionate to gravity of offence. (Para - 32)

Accused-appellant (Indra Bahadur Singh) opened fire - with intention to kill - causing serious fire arm injuries on upper arm- role of accused-appellant (Mahabir Singh) not established - active participation not proved from the evidence - presence on spot tried to be established - common object / intention of firing - presence on spot highly doubtful.**(Para -27)**

HELD:-No illegality, irregularity, legal or otherwise, or perversity in the impugned judgement in convicting the accused-appellant (Indra Bahadur Singh) but no good ground to convict the accused-appellant (Mahabir Singh). Appeal of accused-appellant (Mahabir Singh) deserves to be allowed while the appeal of accused-appellant (Indra Bahadur) deserves to be dismissed. Sentence awarded by trial court

reduced and modified. Accused-appellant entitled to get benefit of Section 428 Cr.P.C. **(Para - 29, 30, 34)**

Criminal appeal partly allowed. (E-7)

List of Cases cited:

1. Sampath Kumar Vs Inspector of Police, Krishnagiri, (2012) 4 SCC 124

2. Smt. Shamim Vs St. of (NCT of Delhi), (2018) 10 SCC 509

3. Namdeo Vs St. of Maha., (2007) 14 SCC 150

4. Yakub Ismailbhai Patel Vs St. of Guj. , (2004) 12 SCC 229,

5. St. of Haryana Vs Inder Singh & ors. , (2002) 9 SCC 537

6. Sumer Singh Vs Surajbhan Singh & ors., (2014) 7 SCC 323,

7. Sham Sunder Vs Puran, (1990) 4 SCC 731,

8. M.P. Vs Saleem, (2005) 5 SCC 554,

9. Ravji Vs St. of Raj., (1996) 2 SCC 175

(Delivered by Hon'ble Hon'ble Rajendra Kumar-IV, J.)

1. The present criminal appeal has been filed by accused-appellants Kadam Singh, Chhotey Singh, Sirnait Singh, Bhurey Singh (Now dead), Indra Bahadur Singh and Mahabir Singh assailing the impugned judgement and order dated 26.03.1982 passed by Sri K.S. Mishra, VI Additional District & Sessions Judge, Etawah in S.T. No.251 of 1979, under Sections 147, 148, 149, 307 I.P.C., Police Station Jaswant Nagar, District Etawah, whereby accused-appellants Kadam Singh, Indra Bahadur and Srinet Singh have been convicted and sentenced under Section 148, 307 and 149 I.P.C. while accused-appellants Mahabir Singh, Chhotey Singh and Bhurey Singh had been convicted and sentenced under Section 147, 307 I.P.C. All the accused-appellants had been sentenced with maximum punishment of 8 years under Section 307 I.P.C. and other sections.

2. Prosecution story in brief as has been set out in F.I.R. is as follows :-

On the date of occurrence i.e. on 12.03.1978 at about 08.00 p.m., injured Suraj Singh and his wife Smt. Chandrawati along with their children were inside the house. The accused-appellants Indra Bahadur and Mahabir arrived at the house of Suraj Singh and called Smt. Chandrawati. She opened the door and asked them what was the work. Both the accused persons told that some thieves were hiding outside her house. The son of Suraj Sigh, namely, Bharat and his mother Smt. Chandrawati came out of the house with a lighted kuppi and both saw that there were no thieves outside the house. In the meanwhile, accused-appellant Indra Bahadur Singh gave a blunt blow to Bharat with Ballam. She asked not to do so. The accused persons were six in numbers. The accused-appellants Bhurey Singh, Mahabir and Chhotey Lal were armed with lathi, while the accused Indra Bahadur Singh was armed with Katta and Ballam, Sirnait Singh with a Ballam and Kadam Singh was armed with farsa. When Suraj Singh came out of his house and accused Indra Bahadur Singh fired upon him with his country made pistol with intention to kill him. Suraj Singh sustained firearm injury and fell down on earth. Smt. Chandrawati pulled her husband, Suraj Singh, inside the house and saved him. All the accused pelted stones on her house and tried to open the door. Accused-appellants fled away leaving the

injured, when they saw the witnesses coming.

3. Smt. Chandrawati took the injured Suraj Singh to Police Station Jaswant Nagar where F.I.R. (Ex.Ka-1) was lodged at about 1.15 a.m. G.D. (Ex.Ka-6) was drawn. The injured Suraj Singh was taken to district hospital Etawah where he was medically examined by Dr. Diwakar Sharma, P.W.-5 at 3:40 a.m.

4. Investigating Officer undertook the investigation of the case who collected the evidence, recorded the statement of witnesses, prepared site plan and after completing entire formalities of investigation, filed charge sheet against the accused-appellants.

5. Trial court framed the charge against the accused-appellants under Sections 147, 148, 149, 307 I.P.C. The accused-appellants pleaded not guilty and claimed trial.

6. The prosecution, in order to prove its case, examined, P.W.-1 Smt. Chandrawati, P.W.-2 Suraj Singh, P.W.-3 Mulayam Singh, P.W.-4 Head Constable Nawaj Khan, P.W.-5 Dr. Diwakar Sharma, out of whom P.W. 1 to 3 are the witnesses of fact while rest two others are formal witnesses. Sri Radheyshyam, Rajendra Prasad, Gyan Chandra Mittal and Indra Bahadur Singh have been examined from the side of defence as D.W.-1, D.W.-2, D.W.-3 and D.W.-4 respectively.

7. After appreciating the evidence, oral and documentary on record trial court has convicted the accused-appellants and sentenced them as noted above. Being aggrieved with the impugned judgement, accused-appellants preferred the present criminal appeal.

8. As per C.J.M. Report dated 07.07.2008 and 08.06.2017, appellant nos. 1 to 4 i.e. Kadam Singh, Chhotey Singh, Sirnait Singh and Bhurey Singh have died, thus, their appeal has been abated by order of this Court dated 17.07.2008 and 07.07.2017. Thus, the present appeal survives for appellant no.5 Indra Bahadur, and appellant No. 6 Mahabir Singh.

9. Heard Sri Sukesh Kumar, learned counsel for the accused-appellants and learned AGA for the State and perused the record with the valuable assistance of learned counsel for the parties.

10. Learned counsel for appellants advanced the argument in the following manner :-

(i) The accused-appellants are innocent and have falsely been implicated in the present case. They have committed no offence.

(ii) There was a cross-case of the incident and F.I.R., from the side of accused, has already been lodged against the prosecution but in cross-case, no charge sheet was submitted by the Investigating Officer.

(iii) The witness, said to be injured in the incident, has not been produced from the side of prosecution. Thus, prosecution story has no reason to stand.

(iv) There are several contradictions and omission in statements of witnesses rendering prosecution case doubtful.

(v) There is no strong motive to accused-appellants to commit the present crime. Without motive, there can be no case against the accused-appellants. The accused-appellant Mahabir Singh has not been assigned any role in the incident.

(vi) In event, any case is found against the accused-appellants, they should be dealt with sympathetic consideration, as the incident pertains to the year, 1978 and about 45 years have been passed.

11. Per contra, learned AGA opposed submissions by submitting that PW-1, 2 and 3 are witnesses of fact, who have supported prosecution case; witnesses are natural and reliable; and medical evidence is totally compatible with the ocular evidence. It is a case of direct evidence in which motive has no importance, trial court has committed no error in passing the impugned judgement.

12. Now, I may proceed to examine the witnesses of prosecution.

13. P.W.-1 Smt. Chandrawati states on oath that accused-appellants Mahabir Singh and Chhotey Lal were armed with lathi, accused-appellants Kadam Singh was armed with Farsa, Indra Bahadur was armed with Katta and Ballam while accused-appellant Srinet Singh was armed with Ballam at the time of incident. She further states that accused-appellant Indra Bahadur Singh fired at her husband (injured Suraj Singh) with intention to kill, causing serious fire arm injuries, her husband fell down on earth and that she took him inside the house and bolted the door from inside, thus she proved the presence of accused-appellant Indra Bahadur Singh and Mahabir Singh along with other accused-appellants on the spot. The motive of the incident is said to take some money by accused persons from her son to which he demanded, on this account, accused-appellants became annoyed. She further states that accused-appellant Indra Bahadur Singh fired at her husband, causing fire arm injury of his upper right arm, she bolted the door from inside. All the accused appellants tried to break the door but could not get success. On alarm being made by her, witnesses arrived there, whereupon accused-appellants ran away with their respective weapon. With the help of witnesses, her injured husband was taken to police station and hospital later. She further states that she put up a written tehrir (Ex.Ka-1) to the police station concerned on which F.I.R. was lodged and G.D. entry was made. Her husband was medically examined in hospital.

14. P.W. 2 Suraj Singh, injured stated in his examination-in-Chief on oath that accused-appellant Indra Bahadur Singh was armed with Ballam and Katta, Srinet Singh with Ballam, Kadam Singh with Farsa while accused-appellants Bhurey Singh, Mahabir Singh and Chhotey Lal were armed with Lathi. At the time of incident, all the accused-appellants started beating him. He, specially, states that Indra Bahadur Singh opened fire on him which hit in his right upper arm causing serious fire arm injury, due to which he fell down on the ground. He also states that in the meantime, he wielded lathi in his defence. He further states that on the alarm being raised, witnesses Munna Singh, Madai, Mulayam Singh, Bhagwan Singh and some other villagers also arrived on spot. He further states that some P.A.C. Officials also arrived there and on seeing them, accused-appellants ran way from the spot. According to him, he was taken to hospital where he was medically examined.

15. P.W.3 Mulayam Singh, supporting the prosecution case, states that when he heard the alarm, he reached on spot and saw that Lathi were being exchanged between Suraj Singh and accused-appellant. Witness further supported the prosecution case by saying that accused-appellant Indra Bahadur Singh opened fire at Suraj Singh. Presence of other accused has also been proved by the P.W.-3. Witness further states that Suraj Singh fell down on the ground, having been injured in the incident. He further states that Smt. Chandrawati wife of Suraj Singh took him inside the house and bolted the door from inside. When accused-appellants ran away from the spot, Suraj Singh was taken to police station and hospital later in the injured position. Witness established the presence of all the accused persons on spot.

16. P.W.-5 Dr. Diwakar Sharma states on oath that on 13.03.1978, he was posted as Medical Officer in Government Hospital, Etawah. On that very day, at about 3:40 a.m., he examined Suraj Singh and found fire arm injuries in the right upper arm. Fresh bleeding present and blackening was also present around the wound and there was abrasion also in the left index finger. Injury no. 1 was fire arm injury which was kept under observation and X-ray was advised. Doctor further states that general condition of patient was not good, he prepared the injury report (Ex.Ka-2). He further opined that injuries might be occurred at 8:00 p.m. on 12.03.1978. A lot of blood was lost from the body of injured Suraj Singh, due to which there was dryness.

17. All the three witnesses have supported the prosecution case, establishing the presence of accused-appellants on spot. They were undertaken lengthy cross-examination by the defence side but nothing could be brought adverse on record in the cross-examination, so as to disbelieve their testimonial statement.

18. It appears that there have been some small minor contradiction and omission certainly in their statements of witnesses but they are not to such an extent so as to disbelieve the prosecution story. So far as discrepancies, variations and contradictions in prosecution case are concerned, we have analysed entire evidence in consonance with submissions raised by learned counsel and find that the same do not go to the root of case.

19. In ***Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124***, Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

20. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to the case of ***Smt. Shamim v. State of (NCT of Delhi) (2018) 10 SCC 509.***

21. Trial Court also considered the defendce witnesses as D.W.-1, D.W-2, D.W-3 and D.W.-4 but they did not find the prosecution case doubtful.

22. So far as non-examination of other eye witnesses is concerned, in view of Section 134 of Indian Evidence

Act,1872 (hereinafter referred to as 'Act,1872'), I do not find any substance in the submission of learned counsel for the appellant.

23. Law is well-settled that as a general rule, Court can and may act on the testimony of a single witness provided he/she is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of Act, 1872, but if there are doubts about the testimony, Court will insist on corroboration. In fact, it is not the numbers, the quantity, but the quality that is material. Time-honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

24. In ***Namdeo v. State of Maharashtra (2007) 14 SCC 150***, Court re-iterated the view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused inspite of testimony of several witnesses if it is not satisfied about the quality of evidence.

25. In ***Yakub Ismailbhai Patel Vs. State of Gunjrat reported in (2004) 12 SCC 229,*** Court held that :-

"The legal position in respect of the testimony of a solitary eyewitness is well settled in a catena of judgments inasmuch as this Court has always reminded that in order to pass conviction upon it, such a testimony must be of a nature which inspires the confidence of the Court. While looking into such evidence this Court has always advocated the Rule of Caution and such corroboration from other evidence and even in the absence of corroboration if testimony of such single eye-witness inspires confidence then conviction can be based solely upon it."

26. In ***State of Haryana v. Inder Singh and Ors. reported in (2002) 9 SCC 537,*** Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence-inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court.

27. From the evidence led by both the parties, it is evident that accused-appellant Indra Bahadur Singh opened fire on Suraj Singh with intention to kill him, causing serious fire arm injuries on his upper arm but role of accused-appellant Mahabir Singh in the alleged incident is not established. Although, his presence on spot has been tried to be established. It is subject to common prudence, if he had been on spot, he would have certainly played an active participation in the incident but his active participation in the incident is not proved from the evidence. It is also not found in evidence that he had a common object / intention of firing. His presence on spot is highly doubtful and he is entitled to get benefit of doubt.

28. So far as accused-appellant Indra Bahadur Singh is concerned, it has been well established from the evidence that he was present on spot and with intention to kill, he opened fire at Suraj Singh causing

serious fire arm injuries, due to which, he became seriously injured and fell on the ground. The learned Trial Court has taken right view in this regard.

29. Having heard the learned counsel for the parties and having perused the entire evidence on record, I do not find any illegality, irregularity, legal or otherwise, or perversity in the impugned judgement in convicting the accused-appellant Indra Bahadur Singh but I do not see any good ground to convict the accused-appellant Mahabir Singh.

30. In view of discussion made above, the appeal of accused-appellant Mahabir Singh deserves to be allowed while the appeal of accused-appellant Indra Bahadur deserves to be dismissed.

31. Accordingly, the appeal of accused-appellant Mahabir Singh would stand **allowed**. He is acquitted of charge levelled against him. The appeal of accused-appellant Indra Bahadur Singh is dismissed on merit. His conviction is upheld and maintained.

32. So far as the sentence of accused-appellant Indra Bahadur Singh awarded by trial court is concerned, it is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].**

33. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, motive, nature of offence, weapon used in commission of murder and the manner in which it was executed or committed. By the efflux of time, accused-appellant Indra Bahadur Singh must have aged and incident pertains to the year, 1978 and 45 years has elapsed. He should be dealt with sympathetic consideration, if the sentence awarded to him is reduced to five years rigorous imprisonment. It would meet the ends of justice.

34. The criminal appeal of accused-appellant Indra Bahadur Singh is partly allowed and sentence awarded by trial court is reduced and modified to the extent

of five years rigorous imprisonment under the alleged offence. Accused-appellant Indra Bahadur Singh shall be taken into custody to serve out the remaining sentence accordingly. The sentence in any other sections, if any, shall run concurrently. The accused-appellant shall be entitled to get benefit of Section 428 Cr.P.C.

35. Certify the judgement along with the lower court record to the court concerned for information and necessary compliance.

(2023) 6 ILRA 741
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD 10.05.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Criminal Appeal No. 836 of 1983

Gulab Singh & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri R.B. Sahai, Sri Aditya Yadav, Sri Anil Kumar Singh, Sri G.S. Chaturvedi, Sri Kamal Krishna, Sri Lav Srivastava, Sri Mukesh Kumar Pandey, Sri R.B.Singh, Sri Ranjit Singh,Sri Shyam Srivastava, Sri Shyam Sunder Misra, Sri Sunder Mishra, Sri Surendra Singh, Sri Sushil Kumar Dwivedi, Sri V.P. Srivastava, Sri Vikas Bhatnagar, Sri Virendra Kumar Yadav, Sri Vishesh Kumar

Counsel for the Opposite Partiy:
DGA, A.G.A., Sri Ramesh Sinha

(A) Criminal Law - appeal against conviction - Indian Penal Code, 1860 - Sections 302/149 , 307/149 , 148 & 147 - Juvenile Justice (Care and Protection) of Children Act, 2015 - Section 94(2) - Presumption and determination of age, Section 24 (1) - Removal of disqualification on the findings of an offence, Section 18(1)(g) - Orders regarding child found to be in conflict with law , Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 12(3)(b) - Procedure to be followed in determination of age , The U.P. Panchayat Raj Act, 1947 - Section 110 - Powers of State Government to make Rules, The U.P. Panchayat Raj (Maintenance of Family Registers) Rules, 1970 - Rules 5 , 6 ,73 , Indian Evidence Act, 1872 - Section 35 - Relevancy of entry in public record made in performance of duty.

(B) Criminal Law - no substantial difference between the Juvenile Justice (Care and Protection of Children) Act 2005 and the Juvenile Justice (Care and Protection of Children) Act 2000 - Act of 2015 focuses on crime committed by children aged 16-18 years - Board's determination of age is conclusive proof of a child or juvenile in conflict with law - age recorded by the committee or Board for the purposes of the Act of 2015 is considered the true age.(Para - 35)

Judgment and order passed in appeal - challenged before Supreme Court in Special Leave to Appeal - court declined to interfere with conviction order - but issued a direction for the High Court to consider and pass orders on the application of Applicant no.10 - who claimed to be juvenile on the incident date - Finding recorded by Board - Competent Authority signed family register cuttings - date of birth of appellant no. 10 was changed from 28.05.1965 to 03.06.1965 - difference of five days - no benefit is given to the appellant no. 10. **(Para -14, 31)**

HELD:-Board finds appellant no. 10 was a juvenile at the time of commission of the offence i.e. 05.12.1982 , based on cogent evidence. Sentenced to 3 years in prison, but entitled to the Act of 2015 benefit due to his juvenile status. Sending to a special home for three years is unjust due to appellant's over 3 year sentence as per Section 18(1)(g) of 2015

Act. Applicant no. 10 will not face disqualification due to his conviction and sentence under Section 24 of 2015 Act. **(Para - 36, 37, 38, 40)**

Miscellaneous application allowed. (E-7)

List of Cases cited:

Manoj Vs St. of Har., (2022) 6 SCC 187

(Delivered by Hon'ble Hon'ble Manish Kumar Nigam, J.)

1. Heard learned counsel for the appellants, learned A.G.A. for the State.

2. This appeal was filed by appellants Gulab Singh (A1), Shiv Narain Singh (A2), Munnu Singh (A3), Nanka (A4), Basdeo (A5), Chhotku (A6), Girish (A7), Kishore (A8), Jhoori Singh alias Chandra Bhushan Singh (A9) and Kalloo @ Avadesh (A10) against the judgment and order dated 05.04.1983 passed by IIIrd Additional Sessions Judge, Fatehpur in S.T. No. 119 of 1982 (Gulab Singh & others Vs. State of U.P.), by which the appellants had been convicted and sentenced to life imprisonment under Section 302 read with 149 I.P.C., seven years rigorous imprisonment under Section 307/149 I.P.C. Jhoori Singh alias Chandra Bhushan Singh (A9) and Kalloo @ Avadesh (A10) were further convicted and sentenced to two years rigorous imprisonment under Section 148 I.P.C. Shiv Narain Singh (A2), Munnu Singh (A3), Nanka (A4), Basdeo (A5), Chhotku (A6), Girish (A7) and Kishore (A8) were also convicted and sentenced to one year rigorous imprisonment u/s 147 I.P.C.

3. Briefly stated the facts of the case are that on the basis of a written report (Ex. Ka-1), F.I.R. lodged by PW-1 informant Brij Bhushan at Police Station Ghazipur, District Fatehpur on 05.12.1981 at about 9:30 A.M. regarding an incident which had taken place on 05.12.1981 at about 8:15 A.M., Case Crime No. 941 of 1981, under Section 147, 149, 302 & 307 I.P.C. against the appellants as well as co-accused Raghubir and Babu Singh Yadav was initiated. In the aforesaid incident, Chandra Bhushan and Ban Bihari died and Ram Kripal, Kunj Bihari and Brij Bhushan had received injuries.

4. After investigation, the police submitted a charge sheet against all the accused persons before the Chief Judicial Magistrate, Fatehpur.

5. Since, the offences mentioned in the charge sheet were triable exclusively by the court of Sessions, the Chief Judicial Magistrate committed the case of all the accused to the court of Sessions Judge, Fatehupur where the case was registered as S.T. No. 119 of 1982 (Gulab Singh and others v. State of U.P.), thereafter the case was transferred to the court of IIIrd Additional Sessions Judge, Fatehpur, who on the basis of material collected in the investigation and after hearing the prosecution as well as the accused on the point of charge, framed charges under Section 302/149 and 307/149 against all the appellants.

6. Apart from the aforesaid charges, a charge under Section 148 I.P.C. was framed against Jhoori Singh @ Chandra Bhushan (A9) and Kallu @ Avdhesh (A10). Charge under Section 147 I.P.C. was framed against Sri Narayan Singh (A2), Munnu Singh (A3), Nanka (A4), Basudev (A5), Chhotuku (A6), Girish (A7) and Kishore (a-8). The accused appellants

denied the charges framed against them and claimed trial.

7. The trial court after considering the evidence brought on record by the prosecution and also the material brought on record convicted and sentenced all the appellants to life imprisonment under Section 302 read with Section 149 I.P.C. Also a punishment of 7 years rigorous imprisonment under Section 307/149 I.P.C. was awarded. Jhoori Singh (A9), Kallu @ Avdhesh (A10), were further convicted and sentenced to 2 years rigorous imprisonment under Section 148 I.P.C. Shiv Narayan Singh (A2), Munnu (A3), Nanka (A4), Basudev (A5), Chhotku (A6), Girish (A7) and Kishore (A8) were convicted for a year of rigorous imprisonment under Section 147 I.P.C.

9. The present appeal was filed against the judgment and order dated 05.04.1983 passed by Additional Sessions Judge. It is to be noted that all the accused persons were on bail during trial.

10. After filing of the appeal, the appellants were granted bail by this Court by order dated 06.04.1983.

11. This Court after hearing the counsel for the appellants as well as learned A.G.A. for the State vide its judgment and order dated 16.08.2018 confirmed the judgment of the trial court with regard to Gulab Singh (A1) and Kallu @ Avdhesh (A10). The appeal of Shiv Naryan (A2), (A3), (A4), (A5), (A6) and (A7) was allowed and they were acquitted of all the charges framed against them by this Court. The appeal was allowed in part and dismissed qua Gulab Singh (A1).

12. By an order dated 23.01.2020 earlier order dated 16.08.2018 was corrected and name of Kallu @ Avdhesh (A10) was added in the first line of third last paragraph of the order dated 16.08.2018 and following paragraph was added before second last paragraph of the judgment:

"The appellant Kallu @ Avadesh (A10) is on bail. His bail bonds are cancelled and sureties discharged. Chief Judicial Magistrate, Fatehpur, is directed to take him in custody and send him to jail for serving out the remaining part of his sentence."

13. After the judgment and order dated 16.08.2018, Criminal Misc. Application No. 1 of 2019 dated 06.12.2019 was filed on behalf of Kallu @ Avdhesh (A10) with a prayer that the appellant no. 10 Kallu @ Avdhesh be declared juvenile and the order of sentence against Kallu @ Avdhesh be set-aside.

14. Judgment and order dated 16.08.2018 passed in this appeal was challenged before the Hon'ble Supreme Court in Special Leave to Appeal (Cri) No. 3506-3507 of 2020 (Kallu @ Avdhesh v. State of U.P.). Vide its order dated 31.07.2022, the Hon'ble Supreme Court declined to interfere with the order of conviction. However, it issued a direction, directing the High Court to consider and pass orders on the application of the Kallu @ Avdhesh (A-10) claiming to be juvenile on the date of incident.

15. After the order of Hon'ble Supreme Court dated 21.08.2020, Criminal Misc. Application No. 1 of 2019 dated 06.12.2019 under Section 9(2) of Juvenile Justice (Care and Protection) of Children Act, 2015 (hereinafter referred to as the "Act of 2015") on behalf of appellant no.

10 Kallu @ Avdhesh was placed before this Court.

16. By the order dated 27.09.2021, the question of determining the juvenility of appellant no. 10 Kallu @ Avdhesh was referred to the Juvenile Justice Board, Fatehpur (hereinafter referred to as "The Board") to consider and dispose of the matter in accordance with law within two months from the date of presentation of certified copy of the order dated 27.09.2021.

17. In compliance of the order dated 27.09.2021, the Board vide its order dated 06.01.2022, by a 2:1 decision, held that the appellant no. 10 Kallu @ Avdhesh was a juvenile on the date of the incident i.e. on 05.12.1981.

18. After the order dated 06.01.2022 was passed by the Board, the same was placed on record of this appeal. A Counter affidavit dated 02.03.2022 was filed by the State wherein it has been claimed on the basis of a certificate issued by Principal of the Uccha Prathmik Vidyalaya Gamhari, Bahua, Fatehpur and on the date of birth certificate issued by Principal of Jagat Inter College, Ghazipur, Fatehpur that the date of birth of appellant no. 10 Kallu @ Avdhesh is 05.03.1962 and that the appellant no. 10 was not a juvenile on the date of the incident.

19. A rejoinder affidavit has been filed thereafter on behalf of appellant no. 10 Kallu @ Avdhesh wherein it has been specifically stated that the appellant no. 10 Kallu @ Avdhesh is an illiterate person and had never gone to any school. It has been further stated in the rejoinder affidavit that no such evidence was filed on behalf of State when the proceedings were going on before the Board. It has been further stated in the rejoinder affidavit that neither the State nor the informant had filed any appeal against the order dated 06.01.2022 passed by the Board, meaning thereby that these issues could not be raised now at this stage.

20. Today when the matter was taken up, Application No. 1 of 2019 was pressed by the counsel for the appellant. It has been contended by the learned counsel for the appellant that in pursuance to the order passed by this Court, the Board had undertaken the exercise to determine the age of the appellant no. 10 Kallu @ Avdhesh. On enquiry it had been held by the Board by a majority of 2:1 that at the time of incident, appellant no. 10 Kallu @ Avdhesh was a minor. It has been further contended by the learned counsel for the appellant that the order dated 06.01.2022 passed by the Board became final as no appeal was preferred either by the informant or by the State against the order of the Board.

21. Counsel for the appellant submitted that as the appellant no. 10 has been held to be a juvenile on the date of incident, then in view of the provisions of Act of 2015, appellant no. 10 is to be released forthwith as he had remained in jail for more than 3 years and even otherwise at present, the appellant no. 10 was aged about 57 years and therefore, cannot be sent to a juvenile home.

22. Per contra, relying upon the counter affidavit filed by the State, learned A.G.A. stated that as per the certificates annexed along with counter affidavit, the appellant no. 10, was not a juvenile at the time of incident and the report of the Board was incorrect. It has been further contended that the inquiry made by the Board was not

in accordance with law and the appellant no. 10 cannot be given the benefit of the provisions of the Act of 2015. It has been further contended by the learned A.G.A. that the Board erroneously relied upon the entries made in the family register. It has been further contended that there were interpolation in the entries made in the family register.

23. In reply to the argument of learned A.G.A., learned counsel for the appellant submitted that certificate annexed along with counter affidavit cannot be relied upon. Firstly as only the photo copies of the certificates had been filed along with the counter affidavit and secondly, the aforesaid certificates were never filed by the State before the Board when the Board was enquiring into the matter of Juvenility of the appellant no. 10.

24. It has been further contended that against the order of the Board, no appeal had been preferred by the State or informant and the order passed by the Board became final. The inquiry conducted by the Board was in accordance with law and cannot be faulted.

25. After consider the respective submissions made by the learned counsel for the appellant and perusal of the record, we are of the view that the contention of the learned A.G.A. for the State that entries made in the family register cannot be relied upon, is not correct.

"Family Register

26. The Family Register Rules prescribes preparation of a Family Register in the State of Uttar Pradesh which contains family-wise names and particulars of all persons ordinarily residing in the village pertaining to the Gaon Sabha. Such Rules have been framed under Section 110 of the U.P. Panchayat Raj Act, 1947. Such Rules read as under:

"1. (1) These Rules may be called the U.P. Panchayat Raj (Maintenance of Family Registers) Rules, 1970.

2**. Form and preparation of family register**.—A family register in form A shall be prepared containing family-wise the names and particulars of all persons ordinarily residing in the village pertaining to the Gaon Sabha. Ordinarily one page shall be allotted to each family in the register. There shall be a separate section in the register for families belonging to the Scheduled Castes. The register shall be prepared in Hindi in Devanagri script.

3**. General conditions for registration in the register.** —Every person who has been ordinarily resident within the area of the Gaon Sabha shall be entitled to be registered in the family register.

Explanation.—A person shall be deemed to be ordinarily resident in a village if he has been ordinarily residing in such village or is in possession of a dwelling house therein ready for occupation.

4. **Quarterly entries in the family register**.—At the beginning of each quarter commencing from April in each year, the Secretary of a Gaon Sabha shall make necessary changes in the family register consequent upon births and deaths, if any occurring in the previous quarter in each family. Such changes shall be laid before the next meeting of the Gaon Panchayat for information.

5. **Correction of any existing entry.**—The Assistant Development Officer (Panchayat) may on an application made to him in this behalf order the correction of any existing entry in the family register and the Secretary of the Gaon Sabha shall then correct the Register accordingly.

6. **Inclusion of names in the Register.**—(1) Any person whose name is not included in the family register may apply to the Assistant Development Officer (Panchayat) for the inclusion of his name therein.

(2) The Assistant Development Officer (Panchayat) shall, if satisfied, after such enquiry as he thinks fit that the applicant is entitled to be registered in the Register, direct that the name of the applicant be included therein and the Secretary of the Gaon Sabha shall include the name accordingly.

6-A. Any person aggrieved by an order made under Rule 5 or Rule 6 may, within 30 days from the date of such order prefer and appeal to the SubDivisional Officer whose decision shall be final.

7. Custody and preservation of the register.—(1) The Secretary of the Gaon Sabha shall be responsible for the safe custody of the family register.

(2) Every person shall have a right to inspect the Register and to get attested copy of any entry or extract therefrom in such manner and on payment of such fees, if any, as may be specified in Rule 73 of the U.P. Panchayat Raj Rules.

FORM A
(See Rule 2)

***

Note.—In the remarks column the number and date of the order, if any, by which any name is added or struck off should be given along with the signature of the person making the entry."

27. A perusal of the above Rules indicate that one page is allotted to each family and that any change in the family consequent upon the births and deaths is required to be incorporated on such page. The changes are also required to be laid before the next meeting of the Gram Panchayat. Thus, it is evident that such Rules are statutorily framed in pursuance of an Act. The entries in the register are required to be made by the officials of the Gram Panchayat as part of their official duty.

28. This Court in the case of ***Manoj v. State of Haryana, reported in (2022) 6 SCC 187,*** observed in regard to the Family Register referred to above as under"-

"*39. We are unable to approve the broad view taken by the High Court in some of the cases that family register is not relevant to determine age of the family members. It is a question of fact as to how much evidentiary value is to be attached to the family register, but to say that it is entirely not relevant would not be the correct enunciation of law. The register is being maintained in accordance with the rules framed under a statute. The entries made in the regular course of the affairs of the Panchayat would thus be relevant but the extent of such reliance would be in view of the peculiar facts and circumstances of each case."*

(Emphasis supplied)

"23. The procedure to be followed for the determination of age is provided under Rule 12(3)(b) of Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short 2007 Rules).

"12. Procedure to be followed in determination of age.—(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

29. The Act of 2000 stands repealed by the Act of 2015. The procedure for determining the age is now part of Section 94 of the Act of 2015 which was earlier provided under the abovementioned Rule 12 of the Rules.

30. Section 94 (2) of Juvenile Justice (Care and Protection of Children) Act, 2015 is quoted as under :-

94.Presumption and determination of age *- (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.*

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned

examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

31. We have perused the report of the Board. The Board has recorded a finding that cuttings made in the family register have been signed by the Competent Authority. It has been further held by the Board that the date of birth of the appellant no. 10 has been changed from 28.05.1965 to 03.06.1965 and there is only a difference of five days from which it is clear that no benefit is given to the appellant no. 10. The relevant extract of the report of Board is quoted as under:

"पत्रावली में उपलब्ध साक्ष्य एंव ग्राम पंचायत अधिकारी द्वारा हस्ताक्षरित व प्रमाणित परिवार रजिस्टर की नकल का परिशीलन किया गया। परिवार रजिस्टर के क्रमांक 207 के सामने अंकित विवरण व नामों को काट कर उसके नीचे पुनः नामों एंव अन्य विवरणों का अंकन किया गया है और कटिंग पर हस्ताक्षर बने हैं जिन्हें साक्षी प्रकाश चंद्र ग्राम पंचायत अधिकारी द्वारा सक्षम अधिकारी के हस्ताक्षर होना कहा गया है। कटिंग में अपचारी A के नाम के आगे जन्मतिथि 28.05.1965 अंकित है किंतु किटंग के उपरांत पुनः नीचे अंकित किए गए विवरण में A अपचारी की जन्म तिथि 03.06.1965 अंकित है जिसमें मात्र 05 दिनों का अंतर है जिससे ये प्रतीत नहीं होता की उक्त कटिंग किसी तरह से अपचारी को लाभ पहुँचाने की नियत से की गई है। परिवार रजिस्टर जो ग्राम पंचायत अधिकारी द्वारा प्रमाणित करके दाखिल किया है उसमें A के पारिवारिक जनों का नाम पहले घरेलू अंकित किया गया है फिर उसी कटिंग में उनके सही नाम लिखे गये फिर पूरी सम्पूर्ण विवरण को काट कर उसके नीचे सही नाम के साथ विवरण अंकित किया गया। इससे यह प्रतीत होता है कि उक्त कटिंग सही नाम अंकित किये जाने के परिपेक्ष्य में की गई है और उसमें सक्षम अधिकारी के हस्ताक्षर भी बने हैं।"

32. Section 35 of the Indian Evidence Act in this regard is relevant and the same is reproduced below:

"35. Relevancy of entry in public record made in performance of duty: An entry in any public or other official book, register or [record or an electronic record], stating a fact in in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or [record or an electronic record] is kept, is person in performance of a duty specially enjoined by the law of the country in which such book, register, or [record or an electronic record] is kept, is itself a relevant fact"

33. The family register prepared in discharge of official duty and therefore, in absence of any evidence, to contrary the same would be a relevant evidence.

34. So far as the certificates filed along with counter affidavit are concerned, they do not inspire confidence as the documents are certificates issued by the Principal of some Institution. We find that the Appellant no. 10

had never attended any school. Further aforesaid documents were not filed by the State or informant before the Board when the enquiry was being conducted by the Board as to the juvenility of the Appellant no. 10. The State or the informant has also not challenged the order passed by the Board declaring the Appellant no. 10 to be a juvenile and the said order has attained finality.

35. We have already held in case of Ram Nayan and four others v. State of U.P. passed in Criminal Appeal No. 4499 of 2015 decided on 12.04.2023 that there is no substantial difference in the provisions of the Juvenile Justice (Care and Protection of Children) Act 2005 (hereinafter referred to as "Act of 2005") and the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred as "Act of 2000") except that the Act of 2015 take cares of crime committed by a children in the age group of 16-18 years. Under Rule 12(3)(b) of 2007 Rules, the determination of age by the Board shall be conclusive proof of the age as regards a child or a juvenile in conflict with law. Similarly under Section 94(2) of Act of 2015, age recorded by the committee or the Board to be the age of a person so brought before it, for the purpose of Act of 2015 would be deemed to be the true age of that person.

36. Considering the report of the Board we are of the opinion that categorical finding recorded by the competent juvenile justice Board, which is based on cogent evidence that the appellant no. 10 was a juvenile at the time of commission of the offence i.e. 05.12.1982.

37. In the present case, as is evident from the record and submissions made by the learned counsel appearing for the respective parties, the Appellant no. 10 has already undergone about three years imprisonment. As we have already held that the appellant no. 10 was juvenile in conflict with law at the time of occurrence i.e. 05.12.1981, the appellant no. 10 is entitled to the benefit of the Act of 2015.

38. In view of the Section 18(1)(g) of 2015 Act, the most stringent action which could have been taken against applicant/appellant no. 10, was of sending the applicant to a special home for a period of three years. As the appellant has undergone the sentence for more than three years, therefore now it will be unjust to send the applicant to Juvenile Justice Board.

39. Therefore, we allow the application and direct that applicant/appellant no. 10 Kallo alias Avdesh, convicted and sentence in S.T. No. 119 of 1982 (Gulab Singh and others v. State of U.P.) decided by IIIrd Additional Sessions Judge, Fatehpur shall be forthwith set at liberty provided he is not required to be detained under any other order of competent court.

40. In view of sub Section (1) of Section 24 of the Act of 2015, the applicant/appellant no. 10 Kallo alias Avdhesh Shall not incur any disqualification because of his conviction and period of sentence undergone by him.

41. The miscellaneous application is **allowed** in the above term.

(2023) 6 ILRA 749
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD 25.05.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Criminal Appeal No. 1343 of 1999

Surat Singh ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Apul Misra, Sri Alok Ranjan Mishra, Sri Janardan Singh, Sri P.K. Singh, Sri Ran Vijay Singh, Sri Virendra Kumar Shukla(AC), Sri Rajiv Nayan, Sri G.S. Chaturvedi (Sr. Adv.), Sri V.P. Srivastava (Sr. Adv.)

Counsel for the Opposite Party:
Govt. Advocate, Sri Ashutosh Pandey, Sri Jitendra Kumar, Sri Prashant Rai, Sri Sanjeev Kumar Rai, Sri I.K. Chturvedi (Sr. Adv.)

Criminal Law - Indian Penal Code, 1860 - Sections 302/34 & 307/34 - Punishment for murder - Code of Criminal Procedure, 1973 - Section 313 - Appeal against conviction - Rigorous imprisonment - As per FIR - Accused had exhorted three persons to fire on deceased, thereafter he was died on the spot - Few bullets hit (PW-2), incident was witnessed by him and neighbouring shopkeepers - Charge-sheet submitted - Charges framed - Convicted - Contention by appellant that PW-2 had assigned the role of exhortation to accused and it was figment of imagination of PW-2 - St. argued that there were guns in hands of assailants, then it would mean that gun had to be used - Held, PW-2 had given contrary St.ments in FIR, his testimony was not reliable - PW-2 in cross-examination St.d that he did not know name of father of deceased, thus FIR was not lodged by PW-2 but was handiwork of police who had implicated accused with other two persons as assailants - Deceased was assaulted in some manner and was not killed - Exhortation was not done as there were two individuals who were unknown to assailants and, therefore, it was futile exhortation. (Para 1, 2, 10, 16, 18, 19, 20)

List of Cases cited:

1. Jainul Haque Vs St. of Bihar reported in AIR 1974 SC 45

2. Matadin & anr. Vs St. of Mah. reported in (1998) 7 SCC 216

3. Vadivelu Thevar Vs The St. of Madras reported in AIR 1957 SC 614

(Delivered by Hon'ble Hon'ble Manish Kumar Nigam, J.)

1. This appeal has been filed against a judgment and order of the Second Additional District & Sessions Judge dated 29.5.1999 by which the accused was convicted for the offence under section 302/34 and 307/34 of the Indian Penal Code and was punished for life under section 302/34 IPC and was to undergo for rigourous imprisonment for a period of 7 years for the offence under section 307/34 IPC.

2. The prosecution case as per the First Information Report lodged by one Sohan Singh was that when Sohan Lal and the deceased Jaswinder Singh had gone to get puncture of the tyre of the trolly repaired on a Gypsy No.DNC 4414 and were getting the puncture repaired then at about 9.30 PM, the accused Surat Singh had exhorted three persons to fire on the deceased Jaswinder Singh. The three persons had fired on Jaswinder Singh with an intention to kill him and thereafter Jaswinder Singh died. It is also the case of the prosecution that a few bullets also hit the first informant. The first informant has stated in the First Information Report that there were electricity bulbs at the place where the incident had occurred. He has also stated that the incident was witnessed by the first informant and a few of the neighbouring shopkeepers. After the incident had occurred, a First Information Report was lodged by Sohan Lal on 18.3.1996 at 3.00 PM. Thereafter investigation followed and the police

submitted its charge-sheet in the Court and the IInd Additional District & Sessions Judge, Bijnor on 20.8.1996 framed charges against the appellant. When the appellant was convicted for the offence under section 302/34 and 307/34 of the Indian Penal Code, the instant appeal has been filed.

3. During trial, seven prosecution witnesses namely Dr. R.S. Rana-PW-1; Sohan Lal-PW-2; Subhash Chandra-PW-3; Rajendra Singh-PW-4; Charan Pal Singh-PW-5; Brahmpal Singh-PW-6 and Vijay Kumar-PW-7 were examined from the side of the prosecution. The accused Surat Singh answered the questions under section 313 Cr.P.C. and claimed innocence. From the side of defence, four witnesses namely Islam Siddiqui; Barun Kumar; Naresh Kumar and Rajendra Kumar were brought in as DWs-1, 2, 3 and 4 respectively.

4. The PW-1 was a doctor who had examined the injured Sohan Lal (PW-2) and had proven the injury report. PW-2 was Sohan Lal who claims himself to be an eye-witness. He has stated in his deposition that he recognized and knew Surat Singh who was present in the Court. He had stated that the deceased Jaswinder Singh was the younger brother of the accused. He has also stated that both the deceased and the accused were living in the houses opposite to each other. He has further stated that there were some internal disputes between the two brothers. Jaswinder had some threat to his life and, therefore, he had employed Sohan Lal as his gunman. He has stated that when there was a puncture in the tyre of a trolley then Jaswinder and PW-2 had gone to Najibabad and were getting their tyre repaired at the shop of a Muslim shopkeeper. There was light from the electricity bulbs at the time at around 9.30 PM. In his further deposition, he had stated that while the tyre was being got repaired in the relevant shop, the deceased and he himself were standing in front of the shop which a little away from the puncture shop and was locked. He has stated in his deposition that from the side of Najibabad i.e. from the south of the shop, the accused-appellant Surat Singh and three others came towards the deceased and Sohan Lal and there the accused exhorted his three men who had accompanied him and said "***Maaro Saale Ko Yahi Jaswinder Hai"***. The three persons who accompanied the accused fired on Jaswinder and the bullets hit Jaswinder and also the PW-2. Jaswinder died on the spot and the accused persons ran away to the side of Kotdwar which was north of the shop. A lot of blood collected at the place of incident. From the various individuals who had collected around the place of incident, the PW-2 requested one person to write the report for him and he dictated the report to that person. After having written down the report, the person who had written the report read out the report to PW-2 and thereafter he had put his thumb impression. Thereafter it has been stated that PW-2 took the report to the police station and from there he was taken to the hospital by the police and the medical examination of PW-2 was done. He has also deposed that in the First Information Report he had stated that Jaswinder and he himself were standing outside the shop where the puncture was being repaired. He has also stated that when the assailants had come from the southern side of the shop i.e. from the side of Najibabad, the deceased and PW-2 were standing northwards towards Kotdwar. He has stated that from the police station, he was taken to the hospital on a rickshaw. After the medical examination, the police had taken the PW-2 to the place of incident. He has further stated in his deposition that the affidavit (Paper No.14/2-Kha) which

is alleged to have been filed by him on 4.11.1996, was not in fact filed by him. He has stated that certain persons from the side of the accused had forcibly got him photographed for the affidavit. The fact that he was forcibly photographed, had also been reported orally by him to the Station House Officer, Govindgarh, Punjab. He has stated that he had asked the police people that he had to get the report lodged and they had on his dictation written the report. He has stated that it took 10 to 15 minutes to get the report lodged and after the report was lodged, he also signed on the report. He has stated that because of his injuries, blood was oozing out. However, it was stated that there was no blood on the report. He has stated that when he was photographed, he was sitting in an Ambassador Car. He had not specifically got himself photographed. He has stated that he had recognized the accused Surat Singh as he was living opposite the house of the deceased. He has further stated that he did not know the name of the father of the deceased and the accused. Still further he has stated that he did not know that how the name of the father of the accused was there in the First Information Report.

5. PW-3 is Constable Subhash Chand. He was given the responsibility to take the dead body to Bijnor and to get the post-mortem done. He has stated that he had taken the dead body from the place of incident on a tempo and reached Bijnor at 9.30 AM. He has stated that it was wrong that he had started from Najibabad at 10.00 AM next day and reached Bijnor at 1.30 PM. He, however has stated that he had not got the facts registered in the GD that the tempo had broaken down.

6. PW-4 Rajendra Singh is the Sub-Inspector and has stated that he had filed the Panchayatnama.

7. PW-5 is the Station House Officer Charan Pal Singh who was posted at Najibabad. He has stated that he had arrested the accused on 20.3.1996.

8. PW-6 Brahmpal Singh is a Constable who was the bodyguard of the accused. He has stated that he and Constable Gangadas were posted in March 1996 for guarding Surat Singh and he has stated that three or four persons used to always come to Surat Singh. They were Pukhraj, Mahipal @ Pappu and Sunil and whenever they came, the accused used to talk to them while the guards were away. He has stated that on 18.3.1996 he was on duty in the Guest House of the Zila Parishad of Najibabad and on that date Pukhraj, Mahipal and Sunil had come to meet Surat Singh. The accused had talked to them at a certain distance from his guards and thereafter had instructed the guards that as he had his own gun, there was no requirement of the PW-6 and other guards. He had also stated that he was absolutely safe and did not require any gunner.

9. PW-7 is the doctor who had conducted the post-mortem on the body of the deceased.

10. Learned counsel for the appellant has submitted that the PW-2-Sohan Lal was the sole witness on the basis of whose statement, the conviction order had been passed. He has submitted that the PW-2 had assigned the role of exhortation to the accused/appellant. Learned counsel for the appellant states that the exhortation was a figment of imagination of the PW-2 and the role of exhortation as had been alleged by PW-2 was absolutely unnecessasry. PW-2 has stated that the accused exhorted three persons to fire and upon firing by the three

persons, Surat Singh had died. Learned counsel for the appellant states that if three persons had to fire, they would have fired on the deceased even without any exhortation by the accused. He submits that definitely the three persons were knowing the deceased person. This, learned counsel for the appellant states, becomes apparent because when the exhortation was "***Maaro Saale Ko Yahi Jaswinder Hai***" and if the three persons who were firing did not know the deceased Surat Singh, then they could have fired on PW-2 Sohan Singh as well if they had not known who Jaswinder was. He, therefore, submits that the story of exhortation has no legs to stand. Furthermore, learned counsel for the appellant states that exhortation is a weak piece of evidence. When there is rivalry between two persons then it is quite often very easy to implicate the person with whom the other person has a rivalry by giving him the role of exhortation. Learned counsel submits that when the deceased had died and the assailants had run away, then implicating an innocent person as a person who had exhorted was very easy. Learned counsel for the appellant, therefore, states that unless the evidence in respect of exhortation is absolutely clear, cogent and reliable, conviction cannot be recorded against the person who had allegedly only exhorted the actual assailants. In this regard, learned counsel for the appellant has relied upon the decision of the Supreme Court in ***Jainul Haque vs. State of Bihar*** reported in **AIR 1974 SC 45**.

11. Learned counsel for the appellant further states that even the exhortation, if is believed to be there, then it becomes very difficult to implicate a person for the offence of murder under section 302 IPC. He states that when the words ***"Maaro Saale Ko Yahi Jaswinder Hai"*** were used, then it could be presumed that he never meant that the deceased had to be actually killed. In this regard, learned counsel for the appellant relied upon the decision of the Supreme Court i**n Matadin & Anr. vs. State of Maharashtra** reported in **(1998) 7 SCC 216.**

12. Learned counsel for the appellant thereafter stated that the conviction on the basis of the testimony of a single witness should be done with lot of circumspection. He submits that witnesses could be divided into three categories :-

1. wholly reliable;

2. wholly unreliable; and

3. neither wholly reliable nor wholly unreliable.

13. Learned counsel for the appellant states that if the sole witness is "*wholly reliable*", the Court would not have any difficulty in basing its judgment on the wholly reliable witness. If the witness is of the second category i.e. "*wholly unreliable",* then also there was no difficulty for the Court to come to a conclusion. It is only in the third category that the Courts have to be circumspect and have to look for the corroboration in material particulars by reliable testimony; direct or circumstantial. In the instant case, learned counsel for the appellant has stated that in the First Information Report, the name of the father of the accused had been given whereas in the cross-examination, PW-2 at page 39 of the Paper-Book, has stated that he did not know the name of the father of the accused. He goes to the extent of saying that he did not know as to how the name of the father of the accused was

mentioned in the FIR. Furthermore, learned counsel for the appellant has stated that the PW-2 had given, on 4.11.1996, an affidavit which was placed by the defence on record as evidence that the PW-2 was wrongly implicating the accused persons. However, from the record, PW-2 had shown that on 2.12.1996 he had given a statement that he was withdrawing the earlier affidavit dated 4.11.1996. Thereafter learned counsel for the appellant states that with regard to the coercion in getting himself photographed, the PW-2 has stated that he had reported that matter orally to the Police in Punjab. Further learned counsel for the appellant states that in the FIR, he had stated that the deceased and the PW-2 were standing at the shop where the puncture was being repaired but subsequently in the cross-examination he had stated that they were standing in front of another shop, the shutter of which was down and was locked. Learned counsel for the appellant stated that this he probably was saying because there were, in the site plan, bullet marks on the shutter of the closed shop. Learned counsel, therefore, states that if the statement made in the FIR was different from the statement made in the cross-examination then the witness become unreliable. Learned counsel for the appellant has further stated that if the PW-2 was bleeding profusely, then the complaint which he had filed should have some blood marks. Further learned counsel for the appellant states that if the FIR is seen then it would become clear that it was scribed by one Anil Goyal whereas in the cross-examination, PW-2 had stated that he had got the report written by some police official. Learned counsel has also stated that the injury report shows that at the time when the injured PW-2 was getting his injuries examined then only Head Constable Virendra Kumar and Constable Yashvir Singh were present. From where Anil Goyal had appeared and written the FIR was not clear. He also submits that Anil Goyal never appeared in the witness box and no effort was made by the prosecution to search him out and to make him appear in the witness box. Learned counsel for the appellant, relying upon a judgment of the Supreme Court in **Vadivelu Thevar vs. The State of Madras** reported in **AIR 1957 SC 614,** therefore, states that when the witness was neither wholly reliable nor wholly unreliable, then it was very unsafe to rely upon that witness and convict the accused. He submits that it was all the more unsafe where witness was the sole witness.

14. Learned counsel for the appellant thereafter has submitted that it could not be ruled out that the police had itself written the FIR and had implicated the accused for reasons best known to it. Learned counsel submits that when the PW-2 himself was stating that if the police had written the FIR to his dictation then how the name of Anil Goyal appeared was not clear. Still further, relying upon the testimony of PW-3, learned counsel for the appellant submits that the dead body was to be taken along with all the documents to Bijnor for post-mortem at 10.00 pm. The distance between Bijnor and Najibabad was only around 60 kilometers but the body reached Bijnor at 9.30 AM next day. This shows that the police had taken time to implicate the accused and had lodged an ante timed FIR. Learned counsel for the appellant further states that the police had tried to implicate Sunil Kumar and Mahipal @ Pappu as assailants but they failed to get them convicted as Sohan Lal and Sarvjeet Singh who had tried to identify them in the identification parade, failed to identify the two persons Sunil Kumar and Mahipal as

assailants. He, therefore, submits that the police was trying to implicate one individual after the other for no reason whatsoever. In the instant case, learned counsel for the appellants, therefore, submits that the whole case becomes absolutely doubtful.

15. It has been further argued by learned counsel for the appellant that the co-accused Pukhraj to whom the role of actual firing was assigned, has been acquitted in Sessions Trial No.546 of 1997.

16. Sri J.K. Upadhyay, learned AGA, however, submits that exhortation "Maaro Saale Ko Yahi Jaswinder Hai" would have different meanings, if the assailants had only dandas in their hands. In the instant case, he states that, there were guns in the hands of the assailants then the exhortation "Maaro Saale Ko Yahi Jaswinder Hai" would definitely mean that the gun had to be used. He further submits that PW-2 was an injured witness and the testimony of an injured cannot be lightly done away with. He, therefore, submits that even if the accused was not directly involved in the offence of murder, he should be punished under section 34 IPC for being accompanied with assailants.

17. Sri I.K. Chaturvedi, learned Senior Counsel assisted by Sri Saurabh Chaturvedi, learned counsel appearing for the informant also adopted the arguments of the learned AGA. He submits that it mattered little that whether the name of the father was known to the PW-2. He further submits that PW-2 was a reliable witness as he was an injured witness and there was no harm if the accused was punished for exhortation. He also submits that no adverse inference could be drawn if the PW-2 had submitted an affidavit on 4.11.1996 and thereafter had withdrawn the same on 2.12.1996. He submits that there was sufficient light for the PW-2 to see as to who was present and who was not present and, therefore, it could not be said that he was a doubtful witness or he was giving witness for some extraneous reasons.

18. Having heard Sri G.S. Chaturvedi, learned Senior Counsel and Sri V.P. Srivastava, learned Senior Counsel assisted by Ms. Saumya Chaturvedi, Sri Ran Vijay Singh and Sri Rajiv Nayan, learned counsel for the appellant; Sri I.K. Chaturvedi, learned Senior Counsel assisted by Sri Jitendra Kumar, learned counsel for the informant and Sri J.K. Upadhyay, learned AGA for the State, we are of the view that the appeal deserves to be allowed. From the arguments made by learned counsel for the appellant, it is clear that exhortation was not required. The Court is of the view that if the assailants were not knowing the deceased and his bodyguard then it would have been in the fitness of things that the person who made the exhortation should have also in addition to just taking the name of the deceased should have said as to how Jaswinder had to be identified. The Court is also of the view that if there were two individuals who were not known to the assailants and the person who was making exhortation intended only one person to get killed then he would not make the exhortation but he would indicate to the assailants by any sign etc. as to which of the two individuals had to be killed. The Court, therefore, finds that exhortation which as it was a weak evidence, as has been held by the Supreme Court in **Jainul Haque vs. State of Bihar** reported in **AIR 1974 SC 45** was not such an evidence which could be used to convict the accused.

19. The Court is also of the view that when Sohan Lal had given statements to the contrary in the First Information Report then his testimony was not very reliable. In the FIR had had stated that the deceased and the PW-2 were standing at the puncture repairing shop while in the cross-examination only to explain the site-map which states that there were bullet marks on the closed shutter, he states that he and Jaswinder were standing at a place where the shutter was closed. We are, therefore, of the view that he was definitely not a very reliable witness. Furthermore, the Court is also of the view that when the PW-2 in the cross-examination states that he did not know the name of the father of the deceased then the FIR was definitely not lodged by the PW-2 but was the handiwork of the police who had, for some reason or the other, implicated the accused in the case and was also trying to implicate Sunil Kumar and Mahipal @ Pappu as assailants. Such a person, therefore, who is not wholly reliable, his testimony cannot be used for the conviction of an accused without any corroborating evidence. Some more corroboration in the material particulars by some reliable testimony; direct or circumstantial ought to have been there. In the absence of the corroborating evidence, we find that it was absolutely unsafe to convict the accused.

20. We also find that the police was not above board. Firstly, as has been stated above, the name of the father as was included in the FIR was the result of the handiwork of the police and secondly we find that the dead-body which was sent at 9.30 PM from Najibabad, reached Bijnor next day at around 10.00 AM and there is absolutely no explanation for this delay. The fact about breaking down of the tempo was nowhere recorded in the GD. We also find that the story of exhortation wherein the PW-2 says that the accused had uttered "***Maaro Saale Ko Yahi Jaswinder Hai"*** could not be used to convict the accused. One cannot conclude as to why he had taken the name of only Jaswinder when there were two individuals there. It could have also meant that the deceased was to be only assaulted in some manner and was not to be killed and also; we are definitely of the view that the exhortation was not possibly done as there were two individuals who were unknown to the assailants and, therefore, it was an absolutely a futile exhortation. We further find that when the assailant Pukhraj himself had been acquitted, no purpose would be served in punishing the person who allegedly exhorted the main accused-assailant Pukhraj in Sessions Trial No.546 of 1997.

21. Under such circumstances, we set aside the judgment and order dated 29.5.1999 passed by the IInd Additional Sessions Judge, Bijnor in Sessions Trial No.193 of 1996 (State vs. Surat Singh). The appellant be released forthwith if he was not required in any other criminal case.

22. The appeal is, accordingly, allowed.

(2023) 6 ILRA 756
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD 23.05.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE VINOD DIWARKAR, J.

Criminal Appeal No. 3832 of 2014

Angad Rai @ Jhullan Rai @ Fhulak & Anr.
...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Dileep Kumar, Sri Ajay Srivastava, Sri Mohd. Farooq, Sri Raja Ullah Khan, Sri Rajrshi Gupta, Sri Shashi Bhushan Kunwar, Sri Sheshadri Trivedi, Ms. Shambhawi, Sri Pradeep Kumar Rai, Sri Kamal Krishna (Sr. Adv.)

Counsel for the Opposite Party:
G.A., Sri A.K.Rai, Sri D.K.Singh

Criminal Law - Indian Penal Code, 1860 - Sections 302 r/w 34 & 506 - Punishment for murder - Code of Criminal Procedure, 1973 - Sections 161, 313 & 319 - Appeal against conviction - Life imprisonment - Relied upon testimony of PW-4, postmortem report and other evidence, trial court convicted them - Contention by appellants, they have been falsely implicated for political reasons - St. argued that deceased was died by them at the instance of opposite party who exercised enormous political clout in the area - On account of this all other eye-witnesses turned hostile - Held, except version of informant and St.ment of close relatives of deceased about receiving of threats from opposite party no other material was collected against them during investigation - PW-4 was a related and chance witness - PW-4 as sole eye-witness, was 80 year old, suffering from old age disease - At such age faculties of man would be somewhat restricted - Second Investigating Officer had recorded St.ment of PW-4 - PW-4, never St.d that he informed anyone of incident or offered to get his St.ment recorded - Timing of incident as per prosecution has been overlooked on ground that couple of hours variation can be expected in assessment of time - Witnesses who have turned hostile have not supported prosecution case in examination-in-chief - Impugned order set aside. (Para 2, 3, 12, 13, 14, 35, 39, 42, 43, 46, 53, 55)

Criminal Appeal allowed. (E-13)

List of Cases cited:

1. Rajesh Yadav & anr. Vs St. of U.P., (2022) 12 SCC 200, (Para 21, 39)

2. Shahaja @ Shahajan Ismail Mohd. Shaikh Vs St. of Mah., 2022 SCC OnLine SC 883, (Para 27, 28)

3. Md. Jabbar Ali & ors. Vs St. of Assam, reported in 2022 SCC OnLine SC 1440, (Para 55 to 58)

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

1. Heard Sri Kamal Krishna, learned Senior Advocate assisted by Sri Shashi Bhushan Kunwar and Sri Pradeep Kumar Rai, Advocates for the appellant Angad Rai @ Jhullan Rai @ Fhulak; Sri Dileep Kumar, learned Senior Advocate assisted by Ms. Shambhawi Shukla, Advocate for the appellant Umesh Rai @ Gora Rai; Sri Arunendra Kumar Singh, learned AGA for the State; Sri Durgesh Kumar Singh, learned counsel for the informant and perused the materials placed on record including the lower court records.

2. This appeal is by the accused Angad Rai @ Jhullan Rai @ Fhulak and Umesh Rai @ Gora Rai challenging their conviction and sentence vide judgment and order dated 26.09.2014, passed by the Additional Sessions Judge, Court No.01, Ghazipur in Sessions Trial No. 140 of 2006, arising out of Case Crime No. 493 of 2005, under Sections 302, 506 IPC, Police Station Muhammadabad, District Ghazipur; whereby they have been sentenced to life imprisonment alongwith fine of Rs. 10000/- coupled with a default sentence of one year imprisonment, under Section 302 r/w 34 IPC and under Section 506 IPC, five years imprisonment alongwith fine of Rs.

5000/- coupled with a default sentence of six months, each. All the sentences are directed to run concurrently.

3. Accused appellants have been convicted and sentenced for the murder of Rajendra Rai (hereinafter referred to as the 'deceased') in the morning hours on 27.6.2005. A written report was made in respect of the incident by the father of the deceased namely Kapil Dev Rai. This written report was scribed by Rakesh Kumar Rai, who happens to be the son of the deceased. The written report states that the informant's son Rajendra Rai is an active member of political party (we deem it appropriate to avoid referring the name of party as it has no relevance for the matter in issue) and as the Zila Panchayat and Kshettra Panchayat Elections were nearby, as such, Afzal Ansari (Member of Parliament Ghazipur) and his younger brother Mukhtar Ansari (MLA) were attempting to get the deceased in their party. About fifteen days prior to the incident the deceased was stopped at Muhammadabad and was told that since he is the husband of the Ex-Block Pramukh of Block Bhawarkol if he leaves the company of Krishnanand Rai and joins their party, then he would be benefited and it would secure his life and property. Again on 26/27.6.2005, the aforesaid persons sent message through the accused Umesh Rai @ Gora Rai alongwith three others, who came to informant's house at village Vachchhalpur and threatened that since the deceased is not joining the political party of the aforesaid two persons and is also not dissociating himself with Krishnanand Rai, as such, his life is at risk. The informant's son got frightened and divulged the receiving of threat, to the informant. In order to report such threat to the police, the informant alongwith the deceased were going to police station in the next morning at about 6.30 am, when at village Mathiya, under a planned conspiracy of Mukhtar Ansari and Afzal Ansari, the accused Umesh Rai @ Gora Rai alongwith three unknown persons exhorted that as the deceased is not joining the party of Afzal Ansari and Mukhtar Ansari, as such, he would face the consequences. The informant's son ran in order to save himself but the accused chased him inside the house of Shiv Kumar Yadav and shot him dead. The informant's son accordingly has died and at the place of occurrence Chandra Shekhar Rai and various other persons have arrived, who have seen the incident, but due to fear of the accused they could do nothing. A request was thus made to lodge the report and take action against the guilty persons. Based on such written report, first information report (Exhibit Ka-7) came to be registered as Case Crime No. 493 of 2005, under Sections 302/506/120B IPC at 7.40 a.m. at Police Station Muhammadabad, District Ghazipur. The distance between the police station and village Mathiya is stated to be about two and half kilometer. In the FIR three named accused were shown as Afzal Ansari, Umesh Rai @ Gora Rai, Mukhtar Ansari and the other three were unknown persons.

4. Investigation commenced pursuant to FIR and bloodstained and plain plaster was recovered from the place of incident (roof of the house of Shiv Kumar Yadav) and kept in separate boxes. A recovery memo in that regard has been prepared, which is duly exhibited as Ext.Ka-2. Four empties alongwith two pellets were also recovered from the place of occurrence, in respect of which also the memo of recovery is prepared and exhibited as Ext.Ka.3.

5. Inquest proceedings were then conducted at the place of occurrence and

the inquest report has been duly exhibited as Ext.Ka.9. As per the inquest report, the information of crime was received at the police station at 7.40 a.m. on the date of incident i.e. 27.6.2005 and the inquest began at 8.15. Information in respect of incident was received from Kapil Dev Rai (first informant). The inquest concluded at 10.05 am. The five witnesses to the inquest are Rambachan Rai, Vijay Bahadur Rai, Tarkeshwar Rai, Ravikant Rai and Ramashankar Rai.

6. The condition of body has been specified in the inquest as lying on the roof of the house of Shiv Kumar Yadav. The inquest witnesses found gunshot injury on the head and thighs of the deceased. There were other injuries on the body of deceased. The inquest witnesses thus opined that in order to ascertain the cause of death the postmortem be got conducted on the dead body of deceased. The body was accordingly sealed and sent to the mortuary.

7. The postmortem on the deceased has been conducted at 4.45 pm on the date of incident, wherein the deceased was found to be 55 years old with a heavy body and the time of death was reported to be about half day. In the opinion of autopsy surgeon the deceased suffered instant death as a result of ante-mortem head injury from a firearm. The postmortem has been proved by the autopsy surgeon (PW-3). As per postmortem, following ante-mortem injuries have been found on the deceased:-

"1. Firearm wound of entry 1.2 cm x 1.0 cm inverted margin with ring abrasion, situated at left occipital region head 7.0 cm behind left ear.

2. Firearm wound of exit 1.6 cm x 1.2 cm everted irregular margin on right parietal scalp, 6.0 cm above right eyebrow. On carefull dissection and probing both wounds (1 & 2) were found inter-communicating with fracture of occipital and right parietal bone and laceration of meninges and brain matter.

3. Contusion of left frontal scalp and eyelid 7.0 cm x 3.0 cm.

4. Firearm wound of entry 1.1. cm x 1.0 cm inverted margin at upper most part of right back thigh just below gluteal region.

5. Firearm wound of exit 1.4 cm x 1.1 cm everted margin on the upper part of right thigh 28 cm about patela right knee joint. On careful dissection and probing both the wounds (4 & 5) were found inter-communicating with laceration into soft tissue and muscle.

6. Abrasion 36 cm x 8 cm involving right thigh and upper leg medially.

7. Abraded contusion 12 cm x 8 cm on left back"

The postmortem report also shows existence of semi-digested food in the stomach as well as gases and fecal matter in the large and small intestine.

8. The Investigating Officer proceeded to record statement of various eye-witnesses, whereafter charge-sheet under Sections 302/506 IPC came to be submitted on 22.11.2005 against the two accused, which has been duly exhibited as Ext.Ka.5. The site plan has also been prepared by the Investigating Officer on the basis of information furnished by the first informant, which has been exhibited as Ext.Ka.6, during trial.

9. The Magistrate took cognizance on the charge-sheet and committed the case to the Court of Sessions wherein charges were framed against the accused appellants under Sections 302/34 and 506 IPC. The accused appellants were explained the charges levelled against them on 10.1.2007, which they denied and demanded trial. The trial accordingly commenced in which prosecution has adduced following documentary evidence:-

"1. FIR dated 27.06.2005 Ex.Ka.7

2. Written Report dated 27.06.2005 Ex.Ka.4

3. Report of Blood Stained & Plain Plaster Ex.Ka.2

4. Recovery memo of empties and pellets Ex.Ka.3

5. P.M. Report dated 27.06.2005 Ex.Ka.1

6. Report of Vidhi Vigyan Prayogshala dated 19.01.2006

7. Panchayatnama dated 27.06.2005 Ex.Ka.9

8. Charge Sheet (Mool) dated 22.11.2005 Ex.Ka.5"

10. In addition to documentary evidence the prosecution has also produced Vijay Bahadur Rai (PW-1), who is a witness to the inquest. Ravi Kant Rai is produced as PW-2, who too is a witness of inquest. Dr. Nishar Ahmad, Autopsy Surgeon has been produced as PW-3. Chandra Shekhar Rai, who allegedly has seen the incident and whose presence is mentioned in the FIR, has been produced as PW-4. Dinesh Kumar Pandey is the nephew (Bhanja) of the deceased, who has been produced as PW-5. Rakesh Kumar Rai is produced as PW-6, who is the scribe of the written report and is the son of the deceased. Tara Yadav has been produced as PW-7, who had come to her maternal house on the date of incident, situated next to the house of Shiv Kumar Yadav, where the deceased has been done to death. Yogendra Yadav @ Jogi Yadav has been produced as PW-8, who is resident of village Mathiya and had allegedly seen the incident. Similarly, Ashok Singh Yadav (PW-9) and Triveni Yadav (PW-10) are the resident of village Mathiya and had allegedly seen the incident. Constable Rampreet Chauhan has been produced as PW-11, who was associated in preparation of inquest and has taken the dead body to the mortuary. Kamlesh Yadav has been produced as PW-12, who too is resident of village Mathiya and had allegedly seen the incident. Mahendra Yadav has been produced as PW-13, who too is a resident of village Mathiya and had allegedly seen the incident. Jagdish Kumar Yadav has been produced as PW-14, who was the second Investigating Officer in the present case. PW-15 Harish Chandra Mishra is the first Investigating Officer in the present case. Ram Awadh Adarsh has been produced as PW-16 to prove the FIR and GD of the FIR. Mangla Yadav has been produced as PW-17, who had conducted the inquest.

11. On the basis of evidence led in the matter by the prosecution, the incriminating material produced during trial was confronted to the two accused, for recording their statement under Section 313 Cr.P.C. It is thereafter that the prosecution has adduced the testimony of Smt. Brijbala Rai as PW-18, who happens to be the wife

of the deceased. The accused were thereafter confronted with the incriminating material that had appeared against them in the testimony of PW-18, and their supplementary statement was recorded under Section 313 Cr.P.C. The defence, however, has not produced any witness on its behalf. Trial court has examined the testimony of witnesses as also the documentary evidence and found that all other eye-witnesses, except PW-4 Chandra Shekhar Rai, have turned hostile.

12. Trial court found the testimony of PW-4 to be trustworthy and reliable and his presence at the place of occurrence was also found free of any doubt. Relying upon the postmortem report as also other evidence brought on record the trial court has come to the conclusion that the prosecution has succeeded in establishing the guilt of the accused appellants beyond reasonable doubt and consequently convicted them for the offence under Sections 302/34 and 506 IPC and sentenced them to life and other punishments as per above.

13. Aggrieved by the judgment of conviction and sentence, the two accused appellants have filed the present appeal. It is urged on behalf of the appellants that the testimony of eye-witness PW-4 is not reliable and his presence at the place of occurrence is also doubtful. Submissions have been made at length in order to submit that the prosecution had included reference of PW-4 in the written report, primarily as as he was closely related to the informant and would have supported the prosecution case, blindly, to implicate the accused appellants. It is also urged that the evidence led by the prosecution in no way connects the accused appellants with the commission of the offence, inasmuch as, neither the motive for committing the offence has been established against the accused appellants nor their association with Ansari brothers are established and, therefore, their conviction and sentence is wholly without any basis. It is urged that the accused appellants have been falsely implicated for political reasons, particularly, as the brother of the accused Angad Rai namely Ram Narayan Rai @ Pahalwan Rai had been done to death in which the then local MLA Krishnanand Rai was named as accused and it was at his instance that the accused appellants have been falsely implicated. It is also urged that the other accused namely Gora Rai is the cousin of Angad Rai (Mausera Bhai). Further arguments have been made on behalf of the appellants to contend that they are wholly innocent and have been falsely implicated and that the trial court has erred in convicting and sentencing them.

14. The appeal is strongly opposed by Sri Arunendra Kumar Singh, learned AGA and Sri Durgesh Kumar Singh, who has appeared for the informant, who states that the deceased was done to death in a brutal manner in broad day light by the two accused at the instance of Ansari Brothers, who exercised enormous political clout in the area. It is submitted that on account of political influence exercised by the accused appellants all other eye-witnesses have turned hostile and the investigation deliberately left out such materials, as would have implicated the accused appellants in the matter.

15. On behalf of the informant it is urged that as per the then law the informant had no right to actively participate in the proceedings and since the prosecution acted in wholly unfair manner, on account of political influence exercised by powerful

persons, as such, the facts of the case needs to be carefully examined by the Court so that justice is done in the case and the faith of the common man in the system is strengthen. Informant also alleges that the investigation was wholly botched up and due to political influence all other eye-witnesses were produced on the same day, and declared hostile, which shows that the whole system was acting in a partisan manner so as to deny justice in the facts of the case.

16. It is in the above backdrop that this Court is required to consider as to whether the prosecution has succeeded in proving its case against the accused appellants, beyond reasonable doubt, on the basis of evidence led in the matter and also whether the conviction and sentence awarded to the two accused appellants is just and proper or not?

17. In order to effectively appreciate the contentions urged on behalf of rival parties, it would be appropriate to refer to the evidence led in the matter at some length.

18. Vijay Bahadur Rai has been produced as PW-1, who is witness of inquest. He has proved the inquest report in his examination-in-chief. In the cross-examination, he has stated that place of occurrence is actually a ward of Muhammadabad town, which is also a town area. He has stated that he heard about the murder of deceased at about 6.00 in morning and arrived at village Mathiya alongwith large number of other villagers at about 7.00 am. He has stated that prior to his arrival at the place of occurrence, large number of persons as well as police had already arrived and gathered there. The SHO of Muhammadabad had come to the place of occurrence at about 12.00 noon by when the dead body of deceased was still lying there. He has stated that the SHO took the dead body alongwith other villagers, including PW-1, to the police station where the inquest was conducted. He has stated that the inquest was completed at about 2.00 in the afternoon. It was thereafter that the dead body was taken by the police for postmortem to Ghazipur. The defence relies upon this testimony of PW-1 to submit that police papers are fudged and not reliable.

19. PW-2 Ravi Kant is also a witness of inquest. He too has proved the inquest report. Contrary to what has been stated by PW-1, PW-2 has stated that the inquest was conducted at the place of occurrence. He has further stated that the Investigating Officer has not interrogated him.

20. PW-3 is Dr. Nishar Ahmad, who has proved the postmortem report and has specified the injuries found on the deceased. As per him, the deceased met an instant death on account of gunshot injury sustained on his head. As per the doctor the deceased had eaten something about 3-3½ hours prior to the incident since undigested food was found in his stomach. He also found existence of gases and fecal matter in his intestine and opined that either deceased was suffering from constipation or had not eased himself. He has explained that Injury No. 1 & 4 are firearm wounds of entry whereas Injury No. 2 & 5 are firearm wound of exit. The witness has stated that the deceased would have died at about 6.00 in the morning and that variation of 2-4 hours in the estimated time of death is possible. He has opined that it was possible that the deceased died at about 2.00 or 3.00 in the night.

21. PW-4 is the sole eye-witness, who has supported the prosecution case and,

therefore, his statement needs a careful examination. This witness is the cousin of the first informant and has stated that on the date of incident he was on way to the Yusufpur market to purchase paddy seeds. He sat below a tree to take rest in a grove. He saw firing on the motorcycle on which the deceased was sitting with the informant. The two accused were also on a motorcycle. Angad Rai was driving it while the other accused Gora Rai had pistols in both his hands from which he fired on the deceased. The gunshot, however, missed. The motorcycle of deceased fell and he rushed towards Mathiya basti to save himself. The accused followed the deceased on the motorcycle and got down after about 15 paces and rushed in the lane. After the witness reached a well, he heard 4-5 gunshots and saw the two accused coming out of the house of Shiv Kumar Yadav. He went inside the house of Shiv Kumar Yadav and saw that the deceased had fallen on the roof of Shiv Kumar Yadav.

22. In the cross-examination, PW-4 has stated that for work he used to go to Muhammadabad on foot which took about an hour's time. PW-4 has disclosed that he has two sons in the age group of 25-35 years, who look after the agricultural work and that the witness also supports them. This witness retired as a Constable from West Bengal Police. He has admitted that in 1977 Shiv Sagar Rai had been killed wherein the deceased was an accused. He has also been confronted with the criminal antecedent of the deceased. He has been confronted with his previous statement made under Section 161 Cr.P.C. where he had not disclosed the Investigating Officer about his purpose of going to the market i.e. to buy seeds. He has also stated that because of his advance age he cannot walk fast and often suffers from pain in his legs. In his further cross-examination, PW-4 has admitted that market is held in Yusufpur on Tuesday and Saturday and that on other days no market is held. However, the shops remain open. He has disclosed that soon after the incident he returned to the village to inform about the murder of Rajendra, but he did not inform this fact to his son, when he crossed him on the way. He has also stated that after the incident he fell sick and his statement was recorded later on. The witness has further explained that informant slammed his head on seeing the dead body of his son. Clothes worn by informant were soaked with blood as he tried to hold the deceased. The witness further claims that on entering the house of Shiv Kumar Yadav he saw only a girl aged 18-20 years cooking food and that none else was present. He claims to have seen the incident from a distance of 100 paces. The witness has admitted that he has weak eye-sight and that only by wearing specs he can read or write.

23. PW-5 Dinesh Kumar Pandey is the son of informant's daughter and has supported the prosecution case, particularly with regard to receiving of threat by deceased about 10-15 days prior to the incident. He claimed that deceased and other family members had their meal around 2.30 the previous night. This witness in the cross-examination has been confronted with his previous statement made under Section 161 Cr.P.C. where he had not disclosed the fact of deceased having food at about 2.30 in the previous night. PW-5 has denied the suggestion that the statement about having food at 2.30 in the night has been cooked up in order to explain the medical evidence.

24. PW-6 Rakesh Kumar Rai is the son of the deceased who feigned ignorance

that his mother had won election of Block Pramukh in the year 1995, 1996 but later lost the election. He asserted that only his grandfather was present when scribed the written report. He claims that he had not gone to the police station to lodge the report.

25. PW-7 Tara Yadav has stated that she was at her maternal house on the date of incident at Mathiya. She heard that somebody had died in her house and did not return till evening. She denied seeing anyone running away with a firearm. In the cross-examination, she has stated that she left while it was still dark to ease herself and by the time she returned before the sunrise she found that crowd had gathered at her house. This witness also carried her three year old daughter with her. She has denied that there was any girl aged 17-18 years in the house. She has not identified the two accused. She did not notice as to when the family members of the deceased arrived. She claims that by the time she returned, she found police personnel present but none of the family member of the deceased was weeping.

26. PW-8 Yogendra Yadav, PW-9 Ashok Singh Yadav and PW-10 Triveni Yadav incidentally have been produced on the same day before the court below by the prosecution. These three witnesses have not supported the prosecution case either in the examination-in-chief, or in the cross-examination. Much emphasis is laid to contend that there was a strong undercurrent and extraneous influence at work due to which witnesses turned hostile and even the conduct of prosecution officer was questionable. This aspect of the matter shall be dealt with, later.

27. PW-11 Rampreet Chauhan is the Constable, who was present at the time of inquest and has taken the body of deceased to the mortuary. PW-12 Kamlesh Yadav and PW-13 Mahendra Yadav are also resident of village Mathiya, who have been produced on the same day i.e. 5.12.2007 and they too have turned hostile.

28. PW-14 Jagdish Kumar Yadav is the second Investigating Officer. He has stated that during investigation no evidence was found against the accused Mukhtar Ansari and Afzal Ansari and, therefore, their names were excluded from further investigation. He claims to have tried to locate PW-4 – Chandra Shekhar Rai, but he was not available and, therefore, his statement was recorded at the police station only on 9.7.2005. This witness has stated that PW-4 had not disclosed him that he was going to purchase seed from Yusufpur. He has also stated that PW-4 did not inform him during investigation that he had reached 20 minutes prior to the incident, nor had he informed him that after a couple of minutes he left for the village to inform about the murder of the deceased. The witness also found no trace of any motorcycle, nor such a motorcycle was made available to the Investigating Officer and even details of such motorcycle was not furnished. During investigation it could not be ascertained as to by which route the deceased reached the place of incident. This witness has also stated that it was not possible from point ‘B’ shown in the site plan to see point ‘D’ as there were bamboo plants in between. He claimed that no firearm was recovered on the pointing out of the accused. He has further stated that the deceased was a history-sheeter and his wife was a Block Pramukh. In case crime no.411 of 2004, under Section 302 IPC the brother of accused Angad Rai was killed and Krishnanand Rai was accused therein as a conspirator. He claimed that Sri Rai

had telephoned him to know about the progress of the case.

29. PW-15 Harish Chandra Rai is the first Investigating Officer and has proved the recoveries made from the place of occurrence. He has stated that PW-5 never informed him that the deceased was frightened or that any threat was received by him from Ansari brothers about 15 days back. This witness has also been confronted with various improvements made in the statement of PW-5 and he has stated that such disclosure was not made to him by the witness during investigation. When he arrived at the place of occurrence, he found the dead body of deceased on the roof of Shiv Kumar Yadav and not on the stairs. He also asserted that no motorcycle was traced, nor its detail was furnished; he tried to locate Chandra Shekhar Rai and had also visited his house but was informed that he had gone to Ghazipur and on 30th he was not well. This witness has stated that till investigation was carried out by him no eye witness from village Mathiya had given statement in support of the prosecution case. No eye witness had come forward to implicate accused Angad Rai.

30. PW-16 S.I. Ram Awadh Adarsh in his statement has stated that Rakesh Kumar Rai had come alongwith the informant to lodge the FIR. However, the signatures of the informant or his companion were not obtained on the FIR.

31. PW-17 is Mangla Yadav, who has proved the police papers and had conducted the inquest. He has stated that after the inquest was conducted at 10.05 in the morning, he delivered the dead body to the Constables, who took it by a Jeep.

32. PW-18 Smt. Brijbala Rai has supported the prosecution case with regard to receiving of threats by the deceased, to leave the company of Krishnanand Rai, and join Ansari Brothers. She has supported the prosecution case that four persons arrived on two motorcycles at 8.00 pm the day prior to the incident and extended threats to her husband. Her husband allegedly told such persons that he would not leave Krishnanand Rai. Later, the deceased informed PW-18 that he had received threats from Umesh Rai @ Gora Rai. She has stated that the informant came thereafter and various family members also arrived at the house. The witness offered food at about 11.00, but as they were troubled, they kept discussing the affairs and it was only around 2.30 that they had food. She also stated that her husband left by motorcycle to lodge the report alongwith informant. In the cross-examination, this witness has admitted that she has engaged two private counsels; all applications etc., were moved by the private counsels with her consent; her son had earlier moved an application for her discharge during trial as Investigating Officer had not correctly recorded her statement; no application was made through the counsel for not appearing as a witness but that she could not depose as she was ill; her statement was incorrectly recorded by the Investigating Officer. This witness has further showed her ignorance about criminal antecedent of her husband. The witness has also been confronted with her previous statement made under Section 161 Cr.P.C. where she had not deposed about the family members having food at about 2.30 in the night.

33. Before proceeding any further it would be worth noticing that the first informant Kapil Dev Rai died few months after the incident and he could thus not be produced in evidence. His statement has

been recorded under Section 161 Cr.P.C., which is required to be examined, as the prosecution and the informant submits that his statement made under Section 161 Cr.P.C. be read in evidence in the facts of the present case. We have examined the statement of informant made under Section 161 Cr.P.C. The informant has supported the prosecution case about threats being extended to the deceased by Ansari Brothers to join their party and to leave the company of Krishnanand Rai.

34. There are two statements of the informant. One immediately after the incident and the other after the second Investigating Officer took over investigation on 9.7.2005. He has stated in his first statement that the deceased informed him about threats extended to him in the night preceding the day of incident and then decided that in the morning itself the police be informed. The informant further stated that on account of conspiracy hatched by the Ansari Brothers, the accused Umesh Rai alongwith three unknown persons extended threats to the deceased and chased him with an intent to fire on him. As per the informant his son was driving motorcycle, while he was the pillion rider. The motorcycle fell and his son rushed towards locality where he was chased by the accused and shot dead. In the second statement of the informant recorded on 9.7.2005, name of the other accused Angad Rai was also introduced for the first time. It is also stated that two other persons were also waiting on a motorcycle but their names are not known.

35. The prosecution case essentially proceeds on the premise that the deceased was being pressurized by Ansari Brothers to join their party and dissociate himself with Krishnanand Rai. Though some of the prosecution witnesses have supported this version of the prosecution, but it remains admitted that no charge-sheet was filed against Afzal Ansari and Mukhtar Ansari in the matter. The Investigating Officer has specifically stated that no material was collected during the course of investigation against these two persons and, therefore, during course of investigation itself their names were excluded from the case. During the course of trial also no application was moved under Section 319 Cr.P.C. to summon the Ansari Brothers. Except the version of informant and the statement of close relatives of deceased about receiving of threats from Ansari Brothers no other material apparently was collected against them during the course of investigation.

36. Although it is alleged that Ansari Brothers asked the deceased to leave the company of Krishnanand and join their party and that this would be in the interest of his life and property but no specific time or place of such threat apparently has been disclosed. The other part of the prosecution story is with regard to threats received from the two accused on the date preceding the incident by Gora Rai and three other unknown persons. No challenge has been laid by anyone to this part of the investigation nor this aspect has been pressed even at the stage of trial. Though we find that allegations were made against Ansari brothers of extending threats to the deceased for joining their party but it remains a fact that neither they were charge-sheeted nor summoned during trial under section 319 Cr.P.C. No date, time or place is otherwise disclosed when such threat was extended by these two persons, directly. No overt act is attributed to these two persons and they are not a party to these proceedings. We are thus not inclined to invoke our jurisdiction under section 391

Cr.P.C. by directing further probe in the matter after expiry of 18 years, though we are not impressed by the manner in which investigation was suddenly dropped against them.

37. We are constrained to make some observations on the manner in which the investigation has been carried out in this case. We have examined the facts of the case and we find that the incident occurred in the house of Shiv Kumar Yadav, however, Shiv Kumar Yadav has not been produced in evidence by the prosecution. None of the other neighbours of the house have been produced either The allegation made by the first informant with regard to threats extended by the political persons named in the police report has also not been investigated thoroughly and properly. No material has been referred to by the Investigating Officer on the basis of which an opinion could be formed that the plea of threats extended to the deceased by the political persons named in the report was baseless. We do not find the subjective satisfaction of the Investigating Officer on the role of the political persons for extending threats to be well founded. We, however, refrain ourselves from saying anything further as those persons are neither before the Court nor any charge-sheet has been filed while investigation. We, therefore, confine the scope of this appeal to the evidence on record against the two convicted accused. The impassioned prayer made by Sri D. K. Singh, in this regard, is thus reluctantly declined.

38. With regard to the incident of 27.6.2005, it is the prosecution case that the deceased had left alongwith the informant to lodge the report early in the morning. The prosecution case further is that while they were going towards the police station they were intercepted by two accused at village Mathiya and thereafter the deceased was shot dead. This part of the prosecution version is based upon the testimony of eye-witnesses and also the documentary evidence, referred to above.

39. The postmortem report in this case has been proved by the doctor, as per which, the deceased had sustained two firearm injuries which resulted in his death. In the opinion of the doctor the death of the deceased was a result of ante-mortem head injury from the firearm. It is, therefore, proved beyond doubt that the deceased died a homicidal death. The question is as to whether the two accused appellants on the basis of evidence led in the matter can be held responsible for the offence or not?

40. So far as the version of first informant is concerned, admittedly he died and he could not depose before the court below. His statement made under Section 161 Cr.P.C. has limited appeal as it neither contains his signatures nor the accused appellants have any opportunity to cross-examine such version.

41. The prosecution case essentially relies upon the testimony of PW-4. PW-4 is the cousin of the first informant and is the uncle of the deceased. He is thus a related witness. This witness has stated that he was going to Yusufpur market to buy seeds. As per the witness, he had left at about 5.00 in the morning and as he got tired he sat in a grove to take rest. It is at this juncture that he saw the incident.

42. The presence of the witness at the place of occurrence is seriously questioned on behalf of the defence. So far as the purpose of going to Yusufpur market early in the morning for buying paddy seeds is

concerned, we find that the specific purpose of visit to market has not been disclosed by the witness in his statement under Section 161 Cr.P.C. What has been stated by the witness in his statement under Section 161 Cr.P.C. is that he was going to the market. The witness has admitted in his cross-examination that Yusufpur market is held twice in a week i.e. Tuesday and Saturday. As the day of incident was Monday, therefore, there was no market on the date of incident. The presence of PW-4 near the place of occurrence is thus a matter of chance. In his statement made before the court PW-4 disclosed that he had reached Mathiya about 20 minutes before the incident which is a clear improvement from his previous statement under section 161 Cr.P.C. as per which he had just arrived when the incident occurred. PW-4 is thus a related and chance witness whose testimony will have to be minutely scrutinized. The statement under Section 161 Cr.P.C. about going to the market is questioned on the ground that such a market is not held on Monday and the specific purpose of buying paddy seed is an improvement made at the stage of trial. In view of the fact that PW-4 is a related witness and his presence otherwise is a matter of chance, therefore, his testimony will have to be carefully analyzed by the Court.

43. At this juncture, it may be worth observing that conviction of an accused is possible on the basis of solitary testimony of an eye-witness, but the court will have to be satisfied with regard to his truthfulness for such purpose. In the facts of the case, PW-4 is 80 year old. He has admitted in his deposition that he is suffering from old age disease since his organs are weak; he has pain in his legs and cannot move fast; his vision is limited and he can read or write only with the help of specs. Otherwise at the age of 80 years the faculties of a man would be somewhat restricted. To what extent such person can see the incident from a distance of 100 paces would remain a fact to be carefully evaluated.

44. We have perused the site plan, as per which, PW-4 was sitting beneath a tree in the grove adjoining the main road. He claims that the deceased was at a distance of 100 paces when he saw the accused firing at him. The version of PW-4 is that the gunshots fired at the deceased while he was on the motorcycle hit none but the motorcycle fell. This part of the version of PW-4 is not supported by the statement of first informant in his statement under Section 161 Cr.P.C. nor is it contained in the first information report. We also find that no motorcycle has otherwise been found on the spot. There is no recovery of the motorcycle, nor any of the prosecution witnesses have disclosed the details and description of the motorcycle. The fact that motorcycle was neither found on the spot, nor it contains any description in the FIR or the statement of informant under Section 161 Cr.P.C. creates a doubt in the prosecution case. PW-4 has stated that he did not venture towards the place of firing. This statement, therefore, conveys that PW-4 remained at the grove when the incident of firing took place on the road. PW-4 then states that he saw the deceased rushing towards the village abadi. The site plan shows that in front of the place where PW-4 was standing was the hutment of Ramkrit and Kamlakar Yadav. There are also bamboo plants behind hutment. PW-4 has also admitted that even in the lane in front of the place where he was standing there existed house on both sides. We, therefore, find it somewhat difficult to comprehend as to how at the age of 80 years with limited

sight and weak legs the deceased could see at such distance and recognize the accused. The version of PW-4 further is that the deceased rushed towards the house of Tara Yadav and reached the roof top of Shiv Kumar Yadav by the stairs. The site plan shows spot 'D' from where this part of the incident is alleged to have been seen by PW-4. The locality has number of houses and a lane exists by which the witness claims to have travelled to the point 'D'. The witness then states that he entered the house and saw that the dead body of deceased was lying on the roof of Shiv Kumar Yadav. In his further statement, PW-4 claims that the first informant slammed his head on the stair case and he sustained injuries and his clothes got wet with blood. However, no bloodstained clothes of the informant are collected during investigation. No injury on the informant has otherwise been found. Such injuries otherwise would have been noticed when the informant reached the police station to lodge the report.

45. PW-4 further states that, he stayed at the place of occurrence for about a minute and immediately returned to the village to inform the family and others about the incident. In the cross-examination, PW-4, however, admits that he crossed the son of the deceased on the way, but did not inform him anything about the incident. This part of the testimony of PW-4 is difficult to believe, inasmuch as, in the event he was returning to village to inform about the incident there was no reason why he would not disclose about the incident to the son of the deceased. What is further amusing is that PW-4 neither came back to the place of incident, nor participated in the cremation and gave no statement to the police. The statement of PW-4 was recorded for the first time on 9.7.2005 which is after 13 days of the incident. PW-4 has also admitted that prior to his statement recorded under Section 161 Cr.P.C. on 9.7.2005, he did not disclose anyone about the incident in the entire village. We find this conduct of PW-4 to be somewhat unusual. Having seen such ghastly act the natural conduct of a person would be to immediately disclose it to the family members or to those who were close to him. His act of not disclosing the incident either to the son of the deceased or to anyone else in the family for more than 10 days is questionable.

46. Sri Durgesh Kumar Singh, learned counsel for the informant states that the first Investigating Officer acted in a partisan manner and only after the second Investigating Officer took over the investigation that the statement of PW-4 was recorded needs to be examined at this juncture. It is a matter of fact that only the second Investigating Officer had recorded the statement of PW-4. PW-4, however, never stated that he informed anyone of the incident or offered to get his statement recorded or that his version was not noticed/recorded by the Investigating Officer. The Investigating Officer in his statement before the Court has stated that he tried to locate Chandra Shekhar Rai on the date of incident but he was not available. He came to the house of PW-4 on 28.6.2005 but he was informed that PW-4 had gone to Ghazipur. On 30.6.2005, PW-4 was not well enough for his statement to be recorded. Since PW-4 has not alleged in his testimony that he was available for his statement to be recorded or that his statement was actually not recorded, though he informed such fact, it would be difficult for this Court to accept the explanation of delay in recording of his statement on the premise that the first

Investigating Officer did not act fairly. PW-4 in his testimony has also stated that when he entered the house of Shiv Kumar Yadav, he only found a girl aged 18-20 years, who was cooking food. This girl, however, has neither been interrogated, nor has been produced in evidence. PW-4 has not alleged that anyone else was present in the house at the time of occurrence.

47. We have carefully examined the testimony of PW-4 and on analyzing it on the touchstone of an interested chance witness we find it difficult to rely upon his testimony which otherwise leaves multiple inconsistencies and improvements unexplained. The other witnesses who have supported the prosecution case are PW-5, 6 and 18.

48. So far PW-5 is concerned, he admittedly is the grandson of the first informant, as such, he too is related to the deceased. PW-5 is a witness who has proved the recovery of bloodstained and plain earth, etc. He is the witness to the recovery of two pellets and two empties. Apart from it, he has stated that he saw the deceased troubled and on asking he was informed that someone had threatened him about 10-15 days back. In the cross-examination, however, this witness has been confronted with his previous statement under Section 161 Cr.P.C., wherein no such disclosure was made to the Investigating Officer. The version of PW-5 about the deceased having received threats about 10-15 days prior to the incident is thus a clear improvement from what was stated by him earlier. His further testimony that three persons alongwith accused Gora Rai had extended threats is also not mentioned in his statement under Section 161 Cr.P.C. The statement of PW-5 that family members had taken food at about 2.30 in the night is also an improvement made in his statement during trial of which no reference is made earlier in his statement made under Section 161 Cr.P.C. The testimony of PW-5 is thus not of help to the prosecution case.

49. PW-6 is the scribe of the FIR and though his statement that he had not gone to the police station to lodge the FIR is questioned with reference to the statement of the Investigating Officer, but we do not intent to dwelve deeper as we do not find it to be a matter of much significance. It remains undisputed that the written report was scribed by PW-6 and the same is duly proved. The testimony of PW-6 is limited to such extent.

50. The place of incident in the present case is the roof top of the house of Shiv Kumar Yadav. Shiv Kumar Yadav has not been produced in evidence during trial. His statement, however, has been recorded under Section 161 Cr.P.C., which states that Chandra Dev Yadav is his brother. Chandra Dev Yadav gave his house to his daughter Tara Yadav, but generally people treat her house to be that of Shiv Kumar Yadav. Tara Yadav has been produced as PW-7. She has clearly stated that she left at the day-break to attend natures call alongwith her daughter and returned prior to sunrise. She saw large number of persons at her house. She also learnt that a dead body was at roof top and was removed in the afternoon. She also stated that by the time she returned prior to sunrise police personnels had already reached the place of occurrence.

51. On behalf of the defence, an argument has been raised questioning the timing of incident disclosed by the prosecution. Reliance is placed upon the

statement of PW-7 to submit that the incident had occurred prior to the sunrise. We have been informed that on the date of incident the sunrise was at about 5.06 am. Strong reliance is placed upon the testimony of PW-7 as she is an independent person. Reliance is also placed upon the testimony of PW-3, who is the autopsy surgeon and has clearly deposed that the deceased had her food about 3.00 to 3.30 hours prior to the incident. Such opinion of the doctor is based upon the fact that semi-digested food was found in the stomach of the deceased. It is also urged that normally people have their meal at about 8.00-9.00 in the villages and, therefore, the fact that semi-digested food was found in the stomach of the deceased indicates that the incident occurred much prior to the time disclosed by the prosecution. As per the defence the incident may have occurred around 3.00-4.00 in the morning. The presence of PW-4 is also questioned on the strength of time of incident.

52. The prosecution in order to meet the medical evidence has come out with the testimony of witnesses as per which the entire family, including the deceased, had their meal at about 2.30 in the night. The statement of PW-5 in that regard, however, is questioned on the ground that such disclosure was not made earlier in his statement under Section 161 Cr.P.C. The other witness, who comes with such explanation is PW-18 Smt. Brijbala Rai, who happens to be the wife of the deceased. Her statement emerges in somewhat peculiar circumstances. PW-18 is shown as a witness in the charge-sheet. She was, however, not produced during trial. An application was moved on 03.04.2008 (Paper no. 101Ba) signed by the prosecution officer and also the private counsel engaged by PW-18 Girja Shankar Rai for discharge of PW-18 during trial. This application was allowed on 03.04.2008 itself. PW-18 was later was introduced in evidence after the statement of accused was recorded under Section 313 Cr.P.C. This witness has specifically alleged that the entire family and relatives sat in the night to discuss the threat received by deceased and it was only around 2.30 in the night that they all had their meals. This statement, however, is a clear improvement over what was earlier disclosed by this witness during her interrogation under Section 161 Cr.P.C. No plausible explanation has been furnished by the prosecution for such improvement to have come into existence at such late stage of proceeding. PW-18 has also stated for the first time that her husband had gone on a motorcycle. This fact is also an improvement and was not disclosed in her statement under Section 161 Cr.P.C. We do not find the testimony of PW-18 to be convincing or reliable, particularly as her statement contains material improvements from what was disclosed by her earlier to the Investigation Officer. A serious doubt is raised upon the timing of the incident inasmuch as the existence of semi-digested food in the stomach of the deceased supports the defence version that time of incident was prior to 6.30 in the morning. This doubt in the timing of incident finds support from the testimony of PW-7. The desperate attempt on part of the prosecution to explain the medical evidence on the aspect of timing by improvements made in the testimony of PW-5 and PW-18 also generates doubt in the prosecution case.

53. We have examined the judgment of conviction and sentence passed by the court below wherein the trial court has noticed that the solitary evidence of prosecution in this case is PW-4, and his

testimony has been relied upon primarily to convict and sentence the accused appellants. We have perused the judgment of the trial court which does not show that the testimony of PW-4 was carefully analyzed by the trial court. The fact that PW-4 was a related and chance witness whose testimony needed a closure scrutiny has completely escaped the attention of the court below. The limited faculties of PW-4 at the advance age of 80 years has also been overlooked. The questions raised with regard to timing of incident as per the prosecution has also been overlooked only on the ground that couple of hours variation can be expected in the assessment of time. Though as a matter of prudence such difference can be ignored but where the prosecution case is seriously challenged on other parameters also the court will have to view the evidence in its entirety so as to determine whether the deposition of the witnesses contains a ring of truth around it. The delay occasioned in recording of the statement of PW-4 has also escaped the attention of the court below.

54. Sri D.K. Singh appearing for the informant has strenuously relied upon the judgment of Supreme Court in Rajesh Yadav and another vs. State of U.P., (2022) 12 SCC 200 to submit that where material lapses occurred in the case of the investigation it becomes the duty of the court to step in for the aid of justice. Para 21 and 39 of the judgment have been relied upon, which are reproduced hereinafter:-

"21. The expression "hostile witness" does not find a place in the Evidence Act. It is coined to mean testimony of a witness turning to depose in favour of the opposite party. We must bear it in mind that a witness may depose in favour of a party in whose favour it is meant to be giving through his chief-examination, while later on change his view in favour of the opposite side. Similarly, there would be cases where a witness does not support the case of the party starting from chief-examination itself. This classification has to be borne in mind by the Court. With respect to the first category, the Court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. Even a chief-examination could be termed as evidence. Such evidence would become complete after the cross-examination. Once evidence is completed, the said testimony as a whole is meant for the court to assess and appreciate qua a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief-examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the court. It is well within the powers of the court to make an assessment, being a matter before it and come to the correct conclusion.

39. Before we part with this case, we are constrained to record our anguish on the deliberate attempt to derail the quest for justice. Day in and day out, we are witnessing the sorry state of affairs in which the private witnesses turn hostile for obvious reasons. This Court has already expressed its views on the need for a legislative remedy to curtail such menace. Notwithstanding the abovestated directions issued by this Court in Vinod Kumar [Vinod Kumar v. State of Punjab, (2015) 3 SCC 220 : (2015) 2 SCC (Cri) 226 : (2015) 1 SCC (L&S) 712] , we take judicial note of the factual scenario that the trial courts are adjourning the cross-examination of the

private witnesses after the conclusion of the cross-examination without any rhyme or reason, at the drop of a hat. Long adjournments are being given after the completion of the chief-examination, which only helps the defence to win them over at times, with the passage of time. Thus, we deem it appropriate to reiterate that the trial courts shall endeavour to complete the examination of the private witnesses both chief and cross on the same day as far as possible. To further curtail this menace, we would expect the trial courts to take up the examination of the private witnesses first, before proceeding with that of the official witnesses. A copy of this judgment shall be circulated to all the trial courts, to be facilitated through the respective High Courts."

55. In the abovenoted case before the Supreme Court the witness had initially supported the prosecution case in the examination-in-chief but turned hostile, later, at the stage of cross-examination. The Supreme Court has deprecated the adjournment of trial after the statement of witness is recorded in examination-in-chief as such time is utilized either to win over the witness or to extend threats etc. In the facts of the present case the witnesses who have turned hostile have not supported the prosecution case at the stage of examination-in-chief itself. The judgment of Supreme Court in Rajesh Yadav, therefore, though lays down important principle for guidance of the Court but is not shown to have relevance on the facts of this case.

56. Sri D.K. Singh has also placed reliance upon the judgment of the Supreme Court in Shahaja @ Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra, 2022 SCC OnLine SC 883, wherein the Supreme Court has evolved thirteen principles for appreciation of ocular evidence. Para 27 and 28 of the judgment which contains these principles are reproduced hereinafter:-

"27. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length it is quite possible for

him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the

later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.

[See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 Cri LJ 1096 : (1983) 3 SCC 217 : AIR 1983 SC 753, Leela Ram v. State of Haryana, (1999) 9 SCC 525 : AIR 1999 SC 3717, and Tahsildar Singh v. State of UP, AIR 1959 SC 1012]

28. To put it simply, in assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, the circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, yet the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence."

57. The first principle laid down by the Supreme Court for evaluation of ocular evidence is that the evidence of witness has to be read as a whole in order to ascertain that it has a ring of truth around it. We have carefully examined the testimony of the sole eye-witness on the touchstone of an interested chance witness and we find that his testimony is shaky and does not inspire confidence of the Court. In Md. Jabbar Ali and others Vs. State of Assam, reported in 2022 SCC OnLine SC 1440, the Supreme Court laid down parameters for examining the testimony of interested witness in paragraph nos.55 to 58 of the report, which are extracted hereinafter:-

"55. It is noted that great weight has been attached to the testimonies of the witnesses in the instant case. Having regard to the aforesaid fact that this Court has examined the credibility of the witnesses to rule out any tainted evidence given in the court of Law. It was contended by learned counsel for the appellant that the prosecution failed to examine any independent witnesses in the present case and that the witnesses were related to each other. This Court in a number of cases has had the opportunity to consider the said aspect of related/interested/partisan witnesses and the credibility of such witnesses. This Court is conscious of the well-settled principle that just because the witnesses are related/interested/partisan witnesses, their testimonies cannot be disregarded, however, it is also true that when the witnesses are related/interested, their testimonies have to be scrutinized with greater care and circumspection. In the case of Gangadhar Behera and Ors. v. State of Orissa (2002) 8 SCC 381, this Court held that the testimony of such related witnesses should be analysed with caution for its credibility.

56 In Raju alias Balachandran and Ors. v. State of Tamil Nadu (2012) 12 SCC 701, this Court observed:

"29. The sum and substance is that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. However, this is only a rule of prudence and not one of law, as held in Dalip Singh [AIR 1953 SC 364] and pithily reiterated in Sarwan Singh [(1976) 4 SCC 369] in the following words: (Sarwan Singh case [(1976) 4 SCC 369, p. 376, para 10)

"10. ... The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without corroboration."

57. Further delving on the same issue, it is noted that in the case of Ganapathi and Anr. v. State of Tamil Nadu (2018) 5 SCC 549, this Court held that in several cases when only family members are present at the time of the incident and the case of the prosecution is based only on their evidence, Courts have to be cautious and meticulously evaluate the evidence in the process of trial.

58. It is thus settled that the evidence of the related witnesses have to be considered by applying discerning scrutiny. .....…"

58. On the evaluation of evidence led by the prosecution in this case and on the basis of discussions held above, we find that it would not be safe to rely upon the testimony of sole eye-witness, namely PW-4, to convict the accused appellants under Section 302, 506 IPC. The finding returned by the court below with regard to guilt of the accused appellants is, therefore, liable to be reversed.

59. We have also factored in the fact that accused appellants have remained in incarceration for over sixteen years and once a doubt is raised with regard to their implication it would not be safe to hold them guilty.

60. Accordingly, this appeal succeeds and is allowed. The impugned judgment and order dated 26.09.2014 is hereby set aside and the appellants are acquitted of the charges levelled against them. Since the appellants have already been released on bail by the Supreme Court, as such, their sureties and bonds shall stand discharged and they shall be set free, unless they are wanted in any other case, subject to compliance of section 437A Cr.P.C.

(2023) 6 ILRA 776
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Criminal Appeal No. 4499 of 2015

Ram Nayan & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
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Manu Sharma, Sri Nazrul Islam Jafri, Sri Pradeep Kumar Chaurasia, Sri Ram Awadh Maurya

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Criminal Law - Indian Penal Code, 1860 - Sections 147, 302/149 & 201 - Punishment for murder - Appeal against conviction - Life imprisonment - Juvenile Justice (Care and Protection of Children) Act, 2000 - Sections 2(l) - Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 12(3)(b) - Juvenile Justice Act, 1986 - Section 2(h) - Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 - Section 2(l) - Juvenile Justice (Care and Protection of Children) Act, 2015 - Sections 2(12), 2(13), 9, 94 (2), 111 - Juvenile Justice (Care and Protection of Children) Model Rules, 2016 - Rule 90 - Informant's son (deceased) had gone with one of appellant and not returned back - Missing report was lodged - Dead body was found on pointing of same accused - Charge-sheet submitted - Convicted - During pendency of appeal, appellant no.3 filed application - Plea of juvenility on date of incident - Report was sought - Declared juvenile - Held, no illegality committed by JJB in conducting enquiry, followed due procedure, as said order was never challenged either by St. or by informant and became final - No substantial difference exist between provisions of Act, 2000 and Act, 2015, except that Act, 2015 takes cares of crime committed by children in age group of 16-18 years age - Said provisions applicable to accused irrespective of fact that claim was made after attaining age of 18 years and at a late stage of trial, inquiry, revision, appeal in respect of juvenile in conflict with law in any court. (Para 3, 4, 5, 27, 33, 35, 37)

Criminal Appeal partly allowed. (E-13)

List of Cases cited:

1. Pratap Singh Vs St. of Jharkhand & anr. reported in (2005) 3 SCC 551

2. Dharambir Vs St. (NCT of Delhi) & anr. reported in (2010) 5 SCC 344, (Para 10 to 15)

3. Arnit Das Vs St. of Bihar reported in (2000) 5 SCC 488

4. Umesh Chandra Vs St. of Raj. reported in (1982) 2 SCC 202

5. Vinod Katara Vs St. of U. P. reported in (2022) SCC Online SC 1204, (Para 26)

6. Sanjay Patel Vs St. of U.P. reported in 2022 SCC Online SC 450

7. Vaneet Kumar Gupta @ Dharminder Vs St. of Punjab reported in (2009) 17 SCC 587

8. LakhanLal Vs St. of Bihar reported in (2011) 2 SCC 251

9. Amit Singh Vs St. of Mah. & anr. reported in (2011) 13 SCC 744

10. Kalu @ Amit Vs St. of Har.reported in (2012) 3 SCC (Crl) 761

11. Babla @ Dinesh Vs St. of Uttarakhand reported in (2012) 3 SCC (Crl) 1067

(Delivered by Hon'ble Hon'ble Manish Kumar Nigam, J.)

1. Heard learned Counsel for the appellant no.3, Suresh @ Suttur and learned A.G.A. for the State.

2. Present criminal appeal has been filed by appellant no.1-Ram Nayan, appellant no.2-Chetman, appellant no.3-Suresh @ Suttur, appellant no.4-Ram Surat and appellant no.5-Raghav Sharan against the judgment and order dated 30.9.2015 passed by Addl. Sessions Judge, Court no.2, Maharajganj in S.T. No.31 of 1998 (State Vs. Suresh @ Suttur & others) connected with S.T. No.40 of 2000 (State

Vs. Raghav Sharan), whereby the appellants have been convicted and sentenced for life imprisonment under Section 302/149, for imprisonment of two years under Section 147 IPC and for imprisonment of three years under Section 201 I.P.C. Fine has also been imposed on the appellants.

3. A First Information Report was lodged in Case Crime No.63 of 1993 under Section 147, 302, 201 I.P.C., P.S.-Kotwali, District-Maharajganj against the Suresh @ Suttur, Chetman s/o Deep Narain, Ram Surat s/o Chetman, Ram Nayan s/o Chauthi Kewat, Raghav Sharan S/o Chetman. As per the prosecution story on 5.3.1993 accused Suresh @ Suttur Yadav had taken Udai Raj the son of first informant from his house and since then Udai Raj had not come back. Missing report was lodged with the police. Suresh @ Suttur Yadav was arrested and on his pointing out dead body of the deceased Udai Raj was recovered by the Police. After investigation charge-sheet was submitted by Police against appellants. However, no charge-sheet was submitted against Raghav Sharan. Initially the accused Raghav Sharan could not be arrested by Police as he was absconding after the incident. Later on when accused Raghav Sharan was arrested, a supplementary charge-sheet was filed against Raghav Sharan by the Police. Learned Magistrate thereafter vide orders dated 11.8.1998 and 2.8.2000 committed the case to trial before the Sessions Court. Sessions Trial No.31 of 1998 (State Vs. Suresh @ Suttur and others) and S.T. No.40 of 2000 (State Vs. Raghav Sharan) were tried together by the sessions court and all the accused-appellants were convicted and sentenced by the sessions Judge vide judgment and order dated 30.9.2015.

4. During the pendency of the present appeal, an application being Application No.91499 of 2016 was filed by appellant no.3 Suresh @ Suttur praying that an inquiry in respect of the juvenility of the appellant no.3, who was a minor on the alleged date of crime i.e. 05.03.1993 be undergone and necessary orders be passed in this regard. The claim of the juvenility was made on the ground that the appellant no.3, Suresh @ Suttur was admitted in Class 2nd on 05.09.1983 and has passed Class-5th on 25.4.1987. The date of birth mentioned in his mark-sheet was 18.3.1977 which was issued by the Principal, Ram Aadhar Junior High School Gaushala, Maharajganj. Applicant/appellant no.3 relied upon the transfer certificate issued by the institution and the other documents mentioned in the affidavit filed in support of the application for consideration of his juvenility. This Court vide order dated 10.10.2017 directed the District Judge, Maharajganj to get an inquiry conducted from the concerned Juvenile Justice Board regarding the plea of juvenility made by the appellant no.3 Suresh @ Suttur and asked him to submit his report within two months from the date of order. On 08.12.2017, a report was submitted by the Juvenile Justice Board, Maharajganj to the effect that on the date of incident i.e. 5.3.1993, appellant no.3, Suresh @ Suttur was 15 years 11 months and 17 days old. The aforesaid report along with the documents considered by the Juvenile Justice Board, Maharajganj were placed on record in the present appeal. By order dated 31.10.2019, learned A.G.A. was granted time to file counter affidavit to the report of Juvenile Justice Board, Maharajganj within four weeks'. On 02.11.2020, an affidavit was filed by learned A.G.A. mentioning therein that as per instructions provided by Station House Officer in writing, no appeal has

been preferred to assail the order dated 8.12.2017 passed by Juvenile Justice Board, Maharajganj.

5. Today when the appeal was taken up, the Counsel for the appellant no.3 relying upon the report of the Juvenile Justice Board, Maharajganj dated 8.12.2017 submitted that on the date of alleged incident i.e. 5.3.1993, the appellant no.3, Suresh @ Suttur was aged about 15 years 11 months and 17 days i.e. appellant no.3 was a juvenile who was in conflict with law on the relevant date. Counsel for the appellant no.3 submitted that appellant no.3 may be released forthwith. It has been submitted by learned Counsel for the appellant no.3 that the bail application of appellant no.3 was rejected by this Court vide order dated 8.4.2016 and has further submitted that the appellant no.3 Suresh @ Suttur was taken in judicial custody on 29.9.2015 and since then, the appellant no.3 has remained in jail for about 8 years. It has been further contended that in view of Section 18(g) of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred as Act of 2015), a child can be sent to a special home for a period not exceeding three years and as the appellant has remained in jail for about 8 years, the appellant is entitled to be released forthwith.

6. Per contra, learned A.G.A. submitted that for the first time, the appellant has raised the claim of juvenility before this Court in the present appeal. Prior to this i.e. during investigation or during his trial, appellant no.3 never claimed himself to be a juvenile.

7. It has been further contended by learned A.G.A. that the alleged incident is dated 5.3.1993 and on the aforesaid date, the provisions of Juvenile Justice Act, 1986 (hereinafter referred as Act of 1986) were in force. Act of 1986 was repealed by Section 69 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred as Act of 2000) which came in force on 1.4.2001. The learned A.G.A. relied upon the Constitutional Bench judgment of the Hon'ble Apex Court in case of ***Pratap Singh Vs. State of Jharkhand and another*** reported in ***(2005) 3 SCC 551*** wherein, it has been held by the Hon'ble Apex Court that the Act of 2000 would be applicable in a pending proceeding in any court/authority initiated under the 1986 Act and was pending when the Act of 2000 came in force and the person had not completed 18 years of age as on 1.4.2001. It has been further contended by the learned A.G.A. that admittedly on 1.4.2001, the appellant no.3 had completed 18 years of age and as such, the provisions of Act of 2000 would not be applicable. It has been further contended that Act of 1986 had been repealed and the appellant had not raised any claim of his juvenility during the period when the Act of 1986 was in force and therefore the same cannot be considered in view of the judgment of the Apex Court in case of Pratap Singh (supra). Learned A.G.A. further contended that the inquiry made by the Juvenile Justice Board, Maharajganj was not in accordance with law and the same cannot be relied upon.

8. In reply, learned Counsel for the appellant contended that after the case of Pratap Singh (Supra), certain amendments were made in the Act of 2000 by the Act No.33 of 2006. Section 2(l) defining juvenile in conflict of law was also amended by Act No.33 of 2006 further Section 7(A) was added in the Act of 2000 the proviso to Section 16 of Act of 2000

was also amended by Section 13 of Act No. 33 of 2006.

9. Counsel for the appellant further contended that the Hon'ble Apex Court in Case of ***Dharambir Vs. State (NCT of Delhi) and another*** reported in (2010) 5 SCC 344, has held that all persons who were below the age of eighteen years on the date of commission of the offence even prior to 1.4.2001 would be treated as juveniles even if the claim of juvenile, is raised after they have attained the age of eighteen years, on or before the date of commencement of the Act of 2000 and were undergoing sentences upon being convicted.

10. We have considered the rival submissions. The striking distinction between the Act of 1986 and Act of 2000 is with regard to the definition of juvenile. Section 2(h) of Act of 1986 defines juvenile as under :-

"2(h) juvenile means a boy who has not attend the age of 16 years or a girl who has not attend the age of 18 years"

Section 2(k) of Act of 2000 defines juvenile as under :-

" 2(K) Juvenile or child means a person who has not completed 18 years of age."

11. Thus the distinction between the Act of 1986 and Act of 2000 is that under the Act of 1986, juvenile means a male juvenile who has not attained the age of 16 years and a female juvenile who has not attained the age of 18 years. In the Act of 2000, no distinction have been drawn between the male and female juvenile. The limit of 16 years in Act of 1986 has been raised to 18 years in Act of 2000. In Act of 2000, wherever the word "juvenile" appears the same will now have been taken to mean a person who has not completed 18 years of age.

12. In Pratap Singh (supra), a reference was made by an order dated 7.2.2003 noticing the conflicting views in case of ***Arnit Das Vs. State of Bihar*** reported in ***(2000) 5 SCC 488*** and ***Umesh Chandra Vs. State of Rajasthan*** reported in ***(1982) 2 SCC 202***, the Constitutional Bench framed two questions, which are as under :-

(a) Whether the date of occurrence will be the reckoning date for determining the age of alleged offender as juvenile offender or the date when he is produced in court/competent authority.

(b) Whether the Act of 2000 will be applicable in the case a proceeding is initiated under the 1986 Act and pending when the Act of 2000 was enforced w.e.f. 1.4.2001.

13. The Hon'ble Apex Court after considering the provisions of Act of 1986 as well as the provisions of Act of 2000 answered the question as under :-

The 2000 Act would be applicable in a pending proceeding in any Court or authority initiated under 1986 Act and is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 1.4.2001.

Prior to amendment, the definition of Juvenile in conflict with law under the Act of 2000 was as under :-

"Section 2(l) (unamended):- *Juvenile in conflict with law" means a juvenile who is alleged to have committed an offence.*

14. After the amendment by Act No. 33 of 2006 the definition of juvenile in conflict with law as in the amended Section 2(l) is as under:-

" 2(l) (after amendment), " Juvenile in conflict with law" means juvenile who is alleged to have committed an offence and has not completed 18 years of age as on the date of commission of such offence."

15. In Dharambir Vs. State (NCT of Delhi) and another (supra), the Apex Court in para 10, 11, 12, 13, 14 and 15 (at pages 346-348) held as under :-

10. Section 20 of the Act of 2000, the pivotal provision, as amended, reads as follows:

"20. Special provision in respect of pending cases.-- Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence:

Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

11. It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of Clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1st April, 2001, when the Act of 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed.

12. Clause (l) of Section 2 of the Act of 2000 provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Section 20 also enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to

the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Act of 2000.

13. At this juncture, it will be profitable to take note of Section 7A, inserted in the Act of 2000 with effect from 22nd August, 2006. It reads as follows:

"7A. Procedure to be followed when claim of juvenility is raised before any court.-- (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act (2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."

14. Proviso to sub-section (1) of Section 7A contemplates that a claim of juvenility can be raised before any court and has to be recognised at any stage even after disposal of the case and such claim is required to be determined in terms of the provisions contained in the Act of 2000 and the rules framed thereunder, even if the juvenile has ceased to be so on or before the date of the commencement of the Act of 2000. The effect of the proviso is that a juvenile who had not completed eighteen years of age on the date of commission of the offence would also be entitled to the benefit of the Act of 2000 as if the provisions of Section 2(k) of the said Act, which defines "juvenile" or "child" to mean a person who has not completed eighteenth year of age, had always been in existence even during the operation of the 1986 Act.

"15. It is, thus, manifest from a conjoint reading of Section 2(k), 2(l), 7A, 20 and 49 of the Act of 2000, read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 that all persons who were below the age of eighteen years on the date of commission of the offence even prior to 1st April, 2001 would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of eighteen years on or before the date of the commencement of the Act of 2000 and were undergoing sentences upon being convicted. In the view we have taken, we are fortified by the dictum of this Court in a recent decision in Hari Ram Vs. State of Rajasthan."

16. Recently the Hon'ble Apex Court in case of ***Vinod Katara Vs. State of Uttar Pradesh*** reported in ***(2022) SCC Online SC 1204*** has held in Paragraph 26 which is quoted as under:-

26. It is thus well settled that in terms of Section 20 of 2000, in all cases, where the accused was above 16 years, below 18 years of age on the date of occurrence, the proceedings pending in the Court would continue and be taken to the

logical end subject to an exception that upon finding the juvenile to be guilty, the Court would not pass an order of sentence against him but the juvenile would be referred to the Board for appropriate orders under the 2000 Act.

17. Further learned Counsel for appellant invited our attention toward definition of "child" and "child in conflict with law" as defined in Act of 2015 and contended that the definition "juvenile" and "juvenile in conflict with law" as defined in Act of 2000 are pari materia.

18. Section 2(12) of the Act of 2015 defines "child" as under:-

2(12). "Child" means a person who has not completed eighteen years of age.

Section 2(13) of Act of 2015 defines "child in conflict with law" as under:-

2(13). "Child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of offence."

19. We are thus of the considered view that the contention of learned A.G.A. that as the appellant no.3 has completed 18 years of age on the date of enforcement i.e. 1.4.2001 of Act of 2000 will not be entitled for the benefit of Act of 2000 is not tenable as after the amendment of definition of juvenile in conflict with law as provided under Section 2(l) of Act of 2000 by Act No. 33 of 2006 and in view of judgment of Apex Court in Dharambir Vs. State (NCT of Delhi) and another (supra) and Vinod Katara Vs. State of Uttar Pradesh (supra) , the juvenility of accused is to be determined on the date of offence, and in case, the accused is juvenile on the date of offence, he will be entitled for protection of 2000 Act. Judgment in case of Pratap Singh (supra) will not come in way after the amendment of definition of "juvenile in conflict with law" by Act No.33 of 2006 and subsequent pronouncement of Hon'ble Apex Court referred above. Further in the light of definition of "child" and "child in conflict with law" as provided in Act of 2015, there is no change in legal position as the material date for determining the juvenility, it is the date of commission of offence and not the date of commencement of Act of 2000 as held in Pratap Singh (supra).

20. Coming to the facts of the present case, the Juvenile Justice Board, Maharajganj has found appellant no.3 to be aged of 15 years 11 months and 17 days on the date of occurrence i.e. 5.3.1993, therefore, even as per the provisions under the Act of 1986, the appellant no.3 was juvenile and after the commencement Act of 2000 or Act of 2015, the juvenility of a person is to be tested on the date of occurrence and juvenile means a person who has not completed the age of 18 years on the date of occurrence. Thus on both counts appellant no.3 was a juvenile as per the report of Juvenile Justice Board, Maharajganj dated 8.12.2017.

21. Contention of learned A.G.A. for the State that the enquiry made by the Juvenile Justice Board, Maharajganj was not in accordance with law, had to be rejected for the reason that neither the State nor the informant had filed any appeal against the order dated 8.12.2017 passed by Juvenile Justice Board, Maharajganj declaring appellant no.3 as juvenile as on

5.3.1993 i.e. date of occurrence and as such the order dated 8.12.2017 passed by the Juvenile Justice Board, Maharajganj declaring appellant no.3 to be juvenile became final.

22. Learned Counsel for the appellant drew our attention towards procedure to be followed for determination of age provided under Act of 2000 and Act of 2015.

23. The procedure to be followed for the determination of age is provided under Rule 12(3)(b) of Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short 2007 Rules).

"12. Procedure to be followed in determination of age.—*(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—*

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

24. The Act of 2000 stands repealed by the Act of 2015. The procedure for determining the age is now part of Section 94 of the Act of 2015 which was earlier provided under the abovementioned Rule 12 of the Rules.

25. Section 94 (2) of Juvenile Justice (Care and Protection of Children) Act, 2015 is quoted as under :-

94.Presumption and determination of age *- (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.*

(2) In case, the Committee or the Board has reasonable grounds for doubt

regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

26. We have perused the report of the Juvenile Justice Board, Maharajganj dated 8.12.2017. The Board considered the relevant documentary evidence produced before it regarding the age of appellant no.3 and also considered the oral evidence of Smt. Sudha Bala Singh, Principal of the Ram Aadhar Junior High School Gaushala, Maharajganj who was also cross-examined by the State and came to the conclusion, in absence of any evidence to the contrary, that the appellant no.3 was aged 15 years 11 months 17 days on the date of incident i.e. 5.3.1993. The Board has considered the relevant material as referred in Rule 12(3) of 2007 Rules as well as Section 94 of thee 2015 Act and has not committed any illegality in determining the age of the accused.

27. We therefore are of the opinion that no illegality had been committed by the Juvenile Justice Board, Maharajganj in conducting an enquiry and declaring appellant no.3 as juvenile after following the due procedure as provided under the Act, coupled with the fact that the aforesaid order of the Juvenile Justice Board was never challenged either by the State or by the informant and has become final.

28. It has been lastly contended by learned A.G.A. that as the appellant no.3 never claimed the juvenility during the course of investigation or during the trial before the Sessions Court and for the first time claimed the same in the present appeal by means of an application dated 16.3.2016. On the date i.e. 16.3.2016 when the application was moved by the appellant the Juvenile Justice (Care and Protection of Children) Act, 2000 was also repealed by Section 111 of 2015 Act, and therefore, the claim of juvenility cannot be decided under the Act of 2000 as had been done by the Juvenile Justice Board, Maharajganj.

29. Per contra learned Counsel for the appellant contended that in view of proviso to Sub-section (2) of Section 9 of Act of 2015, claim of juvenility could be raised before any court and it should be recognised at any stage even after final disposal of the case, and such a claim

should be determined in accordance with provisions contained under the Act of 2015 and rules made these under even if the person ceased to be a child on or before the date of commencement of Act of 2015.

30. Section (9) of the Act of 2015 is quoted as under :-

9. Procedure to be followed by a Magistrate who has not been empowered under this Act.- *(1) When a Magistrate, not empowered to exercise the powers of the Board under this Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.*

(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:

Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act.

(3) If the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

(4) In case a person under this section is required to be kept in protective custody, while the person's claim of being a child is being inquired into, such person may be placed, in the intervening period in a place of safety.

31. Learned Counsel for appellant drew our attention towards Rule 90 of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 and contended that no child should be denied the benefits of the Act and the rules made thereunder and the benefit should be available to all the persons who were children at the time of commission of the offence even if they ceased to be children during the pendency of inquiry or trial.

32. Rule 90 of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 is quoted as under :-

*"**90. Pending Cases**.- (1) No child shall be denied the benefits of the Act and the rules made thereunder.*

(2) The benefits referred to in sub-rule (1) shall be made available to all persons who were children at the time of the commission of the offence, even if they ceased to be children during the pendency of the inquiry or trial.

(3) While computing the period of detention or stay or sentence of a child in conflict with law, all such period which the

child had already spent in custody, detention, stay or sentence of imprisonment shall be counted as a part of the period of stay or detention or sentence of imprisonment contained in the final order of the court or the Board."

33. The submission of learned A.G.A. as noted in the preceding paragraph prima-facie appears to be very attractive but in fact has no substance. Act of 2000 was repealed by Section 111 of the Act of 2015 w.e.f 15.1.2016. Section 111 of the Act of 2015 is quoted as under :-

"111. Repeal and savings.—*(1) The Juvenile Justice Juvenile Justice (Care and Protection of Children) Act, 2000 is hereby repealed.*

(2) Notwithstanding such repeal, anything done or any action taken under the said Act shall be deemed to have been done or taken under the corresponding provisions of this Act."

34. Sub-section (2) of Section 111 of Act of 2015 postulates that any thing done or any action taken under Act of 2000 shall be deemed to have been done or taken under the corresponding provision of Act of 2015.

35. Having heard the arguments of respective Counsel, we are of the opinion that there is no substantial difference between the provisions of Act 2000 and Act of 2015 except that Act of 2015 takes cares of crime committed by children in the age group of 16-18 years of age.

36. The Hon'ble Apex Court in case of ***Sanjay Patel Vs State of U.P***. reported in ***2022 SCC Online SC 450*** has entertained plea of juvenility of accused even after dismissal of Special Leave Petition by the Supreme Court.

37. Thus in view of provisions of Act of 1986, Act of 2000, Act of 2015 and the judgments of Hon'ble Apex Court referred above, we are of the considered opinion that if the accused was juvenile in conflict with law i.e. below the age of 18 years on the date of incident the protection of Act of 2000 and Act of 2015 would be applicable to accused irrespective of the fact that claim was made after attaining the age of 18 years and was made at a late stage of trial/inquiry or even at the stage of trial, revision, appeal or any other criminal proceedings in respect of juvenile in conflict with law in any court.

38. In the present case, as evident from the record and submissions raised by the learned Counsel appearing for appellant no.3 has already undergone about 8 years imprisonment. As we have already held that the appellant no.3 was juvenile in conflict with the law on the date of occurrence i.e. 3.5.1993, the appellant is entitled to the benefit of Act of 2015.

39. Now, since the appellant no.3 was a juvenile on the date of incident and no argument has been advanced about conviction of the accused-appellant no.3 for the aforesaid offence, therefore, this Court has to take into consideration provisions of Section 18 of Act of 2015 to pass order in respect of appellant no.3 (juvenile in conflict with law). If the submission raised by the learned Counsel for the appellant as well as the learned A.G.A are taken into consideration, the appellant no.3 declared juvenile in conflict with the law under the Act of 2015 can be sent to special home for a maximum period of 3 years. At this juncture it would be

appropriate to look into the ratio laid down by Apex Court while dealing with similar situation like in this case in hand.

40. In ***Vaneet Kumar Gupta @ Dharminder Vs. State of Punjab*** reported in ***(2009) 17 SCC 587,*** accused, who was sentenced to life under Section 302 read with Section 149 I.P.C, was found to be a juvenile at the time of commission of the offence. The Apex Court noticing the fact that the accused is in jail for several years directed his release from the jail.

41. In ***LakhanLal Vs. State of Bihar*** reported in ***(2011) 2 SCC 251***, accused, who was sentenced to life under Section 302 read with Section 34 IPC was found to be a juvenile in conflict with law at the time of commission of offence. By the time his appeal reached to Supreme Court, he had crossed 40 years of age. He was in jail for more than 7 years. Under these circumstances, the Apex Court set aside his life sentence and directed his release.

42. In ***Amit Singh Vs. State of Maharashtra*** and another reported in ***(2011) 13 SCC 744,*** accused, was found guilty under Section 396, 506, 341, 379 read with Section 120-B I.PC. and Section 25(1-B), 5 read with Section 27 of Arms Act. Apart from other sentence of imprisonment, he was also sentenced to life and his sentences were confirmed by the Bombay High Court. The Supreme Court also dismissed his Special Leave Petition. Subsequently, he filed a writ petition before the Supreme Court under Article 32 of Constitution claiming juvenility which was considered and he was found to be eligible for the benefit under Act of 2000 and considering the fact that by that time he had been in jail for 12 years, the Hon'ble Apex Court held that as he was in jail for more than the maximum period for which a juvenile may be confined in a special home and directed his released from jail.

43. In ***Kalu @ Amit Vs. State of Haryana*** reported in ***(2012) 3 SCC (Crl) 761***, as the appellant was a juvenile in conflict with law within the meaning of Act of 2000 on the date when offence was committed and he was already in jail for 9 years and has also attained majority long back, Hon'ble Apex Court directed for release of the appellant from jail and also noticing Section 19 of Act of 2000 held that accused shall not incur any dis-qualification because of his conviction.

44. In ***Babla @ Dinesh Vs. State of Uttarakhand*** reported in ***(2012) 3 SCC (Crl) 1067***, the appellant was sentenced to life under Section 302 read with Section 149 IPC, and on the basis of the report of Sessions Judge, Hon'ble Apex Court accepted that the appellant was juvenile in conflict with the law on the date of commission of offence and since the appellant was in jail for more than three years out of the maximum period prescribed under Section 15 of Act of 2000, set aside his life sentenced and directed his immediate release from the jail.

45. In case of ***Sanjay Patel Vs. State of U.P. (supra)***, the Hon'ble Supreme Court has held as under :-

" In view of the categorical finding recorded in this case by the competent Juvenile Justice Board, which is based on documentary evidence, in view of sub-section 2 of Section 7A the appellant is required to be forwarded to the Juvenile Justice Board. Under Section 15 of the 2000 Act, the most stringent action which could have been taken against the

applicant, was of sending the applicant to a special home for a period of three years.

The certificate dated 1.8.2021, issued by Senior Suprintendent of the concerned jail at Lucknow, records that till 1.8.2021, the applicant has undergone the sentence for 17 years and 3 days. Therefore, now it will be unjust to send the applicant to the Juvenile Justice Board.

Therefore, we allow the application and direct that the applicant-Sanjay Patel accused no.2 in ST. No.28 of 2004 decided by learned Sessions Judge, Maharajganj shalll be forthwith set at liberty provided he is not required to be detained under any other order of the competent Court."

46. If the ratio laid down in the above authorities are taken into consideration and applied to the case in hand, no fruitful purpose would be served by remanding the matter to Juvenile Justice Board as applicant/appellant no.3 has already served out more than 7 years sentence. Moreover, he was aged about 15 years 11 months 17 days on 3.5.1993 and by now must have crossed the age of 45 years.

47. In view of discussions made hereinabove, the appeal is ***partly allowed*** in respect of appellant no.3, the judgment and order dated 30.9.2015 passed by Addl. Sessions Judge, Court no.2, Maharajganj in S.T. No.31 of 1998 (State Vs. Suresh @ Suttur and others) , so far as the appellant no.3 has been convicted for the offences under Section 302/149, 147, 201 IPC in Case Crime No.63 of 1993, P.S. Kotwali, District Maharajganj is confirmed. However, so far as punishment is concerned, the same is modified to the period already undergone by the appellant no.3. He shall be set at liberty forthwith if not wanted in any other case.

48. In view of Sub-section (1) of Section 24 of the Act of 2015, the appellant no.3 shall not incur any dis-qualification because of his conviction and period of sentence undergone by him.

(2023) 6 ILRA 789
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD 26.05.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE GAJENDRA KUMAR, J.

Jail Appeal No. 4769 of 2017

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

Counsel for the Appellant:
From Jail, Ms. Shweta Singh Rana

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

Criminal Law - Indian Penal Code, 1860 - Section 302 - Punishment for murder - Code of Criminal Procedure, 1973 - Sections 313 - Appeal against conviction - Life imprisonment - Circumstantial evidence - First informant submitted written report to Police Station, St.d that he was informed by villagers that one dead body of an unknown person was lying in field - In postmortem, cause of death was asphyxia as a result of strangulation - After investigation, charges framed - Other accused persons died during trial - Held, no eye witness to the occurrence - Only evidence against appellant was based on circumstantial evidence as set forth by PWs 1, 2 and 3, who are mother and sisters of deceased - Evidence of PWs 1, 2 and 3 inspired no

confidence against appellant - PW-1 submitted written report two weeks after disappearance of her son - Explanation regarding delay was not given - Links of circumstantial evidence are missing - Being younger brother of co-accused, already acquitted, has been implicated in case - No legal evidence available on record - No motive proved rather P.W.-1, 2, 3 and 6 have specifically St.d appellant had no enmity with deceased - Appellant has been implicated on basis of suspicion raised by co-accused. (Para 2, 4, 8, 10, 11, 25, 41)

Jail Appeal allowed. (E-13)

List of Cases cited:

1. Hanumant Vs The St. of M. P., AIR 1952 SC 343

2. Hukam Singh Vs St. of Raj., AIR 1977 SC 1063

3. Sharad Birdhichand Sarda Vs St. of Mah., AIR 1984 SC 1622

4. Ashok Kumar Chatterjee Vs St. of M. P., AIR 1989 SC 1890

5. C. Chenga Reddy & ors. Vs St. of Andhra Pradesh, 1996(10) SCC 193

6. Bodh Raj @ Bodha & ors. Vs St. of J.& K., 2002(8) SCC 45

7. Subramanya Vs St. of Karn., S.C.R. (2022) 14 S.C.R. 828

8. Pulen Phukan & ors. Vs St. of Assam, 2023 LiveLaw (SC) 265, (Para 13)

9. Pradeep Kumar Vs St. of Chhatisgarh, 2023 LiveLaw (SC) 239, (Para 24)

10. Narendrasinh Keshubhai Zala Vs St. of Guj., 2023 LiveLaw (SC) 22, (Para 8)

11. Guna Mahto Vs St. of Jharkhand, 2023 LiveLaw (SC) 197, (Para 16, 17)

12. Nikhil Chandra Mondal Vs St. of W. B., 2023 LiveLaw (SC) 171, (Para 11)

13. Indrajit Das Vs St. of Tripura, 2023 LiveLaw (SC) 152, (Para 10, 12, 15)

14. Jabir & ors. Vs The St. of Uttarakhand, 2023 LiveLaw (SC) 41, (Para 21)

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

1. This jail appeal has been filed by accused-appellant, Dileep through Superintendent of District Jail, Kannauj against impugned judgment and order dated 30.11.2016 passed by Smt. Preeti Srivastava, Additional District and Sessions Judge, Court No.2, Kannauj in Session Trial No.363 of 2010, (State v. Dileep and others), arising out of Case Crime No. 1020 of 2008, Police Station Kannauj, District Kannauj, under Sections 302 IPC. By impugned judgment and order, accused-appellant has been convicted and sentenced under Section 302 IPC for life imprisonment along-with fine of Rs.5,000/-. In the event of default of payment of fine, he has to undergo further two years simple Imprisonment.

2. Prosecution story, in brief, is that on 21.07.2008, first informant-Kishori Lal submitted a written report Ex.Ka-2 to the Police Station, Kannauj, stating therein that on 21.07.2008 at about 10:00 AM, he was informed by the villagers that one dead body of an unknown person was lying in the field of one Shovran Lal son of Pitam Singh, resident of Haibatpur Katra, Police Station Kannauj, District Kannauj.

3. PW-8, Sub Inspector, Rajbahadur Singh Chauhan, on the said information held inquest over the dead body of unknown person after nominating punch

witnesses and prepared inquest report, photo nash, challan nash and letter to C.M.O., fard report which are proved as Ex.Ka-6 Ex.Ka-7, Ex.Ka-8, Ex.Ka-9, Ex.Ka-10 respectively and other relevant papers thereto; sealed dead body and sent for postmortem, got prepared photographs of dead body. He also collected one towel, one shirt of deceased, one pants of light blue colour, one underwear, one set of plastic sleeper and prepared fard thereof.

4. PW-4, Dr. Nanhoomal, conducted postmortem over the dead body of unknown person aged about 25 years and found one ligature mark 32 x 4 cm around the neck as ante mortem injury. Doctor further opined that the cause of death was asphyxia as a result of strangulation on account of ante mortem ligature mark and three days prior to postmortem. He prepared postmortem report, proved and exhibited as Ex.Ka-4.

5. PW-9, Dayanand Singh, the then Inspector In-charge of Police Station Kannauj, District Kannauj, on 22.07.2008 under took investigation of case crime no.1020 of 2008, under Section 302 IPC and commenced investigation, recorded statement of witnesses, visited spot and prepared site plan Ex.Ka-11. On 28.07.2008 he tried to know about the deceased. He further recorded statement of PW-1 Smt. Munni Devi, PW-2 Smt. Suman; Rajesh, Smt. Sarojini and Babu Ram (not examined); arrested accused Mukesh @ Murari and Shera, recorded their statements and after completing entire formalities of investigation, submitted charge-sheet against Moolchand, Shera, Mukesh @ Murari and accused-appellant, Dileep. In his cross-examination he has stated that accused Moolchand had implicated accused Dileep to have been involved with him. No other accused had implicated accused Dileep.

6. On 05.08.2008, PW-1, Munni Devi submitted a written report Ex.Ka-1 in Police Station Kannauj stating that his son Sunder Lal was taken away by accused Mukesh @ Murari in the morning of 19.07.2008 from her house on the pretext of majdoori and since then he is missing. She came to know that a dead body of unknown person was found in the Village Haibatpur Katra and a prayer was made that she may be permitted to see the clothes of dead body, so as to know whereabouts of her son. She was shown photographs and clothes of deceased whereupon by which she recognized that dead body to be that of her son Sunder Lal. She further stated that Mukesh had taken away her son from the house and had murdered with his associates Shera, Moolchand and Dileep and in orde to remove the evidence they had thrown the dead body somewhere in Haibatpur, Katra. This was told by Moolchand to her married daughter Suman who informed her and this was told to the I.O. during the investigation. In her cross-examination, she had made an application against Mukesh, rest of the accused persons were implicated by the police on the confessional statement made by the accused Mukesh. My son was not taken away by Dileep but he was taken away by Mukesh. She further stated that she had not implicated Dileep in her statement given to the I.O. She further stated that she cannot say whether accused Dileep was implicated as accused truly or falsely.

7. After taking cognizance of the offences, case being exclusively triable by Court of Sessions was committed to Sessions Court, wherefrom it was transferred to Additional District and

Sessions Judge, Court No.2, Kannauj for disposal according to law.

8. Trial Court framed charges on 03.07.2012 against accused-appellant, under Section 302 IPC.

9. Accused-appellant denied the charge levelled against him, claimed false implication, pleaded not guilty and claimed trial.

10. Other accused persons, namely, Moolchand and Shere died during trial and their case has already been abated and another accused-appellant, Mukesh @ Murari has already been acquitted by a co-ordinate Bench of this Court vide order dated 11.09.2019.

11. In order to substantiate its case, prosecution examined as many as 9 witnesses namely Munni Devi as P.W.1, who is mother of the deceased, Suman as P.W.2 who is sister of the deceased, Gori as P.W.3, who is sister of the deceased, Dr. Nanhoomal as P.W.4, who conducted post-mortem of the deceased, Shyam Kumar as P.W.5, who is witness to the inquest report, Santosh as P.W.6, who identified the clothes etc. of the deceased, Farmood Ali Pundir as P.W.7, who is I.O. and submitted charge-sheet against the accused Dileep who was declared absconded, Rajbahadur Singh Chauhan as P.W.8 who prepared the inquest report of the deceased, Dayanand Singh, as P.W.9, the I.O. of the case. In documentary evidence prosecution has produced and proved, tahrir report by Munni Devi as Ex. Ka-1, tahrir report by Kishori Lal as Ex. Ka-2, fard regarding identification unknown deceased as Ex. Ka-3, post-mortem report of the deceased as Ex. Ka-4, Copy of G.D. as Ex. Ka-5, inquest report as Ex. Ka-6, photo nash as Ex. Ka-7, challan nash as Ex. Ka-8, letter to C.M.O. as Ex. Ka-9, fard regarding clothes and sleeper of the deceased as Ex. Ka-10 and charge-sheet etc. and other material exhibits. Subsequent to closure of prosecution evidence, statement of accused under Section 313 Cr.P.C. was recorded by Trial Court, explaining entire evidence and other incriminating circumstances. In the statement, accused-appellant gave an usual answer by submitting that entire story of prosecution was wrong; statement of witnesses are wrong and he desired to lead defense evidence. Further in response of question no.15, he stated that he is Balmiki by caste, a Cleaner (safai karmi) and he was implicated falsely in the present case by Police as he refused to do cleaning job for free, while he is doing a private job in Kanpur.

12. Trial Court, after hearing learned counsel for both the parties and considering entire evidence (oral and documentary) led by prosecution, found accused-appellant guilty of committing an offence of murder of Sunder Lal punishable under Section 302 IPC, convicted and sentenced, as stated above.

13. We have heard learned Amicus Curiae for appellant and learned AGA for State and gone through record with valuable assistance of learned counsel for parties.

14. Learned counsel for accused-appellant assailed impugned judgement and order of conviction and sentence, took us through the record and advanced following submissions :-

i. No body has seen accused-appellant committing murder of Sunder Lal.

ii. The statement of PWs 1, 2, 3 and 6 proves that appellant is not involved in the murder of the deceased.

iii. There is no other evidence direct or circumstantial to connect accused-appellant with the present crime.

iv. There is no motive to accused-appellant to commit murder of Sunder Lal.

v. Main accused Mukesh @ Murari has already been acquitted by a co-ordinate Bench of this Court vide order dated 11.09.2019.

v. As per prosecution case, dead body of Sunder Lal was allegedly lying in the field of one Shovran Lal resident of Haibatpur Katra, Police Station Kannauj. There is no missing report of deceased. Body of deceased was identified after two weeks from his murder by PW-1 and other witnesses on the basis of photographs and his clothes along-with other articles.

vi. There is no complete chain of circumstantial evidence leading to guilt of accused-appellant.

vii. There are major contradictions in the statements of witnesses rendering prosecution case doubtful and unreliable.

viii. Prosecution failed to establish its case beyond reasonable doubtful and accused-appellant is entitled to the benefit of doubt.

15. Learned AGA opposed the submissions aforesaid and submitted that there is no reason to prosecution to falsely implicate or connect accused-appellant with the present crime like murder; deceased Sunder Lal was identified by her mother and other witnesses by seeing his clothes and other articles; accused-appellant has not offered any proper explanation and is involved in committing the aforesaid offence; hence Trial Court has rightly convicted accused-appellant.

16. Although murder of Sunder Lal could not be disputed from the side of defence but according to his Advocate for accused-appellant, he is not responsible for the death of Sunder Lal. Evidence of PW-8 S.I., Rajbahadur Singh Chauhan and PW-4 Dr. Nanhoomal established that dead body of unknown person, later on identified as of Sunder Lal was found in the field of one Shovran resident of Haibatpur Katra and he was murdered by some one by strangulation and ante mortem ligature mark was found on his neck.

17. Thus, the only question remains for consideration is "whether accused-appellant has committed murder of Sunder Lal or not and Trial Court has rightly convicted him as stated above or not?"

18. It would be appropriate for us to consider, briefly, statements of witnesses of prosecution as well as the rival submissions advanced by learned counsel for the parties.

19. PW-1 Munni Devi deposed that on the fateful day at about 08:00 AM, she was present in her house along-with her daughter Gauri and her son Sunder Lal; co-accused Mukesh, who is the elder brother of the accused-appellant (Dileep) came and took her son away Sunder Lal on the pretext of job (majdoori); when her son refused to go with him, co-accused (Mukesh) insisted and assured to come after some time and co-accused (Mukesh) and her son went together; thereafter

deceased did not come back to his house; in the morning, she contacted with co-accused (Mukesh) and asked about her son Sunder Lal (deceased), who answered that he left him (deceased) at near Phoolmati Mandir; co-accused (Mukesh) disappeared thereafter; after three days, she came to know that one dead body was found in the field in Haibatpur Katra; she identified dead body as her son Sunder Lal in Police Station on seeing photographs and his clothes; and she proved the Tahrir as EX. Ka-1. She further stated that her married daughter Suman told her, who was informed by co-accued, Moolchand that Mukesh along with his associates, Shera ,Moolchand and Dileep committed murder of her son and in order to remove evidence the dead body was thrown, somewhere in Haibatpur Katra. She admitted in her cross-examination that there was no fight (enmity) between my son and Dileep. She submitted an application only against Mukesh, rest of the accused persons were implicated by police on the confessional statement made by Mukesh. She further stated that accused Dileep had not taken away her son but it was Mukesh who had taken away her son Sunder Lal. She further admitted that she had not told the I.O., the name of Mukesh. She can not say whether Dileep has been implicated truly or falsely.

20. PW-2, Smt. Suman, sister of deceased Sunder Lal, deposed that she was living along-with her husband and children in the house of her mother; deceased Sunder Lal was her brother; on the fateful day at about 07:30 AM, co-accused (Mukesh) took his brother on the pretext of job (majdoori) in her presence; at that time her mother, sister Gauri and Sita were also present in the house; when her brother Sunder Lal did not return to her house in the evening, her mother went to the house of co-accused (Mukesh) but neither he, co-accused (Mukesh) nor his brother (Sunder Lal) was found there; third day when she came to Saraimeer, she saw co-accused Moolchand near water tank and he told her how Mukesh and Shera murdered Sunder Lal and threated her. About 15 or 16 days, after the incident, she came to know that a dead body of unknown person was found in Haibatpur Katra, then she, her sister Gauri and her mother went to Police Station along-with Santosh and Babu, and seeing the photographs and clothes of her brother; they identified it to be that of deceased Sunder Lal. She further stated that Dileep, the accused present in court had not taken away her brother from the house nor to her knowledge, he is involved in the murder. In her cross-examination she has admitted that Dileep has not committed her brother Sunder's murder. Dileep had no enmity with Sunder.

21. PW-3, Gauri, happens to be sister of deceased, deposed that on the day of incident at about 08:00 a.m., she (Gauri), her mother (PW-1 Munni Devi) and deceased (Sunder Lal) were in the house; co-accused (Mukesh) came to her house and took deceased away with him on the pretext of job (majdoori); when he did not come back, she and her mother searched for him every where but after a drastic search for him deceased was not found; in the same night and next morning, he asked co-accused (Mukesh) about his brother but he answered that he had left deceased at near Phoolmati Mandir; three days after, she came to know that a dead body was found in Haibatpur Katra, she went to Police Station and saw photographs, and Jeans pants, green shirt and black sleeper of her brother and recognized them to be that of his brother Sunder Lal; Police told him that legs of body were tied with one towel

which was shown to her, and she recognized it to be that of Mukesh. She further stated that Suman her sister told her and the family that Moolchand confessed that Mukesh and Shera committed murder of Sunder Lal and in order to remove evidence the dead body was thrown somewhere in field near Haibatpur Katra. She admitted that Dileep the accused present in court ,has not taken away her brother Sunder Lal from the house and to the best of her knowledge. Accused Dileep is not involved in murder of her brother. In cross-examination she has admitted that her brother Sunder Lal had no enmity with Dileep and he has not murdered her brother.

22. P.W. 6, Santosh who belongs to the neighbourhood of the deceased Sundar Lal. He has also identified the clothes that of Sundar Lal at police station along with deceased's mother and sisters. In cross-examination he has admitted that Sundar Lal had never been seen with Dileep. Dileep had no enmity or fight with Sundar Lal. Dileep has not murdered Sundar Lal to the best of his knowledge Dileep is innocent.

23. PWs 1, 2 and 3 are the witnesses of last seen, who have seen the deceased last in the company of co-accused (Mukesh) and being the younger brother, present accused-appellant- Dileep has been implicated in the present case and even except for in statement of co-accused, Moolchand, no other co-accused person and witness has implicated the name of the present appellant Dileep regarding involvement in the aforesaid crime. P.W.9, the I.O. has admitted in his cross-examination that there is no other evidence available on record so as to connect the accused-appellant with the present crime except for the confessional statement of the co-accused Moolchand. From the record, it is apparent that the only evidence that has been against the accused Mukesh is that of the circumstances of last seen together with the deceased Sundar Lal and Mukesh had taken away the deceased Sundar Lal on the pretext of job (majdoori), interestingly Mukesh has already been acquitted by a co-ordinate Bench of this Court vide order dated 11.09.2019 in Jail Appeal No.4771 of 2017.

24. In a case, which rests on circumstantial evidence, law postulates, twin requirements to be satisfied. First, every link in chain of circumstances, necessary to establish the guilt of accused, must be established by prosecution beyond reasonable doubt; and second, all circumstances must be consistent only with guilt of accused.

25. In the case at hand there is no eye witness to the occurrence and case of prosecution rests on circumstantial evidence. There cannot be any dispute as to the well settled proposition of law that the circumstances from which the conclusion of guilt is to be drawn "must or should be" and not merely "may be" fully established. The facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explicable through any other hypothesis except that the accused was guilty. Moreover, the circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused.

26. In **Hanumant v. The State of Madhya Pradesh, AIR 1952 SC 343**, as

long back as in 1952, Hon'ble Mahajan, J. expounded various concomitant of proof of a case based purely on circumstantial evidence and said:

"... circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved..... it must be such as to show that within all human probability the act must have been done by the accused."

27. In **Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063,** Court said, where a case rests clearly on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of accused or guilt of any other person.

28. In **Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622**, Court while dealing with a case based on circumstantial evidence, held, that onus is on prosecution to prove that chain is complete. Infirmity or lacuna, in prosecution, cannot be cured by false defence or plea. Conditions precedent before conviction, based on circumstantial evidence, must be fully established. Court described following condition precedent :-

"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

29. In **Ashok Kumar Chatterjee v. State of Madhya Pradesh, AIR 1989 SC 1890,** Court said:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests :-

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively; should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and,

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

30. In **C. Chenga Reddy and Others v. State of Andhra Pradesh, 1996(10) SCC 193,** Court said:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

31. In B**odh Raj @ Bodha and Ors. v. State of Jammu and Kashmir, 2002(8) SCC 45,** Court quoted from Sir Alfred Wills, "Wills' Circumstantial Evidence" (Chapter VI) and in para 15 of judgment said:

"(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

(2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

(3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;

(4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt,

(5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."

32. In **SUBRAMANYA v. STATE OF KARNATAKA , S.C.R. [2022] 14 S.C.R. 828** the Apex Court recently observed and held :-

"PRINCIPLES GOVERNING APPRECIATION OF CIRCUMSTANTIAL EVIDENCE"

*47. A three-Judge Bench of this Court in Sh**arad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116,** held as under:*

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 SUBRAMANYA v. STATE OF KARNATAKA [J. B. PARDIWALA, J.] A B C D E F G H 860 SUPREME COURT REPORTS [2022] 14 S.C.R. Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions upto-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] : It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of

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

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the following observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047] Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict A B C D E F G H 861 and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

48. In an Essay on the Principles of Circumstantial Evidence by William Wills by T. and J.W. Johnson and Co. 1872, it has been explained as under: "In matters of direct testimony, if credence be given to the relators, the act of hearing and the act of belief, though really not so, seem to be contemporaneous. But the case is very different when we have to determine upon circumstantial evidence, the judgment in respect of which is essentially inferential. There is no apparent necessary connection between the facts and the inference; the facts may be true, and the inference erroneous, and it is only by comparison with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions. ?· The term PRESUMPTIVE is frequently used as synonymous with CIRCUMSTANTIAL EVIDENCE; but it is not so used with strict accuracy, The word" presumption," ex vi termini, imports an inference from facts; and the adjunct "presumptive," as SUBRAMANYA v. STATE OF KARNATAKA [J. B. PARDIWALA, J.] A B C D E F G H 862 SUPREME COURT REPORTS [2022] 14

S.C.R. applied to evidentiary facts, implies the certainty of some relation between the facts and the inference. Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent, and not real; and even when the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ, therefore, as genus and species. The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the reductio ad absurdum."

49. Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused."

33 . In **Pulen Phukan & Ors. v. State of Assam, 2023 LiveLaw (SC) 265** the Apex Court observing about the duty of Investigating Officer and the trial Court regarding the just and fair conclusion has held as under :-

"13. The job of the prosecution is not to accept the complainant's version as Gospel Truth and proceed in that direction but the investigation must be made in a fair and transparent manner and must ascertain the truth. The evidence collected during investigation should then be analysed by the Investigating Officer and accordingly a report under Section 173(2) of the CrPC should be submitted. Further, the duty of the Trial Court is to carefully scrutinise the evidence, try to find out the truth on the basis of evidence led. Wherever necessary the Trial Court may itself make further inquiry on its own with regard to facts and circumstances which may create doubt in the minds of the Court during trial. If the investigation is unfair and tainted then it is the duty of the Trial Court to get the clarifications on all the aspects which may surface or may be reflected by the evidence so that it may arrive at a just and fair conclusion. If the Trial Court fails to exercise this power and discretion vested in it then the judgment of the Trial Court may be said to be vitiated."

34. In **Pradeep Kumar v. State of Chhatisgarh, 2023 LiveLaw (SC) 239** the Apex Court laying down the principle regarding the appreciation of circumstantial evidence has held as under :-

"24. It is important to note that the cardinal principles in the administration of criminal justice in cases where heavy reliance is placed on circumstantial evidence, is that where two views are possible, one pointing to the guilt of the accused and the other towards his innocence, the one which is favourable to

the accused must be adopted. [Kali Ram v. State of H.P. (1973) 2 SCC 808]."

35. In **Narendrasinh Keshubhai Zala v. State of Gujarat, 2023 LiveLaw (SC) 227** the Apex Court laying down the principle regarding the proof in case of circumstantial evidence has held as under :-

"8. It is a settled principle of law that doubt cannot replace proof. Suspicion, howsoever great it may be, is no substitute of proof in criminal jurisprudence [Jagga Singh v. State of Punjab, 1994 Supp (3) SCC 463]."

36. In **Guna Mahto v. State of Jharkhand, 2023 LiveLaw (SC) 197** the Apex Court laying down the principle regarding the duty of the Court that miscarriage of justice should be avoided has held as under :-

"16.We may reiterate that, suspicion howsoever grave it may be, remains only a doubtful pigment in the story canvassed by the prosecution for establishing its case beyond any reasonable doubt. ***Venkatesh v. State of Karnataka,*** *2022 SCC OnLine SC 765;* ***Shatrughna Baban Meshram v. State of Maharashtra,*** *(2021) 1 SCC 596;* ***Pappu v. State of Uttar Pradesh,*** *(2022) 10 SCC 321]. Save and except for the above, there is no evidence: ocular, circumstantial or otherwise, which could establish the guilt of the accused. There is no discovery of any fact linking the accused to the crime sought to be proved, much less, established by the prosecution beyond reasonable doubt.*

17. It is our bounden duty to ensure that miscarriage of justice is avoided at all costs and the benefit of doubt, if any, given to the accused. [Hanumant Govind Nargundkar v. State of M.P. (1952) 2 SCC 71]."

37. In **Nikhil Chandra Mondal v. State of West Bengal, 2023 LiveLaw (SC) 171** the Apex Court observed and held regarding principle of law in criminal cases as under :-

"11. It is a settled principle of law that however strong a suspicion may be, it cannot take place of a proof beyond reasonable doubt....."

38. In **Indrajit Das v. State of Tripura, 2023 LiveLaw (SC) 152,** regarding sequence of circumstances in a chain comprising the basic links in cases based on circumstantial evidence, the Apex Court observed and held as under :-

"10. The present one is a case of circumstantial evidence as no one has seen the commission of crime. The law in the case of circumstantial evidence is well settled. The leading case being ***Sharad Birdhichand Sarda vs. State of Maharashtra.*** *According to it, the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence. The said principle set out in the case of Sharad Birdhichand Sarda (supra) has been consistently followed by this Court. In a recent case –* ***Sailendra Rajdev Pasvan and Others vs. State of Gujarat Etc.****, this Court observed that in a case of*

circumstantial evidence, law postulates two-fold requirements. Firstly, that every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt and secondly, all the circumstances must be consistent pointing out only towards the guilt of the accused. We need not burden this judgment by referring to other judgments as the above principles have been consistently followed and approved by this Court time and again.

12. The basic links in the chain of circumstances starts with motive, then move on to last seen theory, recovery, medical evidence, expert opinions if any and any other additional link which may be part of the chain of circumstances.

15. In a case of circumstantial evidence, motive has an important role to play. Motive may also have a role to play even in a case of direct evidence but it carries much greater importance in a case of circumstantial evidence than a case of direct evidence. It is an important link in the chain of circumstances. Reference may be made to the following two judgments on the importance of motive in a case of circumstantial evidence:

(1) Kuna Alias Sanjaya Behera vs. State of Odisha;(2018) 1 SCC 296 and (2) Ranganayaki vs. State by Inspector of Police,;(2004) 12 SCC 521 ."

39 . Recently in **Jabir & Ors. v. The State of Uttarakhand; 2023 LiveLaw (SC) 41,** the Hon'ble Apex Court reiterated the principles laid down regarding appreciation of circumstantial evidence in criminal cases, which reads as under:

"21. A basic principle of criminal jurisprudence is that in circumstantial evidence cases, the prosecution is obliged to prove each circumstance, beyond reasonable doubt, as well the as the links between all circumstances; such circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else; further, the facts so proved should unerringly point towards the guilt of the accused. The circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused, and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.5 These were so stated in Sarad Birdichand Sarda (supra) where the court, after quoting from Hanumant, observed that:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an Accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in ***Shivaji Sahabrao Bobade v. State of Maharashtra; (****1973) 2 SCC 793 where the following observations were made:*

[SCC para 19, p. 807: SCC (Cri.) p. 1047] Certainly, it is a primary principle that the Accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the Accused, that is to say, they should not be explainable on any other hypothesis except that the Accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of 5 Ibid 3 the Accused and must show that in all human probability the act must have been done by the Accused."

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence." These panchsheel precepts, so to say, are now fundamental rules, iterated time and again, and require adherence not only for their precedential weight, but as the only safe bases upon which conviction in circumstantial evidence cases can soundly rest."

41. In the present case, only evidence against the accused-appellant (Dileep) to connect him with the present crime is based on the circumstantial evidence as set forth by PWs 1, 2 and 3, who are mother and sisters of the deceased. Evidence of PWs 1, 2 and 3 also inspires no confidence against the accused-appellant. Evidently PW-1 went to Police Station concerned two weeks after the disappearance of her son and submitted written report Ex.Ka-1. There is no plausible explanation as to why missing report of deceased was not got registered in Police Station earlier. Other links of circumstantial evidence are completely missing and being the younger brother of the co-accused (Mukesh), who has already been acquitted by a co-ordinate Bench of this Court, has been implicated in the present case. Thus, there is no legal evidence against the accused (Dileep) available on record. There is no motive against the accused alleged or proved rather P.W.-1, 2, 3 and 6 have specifically stated in their depositions that accused (Dileep) had no enmity with the deceased (Sundar Lal). The accused (Dileep) has been implicated in the present case only on the basis of suspicion raised by co-accused (Moolchand). It is established law that suspicion, however, grave it may be but, it cannot take place of proof. There is no proof regarding complicity of the accused (Dileep) in the alleged offence. There is no discovery or recovery or extra-judicial confession made by the accused (Dileep) regarding involvement/complicity in the alleged offence.

42. Considering the entire evidence and legal propositions discussed above, in our view, there is no legal evidence against the accused (Dileep) resultantly, the prosecution has miserably failed to prove and establish the circumstantial evidence to complete the chain regarding the involment/complicity of the accused (Dileep) in the alleged offence.

43. Therefore, in our considered opinion, we are of the view that prosecution could not prove complete links / chain of circumstantial evidence beyond reasonable doubt against the accused-

appellant (Dileep) and the Trial Court committed an error in holding accused-appellant guilty under Section 302 IPC ignoring the missing links / chain of circumstantial evidence.

44. In view of aforesaid discussion and legal propositions as well as main co-accused (Mukesh @ Murari) has already been acquitted by a co-ordinate Bench of this Court, on the similar evidence, present jail appeal is hereby **allowed.** Impugned judgment and order dated 30.11.2016 passed by learned Additional District and Sessions Judge, Court No.2, Kannauj in Session Trial No.363 of 2010, (State v. Dileep and others), arising out of Case Crime No. 1020 of 2008, Police Station Kannauj, District Kannauj, under Sections 302 IPC is set aside.

45. Accused-appellant is acquitted of charged levelled against him. He shall be released forthwith, if not wanted in any other crime.

46. Keeping in view provisions of Section 437-A Cr.P.C., appellant is directed to furnish a personal bond and two sureties before Trial Court to its satisfaction, which shall be effective for a period of six months, along with an undertaking that in event of filing of Special Leave Petition against instant judgment or for grant of leave, appellant on receipt of notice thereof shall appear before Hon'ble Supreme Court.

47. Lower Court record along-with a copy of this judgment be sent back immediately to District Court concerned and also copy of this judgment be sent to Superintendent Jail concerned through District Judge concerned for immediate compliance and further necessary action.

48. Before parting, we provide that **Ms. Shweta Singh Rana, Advocate,** who has appeared as Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2023) 6 ILRA 803
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD 25.05.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Criminal Appeal No. 8093 of 2008

Krishna Kumar & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri I.K. Chaturvedi (Sr. Adv.), Sri Saurabh Chaturvedi

Counsel for the Opposite Party:
G.A., Sri Hari Bans Singh, Sri Dharm Jeet Singh

Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 302, 323 & 149 - Punishment for murder - Code of Criminal Procedure, 1973 - Section 313 - Appeal against conviction - Life imprisonment - As per FIR accused was taunting the sister of first informant - Informant and his brother (deceased) enquired this from accused and his mother - At the same time, male family members of accused came there with lathis in their hands - The mother of accused also hit them by

opposite side of sickle - After investigation, charges framed - Two accused were declared juvenile and JJB had acquitted them - Plea of sudden provocation - Held, the St.ment of PW-1 clearly indicate that other co-accused were not at spot and they had rushed because of shouting, as a result of questioning by first informant - If there was any premeditated crime then sickle could have been used from sharper side - It was because of one of blows by accused, deceased had fallen down, he hit himself with some hard object, caused injuries, ultimately led to his death - Incident was not pre-planned, happened all of a sudden and no common intention to kill deceased - Conviction set aside, directions accordingly. (Para 3, 4, 5, 13, 14)

Criminal Appeal partly allowed. (E-13)

List of Cases cited:

Surain Singh Vs St. of Pun. reported in (2017) 5 SCC 796

(Delivered by Hon'ble Hon'ble Manish Kumar Nigam, J.)

1. This appeal has been filed challenging the judgment and order dated 22.11.2008 passed by the learned Additional Sessions Judge, Varanasi by which the appellants Krishna Kumar, Hirawati and Lalman had been awarded life imprisonment in Sessions Trial No.291 of 2022 arising out of Case Crime No.167 of 2000 under sections 147, 148, 302, 323 and 149 of Indian Penal Code and the appellant-Ram Achal had been awarded life imprisonment in Sessions Trial No.291-A of 2002 arising out of Case Crime No.167 of 2000 under sections 147, 148, 149, 302 and 323 of Indian Penal Code.

2. Upon an incident having taken place on 15.9.2000 at around 4.00 PM, the first informant namely Dinesh Kumar Yadav lodged a First Information Report on the very same day at around 23.05 PM.

3. As per the prosecution case, which can be gleaned out from the First Information Report, the first informant, aggrieved by the death of his brother Ramesh, had lodged the First Information Report. The First Information Report had stated that Shiv Kumar Yadav son of Lalman Yadav was taunting his sister Saroja and upon hearing the taunt, Dinesh Kumar-the first informant and Ramesh-the deceased, ran up to Shiv Kumar Yadav where his mother Smt. Hirawati was also there and they asked Shiv Kumar Yadav and Hirawati (the mother) as to why they were taunting. It is the further case of first informant that as a result of their questioning as to why the taunting was being made, the male members of the family of Shiv Kumar namely Lalman Yadav, Kamlesh Yadav, Krishna Imar Yadav and Ram Achal Yadav came there with lathis in their hands. Hirawati the mother of the accused who herself was made an accused in the FIR, was having a Hasiya in her hands. It has further been stated in the FIR that the deceased Ramesh and the first informant Dinesh Kumar were beaten with lathis and Hasiya and because of the beating, Ramesh fell on the ground and became unconscious. It has also been stated that even Dinesh Kumar (the first informant) was given a beating. Thereafter Dinesh along with his mother and father took Ramesh in an auto-rickshaw to the Government Hospital where the doctors at Government Hospital referred Ramesh to Kabir Chaura Hospital and since Kabir Chaura Hospital was also unable to treat Ramesh, it referred Ramesh to BHU for further treatment where at 8.40 PM, it has been alleged, Ramesh died and, therefore,

the First Information Report was lodged. The lodging of the FIR resulted in Case Crime No.167 of 2000 and thereafter investigation had followed.

4. Upon the investigation having been done, charges were framed and were submitted to the Sessions Court which after framing charges tried the accused Krishna Kumar, Hirawati and Lalman in Sessions Trial No.291 of 2002 and Ram Achal in Sessions Trial No.291-A of 2002. Both the Sessions Trials were tried together and when by the judgment and order dated 21.11.2008 the accused were found guilty under sections 147 and 302 read with section 149 IPC and section 323 read with section 149 IPC, the instant appeal has been filed by the accused Krishna Kumar, Smt. Hirawati, Lalman and Ram Achal.

5. Two accused namely Shiv Kumar and Kamlesh Kumar were declared juvenile and it has been stated by learned counsel for the appellants that Juvenile Justice Board, Varanasi on 25.11.2021 had acquitted them.

6. At the trial stage, the first informant Dinesh Kumar Yadav gave his statement in chief and was also cross-examined as PW-1. Smt. Phoolpatti, the mother of the deceased and the first informant had come into the witness box as PW-2. Dr. B.K. Dubey who had examined the injuries on the body of Dinesh Kumar Yadav, was examined as PW-3. Dr. D.K. Singh, the incharge doctor of the Government Hospital, Phoolpur, Varanasi, who had examined the injuries of Ramesh (deceased) at the Government Hospital and had also examined the injuries on the body of Smt. Geeta, was examined as PW-4. Dr. R.A. Singh, Surgeon, District Hospital Jaunpur was examined as PW-5 and he has proven the post-mortem of the deceased Ramesh. PW-6 Constable Ram Awadh Yadav; PW-7 Ram Kumar Chaudhary and PW-8 Sub-Inspector Bharat Dayal Singh were examined as formal witnesses who had done the investigation. Lalman who was an accused was brought in as a Court Witness. After the prosecution witnesses were examined, the accused gave their statements under section 313 Cr.P.C. and claimed innocence.

7. The PW-1 Dinesh Kumar Yadav has stated that because of the taunt which was there viz.-a-viz. his sister Saroja from Shiv Kumar and because of the verbal altercation he i.e. Dinesh Kumar Yadav had reached the spot where his sister Saroja was grazing the cattle. When he reached there, Hirawati with her Hasiya (sickle) in her hand also reached the spot. Similarly, while verbal altercation continued between Dinesh Kumar Yadav (first informant) and Shiv Kumar, the other accused namely Krishna Kumar, Lalman, Ram Achal and Kamlesh with lathis and dandas reached the spot and started hitting Dinesh and Ramesh. It has been stated in his examination in chief, that Hirawati, however, hit them by the opposite side of the sickle i.e. by the side which was not sharp. When Dinesh and Ramesh shouted, their mother Phoopatti Devi (PW-2) and their bhabhi Geeta Devi came on the spot to save them. They were also hit by the accused persons and they all had sustained injuries. He has further stated that because of the marpeet, his brother Ramesh had received grievous injuries and he also had received injuries over his hands and waist. He has further stated that Ramesh after being hit escaped from the spot and saved himself by hiding himself in the Dhan crops. He has further stated that after going about 15-20 steps Ramesh had fainted and

had also fallen down. It has been stated that the other villagers also reached the spot. PW-1 has stated that he had taken his brother to the Primary Health Centre, Basani where investigation was done by the doctors and primary medication was also given. Since the condition of Ramesh was not good, the doctors had referred him to the Kabir Chaura Hospital and at the Kabir Chaura Hospital, the case was referred to Banaras Hindu University where at 8.40 PM his brother Ramesh had died. He also proved his written information which he had given to the police. Further in his cross-examination, the PW-1 had stated that initially Hirawati was not there at the spot and upon the shouting of his brother because of the hitting by Shiv Kumar, the other persons had come. However, this very prosecution witness namely Dinesh Kumar Yadav had stated that there was absolutely no pre-existing enmity between the families and the incident had taken place only due to certain verbal altercation of obscene words spoken by Shiv Kumar. He has, however, throughout stated that maarpeet had taken place suddenly on a provocation.

8. PW-2 Phoolpatti has also stated that the altercation had taken place because of the fact that the co-accused Shiv Kumar had taunted her daughter Saroja. PW-2 has virtually repeated what the PW-1 had stated. She has, however, stated that the aggressors were the accused persons and not her sons.

9. The doctors PW-3, PW-4 and PW-5 have proved the injury reports and the post-mortem reports.

10. Learned counsel for the appellants Sri I.K. Chaturvedi, learned Senior Advocate assisted by Sri Saurabh Chaturvedi has submitted that if all the evidence is read in their totality, it becomes clear that none of the accused persons were present at the place of incident and that they have all been falsely implicated. In the alternative he has also submitted that definitely there was no premeditation of the accused persons to commit the crime of murder. He submits that if all the evidence, as a whole, is read together, then it would become clear that if at all the incident had occurred, it was a case of sudden fight and it was not a planned murder. Learned counsel for the appellant has, relying on certain statements of the prosecution, argued :-

(i) The FIR and the statements of PW-1 and PW-2 itself, if they are read, learned counsel for the appellants states that everything had happened on the spur of the moment without any pre-meeting of mind and without any plan of committing the crime of murder. In fact, he submits that such was the suddenness of the whole incident that even in the FIR the words which might have been spoken by the accused Shiv Kumar and were not liked by Saroja were not reproduced. He submits that in fact no other person, as has been alleged to be there at the spot and whose names are found in the FIR have come in the witness box. Even Geeta Devi, the Bhabhi had not come in the witness box. In effect, learned counsel for the appellants intends to argue that no-one was at the spot and only when they heard of some altercation, they rushed to the spot.

(ii) The incident had happened in the broad daylight and no independent witness other than the mother of the deceased had come in the witness box.

(iii) The injuries on all the others, other than the deceased were simple in nature.

(iv) To show that the incident had occurred at the spur of the moment and on account of the grave and sudden provocation, learned counsel for the appellants specifically stressed upon a certain paragraph of the cross-examination. Since learned counsel for the appellants had read out paragraph 3 at page 30 of the paper book, the same is being reproduced here as under :-

"इस घटना के पहले भूत प्रेत को लेकर विवाद चल रहा था। कोई मारपीट नहीं हुई थी। इस घटना के पहले मेरी बहन के साथ मुल्जिमान ने कभी छेड़खानी नहीं किया था। घटना वाले दिन भी हमारी बीच कोई वाद विवाद नहीं हुआ था। शिवकुमार सरोज के प्रति बोली बोलने से अचानक यह मारपीट हो गयी। अन्य मुल्जिमान एक साथ आये थे क्रमशः नहीं। शिव कुमार व उनकी मां के चिल्लाने पर अन्य मुल्जिमान आये। तब तक हम लोगों ने शोर नहीं किया था। जब अन्य मुल्जिमान और मारपीट व साथ में तब हमने शोर किया। उसके पहले शोर नहीं किया था। अन्य मुल्जिमान के आने के बाद 2–3 मिनट मारपीट हुईA"

(v) Learned counsel for the appellant while relying on the deposition of PW-5 Dr. R.A. Singh states that the injuries sustained on the head of the deceased had caused the death. He submits that it is not certain whether the cause of the injury was the blow of lathi or because the deceased had fallen down and he received certain injuries by falling over the bricks lying there. Learned counsel, therefore, stated that it cannot be said with all certainty that the blows of the lathis by the accused persons alone were responsible for the death of the deceased.

(vi) Learned counsel for the appellant relying upon the deposition of PW-7 Ram Kumar Chaudhary submits that the spot where the incident had occurred was not even but had certain protrusions of jutting wood etc. which could have been the reason for the injuries on the head of the deceased who had fallen down because of the fact that he had fainted.

(vii) Learned counsel for the appellant further stated that there was no blood found on the spot.

(viii) Learned counsel for the appellant, therefore, submitted that there was no premeditation or pre-plan on the part of the appellants. He submitted that due to the sudden provocation between the family of the deceased and the family of the accused persons at the spur of the moment the incident had occurred and, therefore, the accused could not be held to be guilty of the crime of murder. He submits that as has been held in **Surain Singh vs. State of Punjab** reported in **(2017) 5 SCC 796** when there is no premeditation Exception 4 of Section 300 applies. Since learned counsel specifically relied upon paragraph 7 of the judgment, the same is being reproduced here as under :-

"7. Exception 4 to Section 300 of the Indian Penal Code applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 Indian Penal Code covers acts done in a sudden fight. The said Exception deals with a case of provocation not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is

absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, ***yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing.*** A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that ***one of them starts it,*** but ***if the other had not aggravated it*** by his own conduct it ***would not have taken the serious turn*** it did. There is then ***mutual provocation and aggravation,*** and it is difficult to apportion the share of blame which attaches to each fighter.

The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 Indian Penal Code is not defined in Indian Penal Code. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general Rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not ***must necessarily depend upon the proved facts of each case***. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

"

(emphasis supplied)

11. Sri S.N. Mishra, learned AGA in opposition, however, has submitted that the blows given by the accused persons were brutal in nature, so much so that they caused the death of the deceased Ramesh and had also caused injuries to the persons present at the spot. He, therefore, submits that the the appeal be dismissed and the order of conviction be not interfered with.

12. Having heard Sri I.K. Chaturvedi, learned Senior Counsel assisted by Sri Saurabh Chauturvedi, learned counsel for the appellant; Sri S.N. Mishra, learned AGA and Sri Harivansh Singh, learned counsel appearing for the informant, we are

of the view that the appeal deserves to be allowed.

13. A perusal of the statements of the prosecution witnesses and also all the other record inevitably leads us to conclude that there was some taunting being done by Shiv Kumar with regard to the sister of the first informant and also the deceased namely Saroja and angered by this taunting, they had approached Shiv Kumar and had questioned him as to why he was taunting her. This had probably resulted in a sudden fight. In villages, mostly people keep lathis with them. Upon hearing the shouting etc., the male family members of the accused side rushed to help. It appears that because of the shouting, the mother, father and other brothers who had been made accused in the case had rushed to the spot. They were not present earlier at the spot. The statement of PW-1 clearly goes to indicate that the other co-accused were not there at the spot and they had rushed because of the shouting etc. which had occurred as a result of the questioning by Dinesh Kumar. Further we see that even Hirawati, who is the mother of Shiv Kumar and was also an accused in the case, had, as per the prosecution witness Dinesh, tried to hit them by the blunt side of the sickle. If there was any premeditated crime then the sickle could have been used from the sharper side. The motive to kill the deceased was definitely not there.

14. Under such circumstances, we are left with no other conclusion but to hold, on the basis of the evidence which was there on the record, that the appellants-accused had assaulted the deceased Ramesh with lathi and danda in which it was just possible that the danda hit the head of the deceased in such a manner which caused the death. Also it was possible that because of one of the blows, the deceased had fallen down in such a manner that he hit himself with some hard object which caused injuries which ultimately led to his death. Definitely the incident was not pre-planned. It happened all of a sudden and there was no common intention to kill the deceased Ramesh. If at all the blows etc. were made, they were made with only an intention to teach Ramesh a lesson.

15. Since there was no intention to kill, we definitely rule out that the accused are guilty of murder i.e. an offence under section 302 of Indian Penal Code. However, this much is certain that when the deceased was being hit by lathis and dandas, the appellants had used excessive force. However, since there was no pre-mediation with regard to the killing of the deceased and since everything happened at the spur of the moment, we are of the view that there was no intention to cause death or such common intention which would cause death.

16. Under such circumstances, we hold that the accused-appellants are at the most guilty of an offence under Part-II of section 304 of Indian Penal Code.

17. So far as the question of sentence is concerned, it was argued by learned counsel for the appellants that the appellants are not criminals and putting them in jail would convert them into criminals. He, therefore, prayed that the minimum possible sentence be awarded to them.

18. Having heard learned Senior Counsel for the appellants and the learned AGA on the question of sentence, we are definitely of the view that all the appellants are innocent persons who never had any

criminal record. They are also on bail by this Court. Under such circumstances, we hold that the appellants be fined with a fine of Rs.20,000/- each. This fine may be treated as compensation money for the parents of the deceased Ramesh. After the amount is deposited by the appellants in the State Treasury within a period of three months from today, the entire amount be passed on to the parents of the deceased as compensation.

19. Thus for what has been stated above, we partly allow the appeal. The conviction under sections 148, 302 and 323 of Indian Penal Code be now treated to be a conviction under section 304 (II) IPC. Further since there was no common intention, the conviction under sections 147 and 149 IPC is set-aside. So far as the punishment is concerned, we have already stated that the appellants be now fined with Rs.20,000/- each and this fine be paid as compensation to the parents of the deceased.

(2023) 6 ILRA 810
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD 25.05.2023

BEFORE

THE HON'BLE SIDDHARTH , J.

Criminal Appeal No. 9226 of 2022

Raghvendra ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Brij Raj, Sri Abhishek Srivastava, Sri Krishna Kumar, Sri Kuldeep Singh Yadav, Sri Satendra Singh, Sr. Advocate

Counsel for the Opposite Parties:
G.A., Sri Hare Krishna Mishra, Sri Jitendra Kumar, Sri Purushottam Dixit, Sri Saima Saher

Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149, 323, 504, 506, 307 &302 - Punishment for murder - SC/ST Act, 1989 - Section 3(2) (V) - Constitution of India, 1950 - Article 21 - Against second bail rejection - Maintainability - Appellant submitted that in first criminal appeal of appellant, rejection order was different and present appeal has been filed against different bail rejection order which has been passed after rejection of first criminal appeal by another coordinate Bench - Further submitted that appeal requires to be heard by this Court which was currently having jurisdiction - St. opposed the prayer - Held, in appeal the court was required to consider whether Special Court has erred in granting/denying relief to appellant on the basis of order under challenge - Also required to see whether order of court below can be sustained and its findings are in accordance with legal and factual issues - Object and subject of application u/s 438/439 Cr.P.C., is different from object and subject of appeal u/s 14-A (2) of SC/ST, Act - Therefore, contention of appellant was accepted - Impugned order set aside. (Para 6, 15, 17)

Criminal Appeal allowed. (E-13)

List of Cases cited:

Shakar Kerba Jadhav & ors. Vs St. of Mah. 1969 (2) SCC 793

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

1. Heard learned counsel for the appellant; learned AGA for opposite party no.1; Ms. Saima Saher, learned counsel for informant and perused the material placed on record.

2. The present criminal appeal under Section 14-A(2) Scheduled Castes & Scheduled Tribes (Prevention of Atrocities)

Act has been filed by the appellant to set aside the impugned order dated 30.06.2022, whereby the Special Judge, SC/ST Act, Etawah, has rejected the bail application of the appellant moved by him in **Case Crime No. 0088 of 2021, under Sections 147, 148, 149, 323, 504, 506, 307 and 302 IPC and Section 3(2) (V) of SC/ST Act, Police Station Saifai, District Etawah.**

3. This is the second criminal appeal of the appellant filed against bail rejection order dated 30.06.2022 passed by Special Judge (SC/ST Act), Court No. 2, Etawah, rejecting the bail application of the appellant in S.T. No. 766/2021, Case Crime No. 0088 of 2021.

4. Prayer has been made for setting aside the aforesaid order passed by the court below and allowing this appeal alongwith the bail application filed therewith for enlarging the appellant on bail during the pendency of trial.

5. Learned Additional Advocate General, Shri Gyan Narayan Kanaujiya, has vehemently opposed the prayer for bail of the appellant and has submitted that the first Criminal Appeal No. 4861 of 2021 of the appellant was rejected by the coordinate Bench of this Court on 05.04.2022, which is available and therefore this appeal may be directed to be placed before the same Bench for hearing being second criminal appeal of the appellant since the subject matter of this criminal appeal is the same as in the earlier appeal and therefore as per Chapter V, Rule 13 of the Allahabad High Court Rules, it is required to be heard by the same Bench.

6. Learned counsel for the appellant has submitted that the present criminal appeal has been filed after rejection of the second bail application of the appellant by the court below. In the first criminal appeal of the appellant, the rejection order was different and this appeal has been filed against a different bail rejection order dated 30.06.2022 which has been passed after rejection of the first criminal appeal of the appellant by the order dated 05.04.2022 by another coordinate Bench of this Court. He has submitted that the provisions of Chapter V, Rule 13 of the Rules of Court do not contemplate or provide for posting of subsequent criminal appeal of an accused implicated under the provisions of SC/ST Act for hearing before the same Bench. He has submitted that this appeal requires to be heard by this Court which is currently having jurisdiction for hearing the same.

7. After hearing the rival contentions, this Court finds that before proceeding further, it is required to be decided whether once an appeal under Section 14-A (2) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been dismissed by one Bench of this Court, then after rejection of second bail application by the court below, the Criminal Appeal preferred again before this Court, but against a different rejection order, would be heard by the same Bench which dismissed the earlier appeal and is sitting in different jurisdiction or shall be heard by the Bench which is currently having jurisdiction to hear the same. The relevant provisions necessary for deciding this controversy are Section 14-A(2), SC/ST Act and Chapter V, Rule, 13 of Rules of Court which are quoted herein below;-

14A. Appeals. (2) Notwithstanding anything contained in sub-section (3) of Section 378 of the Code

of Criminal Procedure, 1973 (2 of 1974) an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting refusing bail.

13. Subsequent application on the same subject to be heard by the same Bench:- No application to the same effect or with the same object as a previous application upon which a Bench has passed any order other than an order of reference to another Judge or Judges, shall, except by way of appeal,ordinarily be heard by any other Bench.

8. A perusal of the Section 14A (2) of SC/ST Act shows that an appeal lies to this Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail to an accused.

9. It is clear that every grant or refusal of bail by the Special Court can be subjected to separate appeal before this Court. Like second bail application under Section 438/439 Cr.P.C., second appeal is not provided in the SC/ST Act. Anticipatory Bail Application under Section 438 Cr.P.C., and Bail Application under Section 439 Cr.P.C., can be filed before this Court directly without any approach to the court below. It can also be filed after rejection of the bail application of an accused by the court/courts below. The applications under Sections 438/439 Cr.P.C., are not filed against the findings recorded by the court/courts below rejecting the bail application of an accused. The merits of the order passed by the court/courts below are not required to be seen and the findings recorded therein are not required to be referred or set aside by the High Court before granting anticipatory bail/bail to an accused by exercising powers under Sections 438/439 Cr.P.C.

10. Compared to the above provisions of anticipatory bail/bail under Cr.P.C., Section 14-A (2) of SC/ST Act, clearly provides that an appeal shall lie to the High Court against an order of Special Court or the Exclusive Special Court granting or refusing bail.

11. The section does not contemplates that a second criminal appeal will lie to the High Court against the same rejection order of the Special Court, if the High Court earlier dismissed the appeal preferred against the order of rejection passed by the court below. Rightly so, because an order once affirmed or set aside in appeal by the High Court cannot be revisited by means of another Criminal Appeal subsequently filed therefore, every time an accused approaches the court below for grant of bail unsuccessfully, he has to prefer a fresh criminal appeal against the order passed therein before this Court.

12. A perusal of Chapter V, Rule 13 of the High Court Rules shows that it provides that subsequent application on the same subject will be heard by the same Bench. It provides that no application to the same effect or with the same object, as previous application upon which a Bench has passed any order other than order of reference to any Judge or Judges, shall, except by way of appeal, ordinarily be heard by any other Bench.

13. A perusal of Chapter V, Rule 13 of the High Court Rules, clearly shows that it provides for a subsequent application to be heard by the same Bench regarding the same subject or with the same object as the

previous application. However, it exempts an order of reference to another Judge or Judges and order by way of appeal.

14. It is true that the Courts have held that an application also includes an appeal. For the purpose of deciding the present controversy, the difference between application and appeal are required to be considered. As considered hereinabove, Chapter V, Rule 13 of the Rules of Court distinguishes an application from an appeal. The reason is that the appeal under Section 14-A(2) of SC/ST is not the same as application filed before the High Court after refusal/grant bail by the court below under Section 438/439 Cr.P.C. An appeal affirming or setting aside the judgement of the court below attaches finality to the proceedings so far as the order of the court below is concerned. However, application for grant of relief after exercise of discretion of this Court after once refusing or granting bail to an accused is maintainable subsequently, irrespective of the order of the court below. Anticipatory bail application/bail application filed after rejection or grant of bail by court below are not directed against any order of the court below, but are filed praying for grant/cancellation of bail on the ground that the court below has not properly appreciated the case of an accused and the discretion of the High Court is therefore, required to be exercised.

15. The Special Court under the SC/ST Act undoubtedly exercises the same powers of bail and are governed by the same principles of grant/refusal of bail, but in appeal before this court, the considerations do not remain the same as the considerations in anticipatory bail application/bail applications under Sections 438/439 Cr.P.C. The powers and jurisdiction of appellate court are different than the powers of this Court while entertaining an application. In appeal, this court is required to consider whether the Special Court has erred in granting denying relief to the appellant on the basis of the order under challenge. This court is required to see whether the order of the court below can be sustained and its findings are in accordance with the legal and factual issues involved in the consideration of bail application of the accused by the Special Court or not. The Apex Court in the case of **Shakar Kerba Jadhav and others Vs State of Maharashtra 1969 (2) SCC 793** has held that a court of appeal is a "court of error" and its normal function is to correct the order of court below in appeal. Its jurisdiction should be coextensive with that of the trial court. Therefore, this Court while hearing the appeal under Section 14-A(2) of SC/ST Act, considers the errors committed by the Special Court and grants/denies relief after such consideration. It exercises co-extensive powers with the trial court. Regarding consideration of applications under Sections 438/439 Cr.P.C., this Court never corrects the error committed by the court below in granting/denying relief to the applicant nor its exercises any co-extensive power with that of the trial court on the Sessions Court. Therefore, the effect and the object of application under Section 438/439 Cr.P.C., are different from that of an Appeal under Section 14-A(2) of SC/ST Act.

16. The Blacks Law Dictionary, VIIIth Edition, South Asian Edition defines appeal " to seek review from a lower court decision" by High Court.

17. It is abundantly clear that the object and subject of application under Section 438/439 Cr.P.C., is different from

the object and subject of appeal under Section 14-A (2) of SC/ST, Act. Therefore, it is hereby held that the criminal appeal preferred before this Court under Section 14A-(2) of SC/ST Act after rejection of subsequent bail application by the Special Court can be heard by the Bench having jurisdiction to hear such appeal and it is not required to be placed before the earlier Bench which rejected the earlier appeal which was preferred against different order of rejection/grant of bail by the Special Court.

18. Now proceeding with hearing of this Appeal on merits, the learned counsel for the appellant has submitted that before the trial court only one prosecution witness has been examined, who has stated that he did not saw anyone causing the alleged incident. Witness has stated that he implicated the appellant and the co-accused as per direction given by the Inspector. The appellant and co-accused, Murari Lal, are not involved in this case. Learned counsel for appellant has submitted that the appellant has been falsely implicated in this case. It is a case of malicious prosecution of appellant under the provisions of SC/ST Act. He has no criminal history to his credit and is languishing in jail since 28.05.2021. In case, the appellant is released on bail, he will not misuse the liberty of bail.

19. It appears from the arguments advanced by the counsel for the parties and from perusal of material on record that the court below has not properly considered the facts of the case. Hence, in view of the above consideration, the order of rejection of bail passed by the court below dated 30.06.2022 is, hereby, set aside.

20. Having considered the submissions of the parties noted above, finding force in the submissions made by the learned counsel for the appellant; keeping in view uncertainty regarding conclusion of trial; one sided investigation by police, ignoring the case of accused side; appellant being under-trial having fundamental right to speedy; larger mandate of the Article 21 of the Constitution of India, considering 5-6 times overcrowding in jails over and above their capacity by under trials and without expressing any opinion on the merits of the case, court is of the opinion that the appellant is entitled to be enlarged on bail.

21. Let appellant, **Raghvendra**, be released on bail in the aforesaid case crime number on his furnishing a personal bond and two reliable sureties each in the like amount to the satisfaction of the court concerned subject to the following conditions:

(i) 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.

(ii) The appellant shall not pressurize/intimidate the prosecution witnesses.

(iii) The appellant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 of Cr.P.C.

(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 the trial court.

(v) The appellant shall remain present before the trial court on each date fixed, either personally or through his counsel.

(vi) The appellant shall not indulge in any criminal activity or commission of any crime after being released on bail.

22. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail. If in the opinion of the trial court that 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 in accordance with law.

23 . The trial court may make all possible efforts/endeavour and try to conclude the trial expeditiously in accordance with law after the release of the appellant, if there is no other legal impediment.

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

25. The criminal appeal is **allowed**.

26. Before parting with this case, this Court deems it appropriate to record appreciation for Sri Rajeev Lochan Shukla, Advocate, who was not counsel in this case, but has rendered valuable assistance to this Court in deciding the above controversy which was repeatedly being raised in subsequent criminal appeals filed by the same accused before this Court because of subsequent denial of relief by the Special Court.

(2023) 6 ILRA 815
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN IDRISI, J.

Criminal Revision No. 3630 of 2022

Smt. Shailja ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Sri Aishwarya Krishna, Sri Anurag Sharma, Sri Sarvesh Chaubey

Counsel for the Respondents:
G.A., Sri G.A.,Hemant Kumar,Sri Pradeep Kumar Keshri

A. Criminal Law - Code of Criminal Procedure, 1973-Section 397/401 & Protection of Women from Domestic Violence Act, 2005-Sections 23, 2(5) & 3-shared house-Revisionist married to opposite parties-Both of them were living in the house in question from the inception of their marriage-the residence is lying vacant, no one is there to resides in the house in question with the revisionist-Thus, provision of Rs. 10,000/- as rental money to the revisionist is also not sustainable.(Para 1 to 18)

The revision is allowed. (E-6)

(Delivered by Hon'ble Syed Aftab Husain Idrisi, J.)

1. At the outset, it is pertinent to mention that learned counsel for the revisionist has filed some documents along with another stay application, but perusal of record shows that she has already filed an stay application alongwith memo of revision. So learned counsel for the revisionist wants to withdraw this additional stay application. Learned counsel for opposite no. 2 has no objection to it, therefore, his prayer for withdrawal of this additional stay application is allowed.

2. Accordingly, the additional application seeking stay is dismissed as withdrawn.

3. Heard learned counsel for the revisionist, learned A.G.A. for the State as well as Sri Hemant Kumar, learned counsel for the opposite party no. 2. Perused the record.

4. The instant criminal revision has been preferred against the judgment and order dated 20.08.2022, passed by Additional District and Sessions Judge, Court No. 3, Meerut, in Appeal No. 84 of 2021 (Sandeep Mittal Vs. State of U.P. and another) whereby the appeal was allowed and the order dated 24.9.2021, passed by Civil Judge (J.D.) (Fast Track Court), Offence against Women, Meerut was set aside and appellant no. 2 was directed to pay Rs. 10,000/- to her wife (present revisionist) for rental house in Case No. 6504 of 2015 (91556 of 2015) (Smt. Shailja Mittal Vs. Sandeep Mittal), allowed the application under Section 23 of Protection of Women from Domestic Violence Act, 2005 with the direction to opposite party no. 1 (Sandeep Mittal), not to disturb her residence in common/shared house i.e. 28 Meera Enclave, Garh Road, Meerut.

5. The brief facts of the revision are that the marriage of the revisionist was solemnized with the opposite party no. 2 as per Hindu Rites and Rituals on 26.02.1995. Out of their wedlock a male child was born. It is alleged that in the course of time, there arose difference between the husband and wife. At this, the revisionist (wife) filed an application dated 16.03.2021 under Section 23 of the Domestic Violence Act. Before Civil Judge (J.D.) (Fast Track Court), Offence against Women, Meerut, to which opposite party no. 2 (husband) filed objections. Considering the submissions of learned counsels for the parties and evidence on record, passed by the Magistrate concerned vide its order dated 24.09.2021 allowed the application of revisionist to reside into the common/shared house, situated at 28 Meera Enclave, Garh Road, Meerut. The said order was get complied with. Aggrieved by this order, opposite party no. 2, Sandeep Mittal filed Appeal No. 84 of 2021 before the learned District and Sessions Judge, Meerut, which was allowed by him vide impugned order dated 20.8.2022 and the order dated 20.8.2022 was set aside on the ground that there is dispute between the parties, they do not have cordial relation with each other, and appellant shall pay Rs. 10,000/- per month to the revisionist to hire a rental house for her residence. The revisionist had also filed Suit No. 165 of 2016 under Section 125 Cr.P.C. for interim maintenance which was allowed and the opposite party no. 2 was directed to pay Rs. 7,500/- per month as maintenance amount to the revisionist. Aggrieved by the order dated 28.8.2022, the revisionist filed the present revision.

6. For ready reference, the orders passed by both the trial Magistrate on

24.9.2021 and Appellate Court on 20.8.2022 are reproduced herein under:-

(1) **Order passed by Civil Judge (J.D.) (Fast Track Court), Offence against Women, Meerut on 24.9.2021**

प्रार्थना पत्र अंतर्गत धारा 23 घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम स्वीकार किया जाता है। आपत्ती तदनुसार निस्तारित। विपक्षी संख्या 1 को आदेशित किया जाता है कि वह प्रार्थनी को मकान नंबर 28 मीरा एनक्लेव गढ़ रोड थाना नौचंदी मेरठ में साझा ग्रहस्ती में रहने से प्रभावित नहीं करेगा। आदेश की एक प्रति थाना संबंधित को अनुपालनार्थ प्रेषित की जाए। पत्रावली वास्ते जिरह दिनांक 13.10.2021 को पेश हो।

(2**) Order passed by Additional District and Sessions Judge, Court No. 3, Meerut on 20.8.2022**

अपीलार्थी द्वारा प्रस्तुत दाण्डिक अपील स्वीकार की जाती है। अवर न्यायालय द्वारा पारित आदेश दिनांकित 24.09.2021 अपास्त किया जाता है। अपीलार्थी को आदेशित किया जाता है कि वह प्रत्यर्थी सं० 2 को निवास हेतु किराये के मकान के लिए प्रतिमाह अंकन 10,000/- रूपये अदा करेगा।

7. Learned counsel for the revisionist (Wife) submitted that she revisionist lived in combined/common house with Respondent no. 2 (husband) from the date of her marriage i.e. 26.02.1995 to 20.06.2016. In the course of time opposite party no. 2 engaged in extra marital affairs with his maid, namely, Geeta. On protest to this ugly act of husband started committing domestic violence and cruelty on revisionist (wife) and on her son. On 26.6.2016 respondent no. 2 (husband) attacked the revisionist (wife) with intention to kill her. She suffered grave injuries and got her medical treatment from Dayawati Modi Nursing Home Meerut. After treatment, when she returned to residence (shared matrimonial house), husband did not allow her and her son to enter into the house in question. She next submitted that the impugned judgment and order dated 20.8.2022 has illegally been passed without appreciating the evidence on record in right perspective. The Appellate Court has completely misread, misinterpreted and mis-appreciated the evidence on record. Therefore, the impugned judgment and order dated 20.8.2022 is liable to be set aside.

8. Learned counsel for respondent no. 2 and learned A.G.A. vehemently opposed the submissions made by learned counsel for the revisionist On the cumulative strength of the aforesaid submissions, it is strenuously urged that order under revision does not suffer from any serious illegality and perversity in law, as such the learned Appellate Court has rightly passed the impugned order dated 20.8.2022.

9. To deal with the correctness various terms "domestic relationship, "shared household" and "domestic violence" etc used in the present controversy. A brief resume of such terms having material bearing on the issues involved in the present revision will be helpful in adjudicating the controversy involved in the present criminal revision. Following relevant terms are defined in u/s 2 and 3 of PW for DV Act. Which are quoted herein-under:

Section "2. Definitions.--In this Act, unless the context otherwise requires,--

.....

(f) "domestic relationship" 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;

.....

(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.

Section 3. Definition of domestic violence.--For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it--

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person. Explanation I.--For the purposes of this section,--

(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse" includes--

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) "economic abuse" includes--

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and

her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.--For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration."

10. it is an admitted case both the parties that marital relations between them and it subsists till date. They are legally wedded as husband and wife. Out of their wedlock a son born to them. Who is also living with the revisionist. It has also not been disputed by the learned counsel for respondent no. 2 that after their marriage the revisionist resided with respondent no. 2, in the house situated at 28 Meera Enclave, Garh Road, Meerut. Thus, as per definition of the domestic relationship is under section 2(f) of D.V. Act,2005, Since both of them were living in the same house from the inception of their marriage i. e. 26.02.1995 in the house in question and they had held shared house as defined is u/s. 2(s) of D.V. Act. In the course of time the dispute arose between them, as alleged by revisionist, in view of husband respondent no. 2 having extra marital affairs with his Maid. Geeta. It is also alleged by revisionist committed, domestic violence as he attacked revisionist of his ugly act; he on 26.6.2016, in which she received grave injuries and under gone medical treatment at Dayawati Modi Nursing Home Meerut. It was only when she returned to her residence i. e. shared matrimonial home, respondent no. 2, did not allow her to enter the house in qoestions. As per the definition under Section 3 of Protection of Women from Domestic Violence Act, 2005, this act of respondent no. 2 falls under the domestic violence.

11. Learned counsel for respondent no. 2 contended that besides, his real brother of respondent no. 2 his father and other family members are also residing in the house in question. Sharing of that house by the revisionist may cause unnecessary wrangle , bucking and scuffling, even made and to disturb the peace and harmony of these members. Moreover, present dispute is lasting since 2016 and there are serious litigation between the parties . So their living under one roof is dangerous to the life and health of respondent no. 2 and his family members. It is also submitted that respondent no. 2 is ready to pay Rs. 10,000/- as rent to facilitate the revisionist to reside in rented house.

12. Learned counsel for revisionist Refuting the aforesaid argument of learned

counsel for respondent no. 2, learned counsel for the revisionist submitted that the house in question is a big house, consisting of 16 big and small rooms. The revisionist is in possession only two rooms on the 1st floor of the house in question.

13. Learned counsel for revisionist next submitted that it is an admitted fact that the father of respondent no 2 was the owner of the house in question. His father Shobha Lal Mittal (father-in-law of the revisionist) had died on 07.12.2020. His brother Dr. Pradeep Mittal resides at A-38 Moti Prayag Colony Garh Road, Meerut, as is evident from the perusal of the WS filed in Suit No. 1057 of 2020, wherein he mentioned th

14. It has been argued by the learned counsel for the respondent no. 2 that revisionist wants to take over the entire house situated at Meera Colony and wants to become the owner of that house. Learned counsel for the revisionist refuted this argument of respondent no. 2 and clarified that there is no apprehension in the mind of revisionist that she would take over the ownership of the house in question because after the death of the father, having ownership of the house, the ownership goes to the LRs of the deceased owner. Therefore, this apprehension expressed by the learned counsel for the opposite party no. 2 is baseless and unreasonable and his argument is not tenable.

15. It is also an admitted fact that respondent no. 2 is also not residing with the revisionist in the house in question. This fact is also evident from the facts that he has given his present residential address in the memo of appeal as resident of house no. 468 Phool Bagh Colony, Meerut. In these circumstances, no other man reside with the revisionist. There arises no question of quarreling, causing heart to anyone in that residence. The learned appellate court erred in recording its conclusion in this behalf.

16. Thus, the revisionist is residing in the shared house since 24.09.2021. Respondent no. 2 was also residing with her in that house up to filing of the appeal before learned Sessions Judge and she is in possession of first floor consist of in two rooms. While, the residence is lying vacant, no one is there to resides in the house in question with the revisionist, it will be sheer wastage of money by providing the revisionist rental money of Rs.10,000/- to be spent as rent for living in any other accommodation. It may also be mentioned that for some time respondent no. 2 has expelled to the revisionist, but in compliance of the order dated 24.9.2021 passed by learned Civil Judge (JD), S.S.P. Meerut, provided re-entry to the revisionist in the shared house in question. Since 24.9.2021, she is residing in the shared house situated at 28 Meera Enclave Garh Road, Meerut continuously.

17. Respondent no.2 was residing in their house at the time of filing appeal before Sessions Judge and She was in possession of 1st floor of the have in two rooms set.

18. In view of the above, the finding recorded by the learned appellate court regarding provision of Rs.10,000/- as rental money to the revisionist is also not sustainable.

19. Accordingly, the findings recorded by learned appellate court vide order dated 20.08.2022 is liable to be set aside and the order passed by the learned

Civil Judge (JD) (Fast Track Court), offences against women, Meerut is liable to be upheld findings of the appellate court is perverse and against the law and facts.

20. Resutantly, the revision is **allowed.** The impugned order of the learned appellate court dated 20.08.2022 is set aside and quashed. Order passed by learned Civil Judge (JD) (Fast Track Court), is affirmed. Respondent no. 2 (husband) is directed not to interfere in residence of the revisionist in the shared house in question

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(2023) 6 ILRA 821
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE GAJENDRA KUMAR, J.

Habeas Corpus Writ Petition No. 350 of 2023

Yuvraj Yadav ...Petitioner
Versus
Adheekshak Kendriya Karagar Naini, Prayagraj & Anr. ...Respondents

Counsel for the Petitioner:
Sri Prabha Shanker Chaturvedi, Sri Abhishek Kumar Mishra, Sri Chandrakesh Mishra, Sri D.S. Mishra (Sr. Advocate)

Counsel for the Respondents:
G.A., Sri Dan Bahadur Yadav, Sri Parmeshwar Yadav

The Constitution of India, 1950-Article-226- WRIT of Habeas Corpus- Writ of habeas corpus cannot be entertained when a person is committed to judicial custody or police custody by a competent court by an order-the detention of the accused cannot be said to invalid on account of certain irregularities if any occurring in the earlier remand orders and the accused cannot get the benefit of such technical errors-the petitioner has already invoked provisions of Section 482 Cr.P.C., hence administration of criminal justice has already come into play and the same cannot be set at knaught by simultaneously invoking extra-ordinary remedy under Article 226 of the Constitution of India, which may be a remedy of right but as per settled law cannot be issued as a matter of course. Moreover, when corpus is in legal custody under valid remand order, the present writ petition is not be maintainable as per the law settled by the Apex Court as well as the High Courts. (Para 25, 27 & 31)

Petition dismissed. (E-15)

List of Cases cited:

1. Ram Narayan Singh Vs St. of Delhi & ors. 1953 0 Supreme (SC) 27

2. Keshav Singh Vs Speaker, Legislative Assembly AIR 1965 All 349

3. Gautam Navlakha Vs National Investigation Agency 2021 0 Supreme (SC) 334

4. Surjeet Singh Vs St. of U.P. 1984 ALL. L. J. 375

5. Urooj Abbas Vs St. of U.P. 1971 0 Supreme (All) 211

6. Sunil Kumar Sharma Vs St. (Nct of Delhi)

7. Saquib Abdul Hamid Nachan & ors. Vs St. of Mah. (2006) 108 BOMLR 339, 2006 CriLJ 2196,

8. Manubhai Ratilal Patel Vs St. of Guj. & ors. [2013 1 SCC 314],

9. Saurabh Kumar v. Jailor, Koneila Jail & anr. [2014 13 SCC 436]

10. St. of Mah. Vs Tasneem Rizwan Siddiquee [AIR 2018 SC (Criminal) 1449]

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

1. Heard Sri D.S. Mishra, learned Senior Counsel assisted by S/Sri Prabhashankar Chaturvedi, Abhishek Kumar Mishra and Chandrakesh Mishra, Sr. Advocate, learned counsel for the petitioner and Sri Satyendra Tiwari, learned A.G.A. appearing for the State respondents.

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

"1- यह कि सम्माननीय न्यायालय बंदी प्रत्यक्षीकरण प्रकृति के याचिकादेश, आदेश / निर्देश के माध्यम से याची को सशरीर / सदेह माननीय न्यायालय के समक्ष उपस्थित करने हेतु उत्तरवादीगण को आदेशित / निर्देशित करने की महती कृपा करें।

2- यह कि सम्माननीय न्यायालय बंदी प्रत्यक्षीकरण प्रकृति के याचिकादेश, आदेश / निर्देश के माध्यम से याची की आद्योपान्त, क्रमानुगत / लगातार वर्तमान निरूद्धि व अभिरक्षा को युक्तयुक्तिक ढंग से पूर्णरूपेण व संदेहरहित विधिक प्रक्रिया के अनुकूल व अनुरूप सिद्ध करने हेतु उत्तरवादीगण समेत उनके सहयोगी / सहकर्मी को आदेशित/निर्देशित करने की महती कृपा करें।

3- यह कि सम्माननीय न्यायालय बंदी प्रत्यक्षीकरण प्रकृति के याचिकादेश, आदेश / निर्देश के माध्यम से याचिका के लम्बन अवधि तक जमानत पर अभिरक्षा से मुक्त करने हेतु आदेशित / निर्देशित करने की महती कृपा करें।

4- यह कि माननीय न्यायालय बंदी प्रत्यक्षीकरण प्रकृति के याचिकादेश, आदेश / निर्देश के माध्यम से याची की आद्योपान्त लगातार, वर्तमान अभिरक्षा निरूद्धि को अविधिक, असंवैधानिक घोषित करते हुए याची को अभिरक्षा से अविलम्ब मुक्त / स्वतंत्र करने की महती कृपा करें।"

3. This petition has been filed on behalf of the petitioner- Yuvraj Yadav (corpus) who claims to have been falsely implicated in Case Crime No.558 of 2022, under sections 376, 506, 342 I.P.C. and section ¾ POCSO Act. It is also claimed that FIR has been lodged by the father of the victim and her age therein has been shown as 15 years, which is not true one. The allegation is that petitioner is detained in illegal custody, which is unconstitutional and contrary to law. On behalf of the petitioner an application dated 15.09.2022 was moved with the prayer that remand order may kindly be cancelled which is under section ¾ POCSO Act. On 15.09.2022 the trial court has, without jurisdiction, in a mechanical and arbitrary way, signed custody warrant from dated 02.09.2022 to 15.09.2022. Later on, remand order was mechanically signed, as there was no case diary and any documents / papers regarding the case, were presented before the trial court. It has been specifically mentioned in the application dated 15.09.2022 that under The Right To Information Act, date of birth of the victim in first school, attended from Khand Shiksha Adhikari, Mauaima, Prayagraj was asked for, according to which victim was major and her age was more than 20 years. Additional Sessions Judge and Special Judge, POCSO Act, Prayagraj fixed a date 21.09.2022 for disposal and order for radiologist's report of the victim. The victim's father submitted an affidavit dated 11.10.2022 that as the medical examination of the victim has not been done so he does not want to get her daughter / victim to be radiologically examined in accordance with the order dated 21.09.2022 and prayer was made to reject the same and to discharge her from radiological examination. Objection was also filed on behalf of the victim along with certificate / marksheet of High School examination of 2021 in which date of birth is shown as 18.07.2022. The trial court has dismissed the application of the petitioner in an arbitrary manner on 11.10.2022, which is contrary to the settled case law. The trial court rejecting the

application dated 15.09.2022 by passing the impugned order dated 11.10.2022 by which it has signed remand order under section 3/4 POCSO Act and section 376, 506, 342 IPC which is against the provisions of law. On behalf of the petitioner, case law of **Rishipal Singh Solanki v. State of Uttar Pradesh and Sanjeev Kumar Gupta v. State of Uttar Prades**h were presented along with provisions of J.J. Act, 2015 for perusal but they were not considered and the order was passed to the effect that the age given in 8th standard marksheet is to prevail regarding the age of the victim. The trial court has not considered the provisions given in section 94 (2) (i) of J.J. Act, 2015, according to which the victim was not minor and rather she was major as her date of birth was 03.03.2002, as per the record of class-1, primary school, Umari. This vital point and fact has not been considered by the trial court and remand order was signed in a mechanical way. The trial court has also not considered this important fact and circumstance that trial court has given order dated 21.09.2022 to the I.O. to get the victim radiologically examined for the determination of her age but this was objected to on behalf of the victim and she was not got examined for the determination of age. The remand orders are not formal ones but they are legal and judicial orders, which are required to be passed after perusal of the documents / papers in the circumstances of a given case. Before the trial court, no case diary and papers were presented for the perusal and order of remand was passed in a mechanical and formal way. On 21 September, 01 October, 07 October, 11 October, 15 October, 28 October, no case diary and papers were presented before the trial court and the order was passed in a mechanical way and no judicial custody has been extended. Additional Sessions Judge / Special Judge POCSO Act has no jurisdiction to take cognizance and to pass a remand order, so in this circumstance, the proceedings conducted, remand orders passed dated 11.10.2022 to 27.03.2023, are beyond jurisdiction. Petitioner has been deprived of his personal liberty against the legal process and in violation of the provisions of Article 21 read with Article 14 of the Constitution of India. Additional Sessions Judge / Special Judge POCSO Act, on 03.11.2022, has not passed any remand order extending the custody of the petitioner in the like way, on 21.11.2022, 21.12.2022, 25.01.2023, 07.02.2023, 04.03.2023, 27.03.2023, no remand order has been passed nor is available on record. According to provisions of section 309 Cr.P.C. no remand order can be passed for keeping in custody for an unlimited period. The intermediate custody orders are meaningless and on their basis petitioner cannot be detained in jail. Intermediate custody orders dated 21.12.2022, 25.01.2023, 07.02.2023, 04.03.2023, 22.03.2023 are against the provisions of section 309 Cr.P.C. as well as Article 21 of the Constitution of India. Additional Sessions Judge / Special Judge POCSO Act has no jurisdiction to try the S.S.T. No.326 of 2022 arising out of Case Crime No.558 of 2022 as the same has not been committed to the Court. It is further stated that an application under section 482 Cr.P.C. as Criminal Misc. Application No.37471 of 2022 has been filed in which interim stay order has been granted by this Court vide order dated 23.01.2023, which is extended upto 24.04.2023. The petitioner is detained in illegal custody which is contrary to legal process, unconstitutional and contrary to law. On the grounds, the prayer for habeas corpus has been made by the petitioner that he is innocent and has been falsely implicated in Case Crime

No.558 of 2022. The victim of the alleged offence is major one. Her date of birth is 03.03.2002. As per the provisions of section 94 (2) (i) of J.J. Act, 2015, the date of birth shown in class-1 of the school of the victim is to prevail over the date of birth shown in the high school certificate / marksheet. The trial court has not considered all these provisions. No remand order, available on record, has been passed by any competent court to detain the petitioner in jail. No intermediate custody warrants have been passed on prescribed proforma for detaining the petitioner in jail. Petitioner has been deprived of his personal liberty against the legal procedure in an arbitrary manner which is unlawful and unconstitutional.

4. As per FIR version on 07.08.2022 when the daughter of the first informant was going to purchase books, the petitioner on the way intercepted her daughter at about 1:00 p.m. near Dadauli Nahar (Soraon Highway) and dragged her inside his house, bolting it from inside, committed rape on her and kept her as hostage for four hours. The daughter of the first informant kept crying loudly, depite it the petitioner kept molesting her and after a long time, when the first informant, searched her with his family members, his daughter was found in the house of the petitioner. The petitioner is also said to have threatened the first informant and his family members of making the video viral of his daughter. When the victim was brought home she narrated all the incident to her mother.

5. The first limb of the argument of the counsel for the petitioner has been that the victim was major at the time of alleged incident as per her class-1 record obtained through The Right To Information Act was duly brought to the notice of the court and a prayer was made to set-aside the remand order to the effect that no offence under POCSO Act is made out but the learned trial court, against the provisions of law relied upon the high school certificate and the prayer was declined, which is without jurisdiction and against the law. It is accepted by the learned counsel for the petitioner that against that order an application under section 482 Cr.P.C. has been filed before this court in which proceedings of the Case Crime No.558 of 2022 have been stayed and are still stayed. The second limb of the argument is that trial court concerned has not passed intermediate remand orders according to law and there is no legal remand order on record. The petitioner is in jail without any legal remand order, therefore, the petitioner is in an illegal custody against the process of law which is violative of his personal liberty as provided and protected under the Constitution of India. Learned counsel for the petitioner has relied upon several judgements which are as follows :-

1. Sanjeev Kumar Gupta v. State of Uttar Pradesh 2019 0 Supreme (SC) 783

2. Rishipal Singh Solanki vs. State of Uttar Pradesh AIRONLINE 2021 SC 1050

3. Ram Narayan Singh vs. State of Delhi and others 1953 0 Supreme (SC) 27

4. Keshav Singh v. Speaker, Legislative Assembly AIR 1965 All 349

5. Urooj Abbas v. State of U.P. 1971 0 Supreme (All) 211

6. Surjeet Singh v. State of U.P. 1984 ALL. L. J. 375

7. Sunil Kumar Sharma v. State (Nct of Delhi)

8. Saquib Abdul Hamid Nachan And Ors. v. State of Maharashtra And Anr, 2006 CriLJ 2196

9. Gautam Navlakha vs. National Investigation Agency, 2021 0 Supreme (SC) 334

6. Per contra, learned A.G.A. refuted the arguments advanced by the counsel for the petitioner and submitted that the petitioner is in judicial custody under the valid order passed by the court of competent jurisdiction. No writ of habeas corpus lies against the judicial order as in this case the petitioner is in legal custody by virtue of judicial order, therefore, the writ of the petitioner is liable to be dismissed on this very ground. Furthermore, he submitted that the impugned order dated 11.10.2022 has been challenged in Application No.37471 of 2022 filed under section 482 Cr.P.C. The petitioner cannot be permitted to avail two remedies at the same time from the same court. Therefore, this habeas corpus petition is liable to be set-aside. Learned A.G.A. has relied upon various judgements of Apex Court in **Manubhai Patel vs. State of Gujarat & Ors 2013 CRI. L. J. 160, Saurabh Kumar v. State of Jailor 2014 (13) SCC 436, Koneila Jail & Anr, State of Maharashtra v. Tasneem Rizwan Siddiquee AIR 2018 SC (Criminal) 1449.**

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

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

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

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

"Habeas Corpus Meaning

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

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

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

Habeas corpus is a writ requiring a person to be brought before a judge or

court for investigation of a restraint of the person's liberty, used as a protection against illegal imprisonment.

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

10. We have carefully gone through the judgments cited by learned counsel for the petitioner as well as respondents in light of submissions made by respective parties and perused the record of the petition.

11. As in this case, main controversy hinges upon the order dated 11.10.2022 by which the application dated 15.09.2022 for setting aside the remand order regarding 3/4 POCSO Act was rejected by the Additional District and Session Judge/ Special Judge POCSO Act, Allahabad which is as follows :-

''पत्रावली पेश हुई। प्रार्थी/अभियुक्त की ओर से प्रार्थनापत्र दिनांकित 15-09-22 वास्ते प्रार्थी/अभियुक्त के विरूद्ध धारा ¾ पाक्सो अधिनियम का रिमाण्ड निरस्त करने हेतु प्रस्तुत प्रार्थनापत्र पर आदेश हेतु नियत है।

पत्रावली के अवलोकन से यह स्पष्ट है कि दिनांक 21.09.22 को विवेचक को पीड़िता की आयु निर्धारण हेतु रेडियोलाजिकल जांच कराये जाने हेतु निर्देशित किया गया था, परन्तु पीड़िता की ओर से अभियुक्त की ओर से प्रस्तुत प्रार्थनापत्र के विरूद्ध आपत्ति दाखिल की गयी है, जिसके अवलोकन से यह स्पष्ट होता है कि पीड़िता द्वारा आयु निर्धारण हेतु अपनी जांच कराने से इंकार किया गया है। ऐसी स्थिति में पीड़िता की आयु के संबंध में दो जन्म तिथियां उपलब्ध हैं।

1. अभियुक्त की ओर से प्रस्तुत जन सूचना अधिकार के तहत प्राप्त सूचना कार्यालय खण्ड शिक्षा अधिकारी मऊआइमा प्रयागराज पत्रांक संख्या 467/2022-2023 दिनांक 07-09-22 जनहित अधिकार 2005 दाखिल की गयी है, जिसके अनुसार पीड़िता की जन्म तिथि 03-03-2002 अंकित है तथा पीड़िता की ओर से अपनी आपत्ति दिनांक 11-10-22 के साथ हाईस्कूल 2021 परीक्षा की प्रमाणपत्र सह अंक पत्र दाखिल किया गया है, जिसके अनुसार उसकी जन्म तिथि 18 जुलाई, 2007 है।

अभियुक्त की ओर से क्रिमिनल अपील नम्बर 1240/21 रिषीपाल सिंह सोलंकी बनाम स्टेट आफ उ०प्र० अन्य के पैरा 28 (एच.) संजीव कुमार गुप्ता बनाम स्टेट आफ यू०पी० व अन्य (2019) 12 एस.सी.सी. 370 में हाईस्कूल की सत्यता साबित न होने पर उसको नहीं माना गया है और कक्षा-4 तक अंकित जन्म तिथि को सही माना गया है।

पीड़िता की आयु का निर्धारण किशोर न्याय अधिनियम 2015 के अनुसार किया जाना है, जिसके धारा 94 में स्कूल से प्राप्त जन्म तिथि या मैट्रीकुलेशन सर्टीफिकेट संबंधित बोर्ड को वरीयता दी गयी है।

दोनों ही जन्म तिथियों की सत्यता का निर्धारण साक्ष्य के उपरान्त होना है जो विचारण के समय साक्ष्य का विषय है। ऐसी स्थिति में धारा 94 किशोर न्याय अधिनियम के अनुसार बोर्ड द्वारा हाईस्कूल प्रमाणपत्र सह अंक पत्र को प्रथम दृष्टया वरीयता देते हुये पीड़िता को घटना की तिथि पर नाबालिक माना जाता है तथा अभियुक्त की ओर से प्रस्तुत प्रार्थनापत्र दिनांकित 15-09-22 जो पीड़िता को बालिग घोषित किये जाने व धारा ¾ पाक्सो अधिनियम में रिमाण्ड निरस्त करने हेतु प्रस्तुत प्रार्थनापत्र निरस्त किया जाता है तथा अभियुक्त का रिमाण्ड मु.अ.सं. 558/22, अ. धारा 376,506,342 भा.द.सं. व धारा ¾ पाक्सो एक्ट, थाना सोरांव प्रयागराज में दिनांक 15-10-22 तक स्वीकृत किया जाता है।''

12. In the application dated 15.09.2022 the ground was taken for setting aside the remand order under section 3/4 POCSO Act is that according to the documents obtained throught Right To Information Act regarding date of birth of the record of class-1 of the primary school in which the victim was admitted and studied was 03.03.2002 which is the true date of birth of the victim which ought to have been considered and relied upon by the trial Court for deciding whether the victim was minor or major at the date of

incident but the trial court relied upon the high school marksheet / certificate of the victim which was filed on behalf of the victim by way of objection to the application moved on behalf of the petitioner which is against the provisions of law particularly section 94 of the J.J. Act, 2015. From the perusal of the order dated 11.10.2022, it is apparent that after giving ample opportunity of hearing to both the parties the trial court arrived at the conclusion that both the dates of birth are subject to evidence for the determination of the truthfullness which will be decided at the stage of trial after adduction of evidence. In these circumstances giving precedence, in view of provisions of section 94 of J.J. Act, 2015, to the high school marksheet / certificate the victim is prima facie found minor and the application dated 15.09.2022 on behalf of the accused for declaring the victim major and cancelling the remand under section 3/4 POCSO Act was dismissed. Accused was remanded in Case Crime No. 558 of 2022, U/S 376, 506, 342 I.P.C. and 3 POCSO Act, PS Soraon, Prayagraj till 15.10.2022. The order dated 11.10.2022 has been challenged by virtue of an application filed under section 482 Cr.P.C. before this Court in which an order has been passed by the Court which is as follows :-

"Court No. - 66

Case :- APPLICATION U/S 482 No. - 37471 of 2022

Applicant :- Yuvraj Yadav

Opposite Party :- State Of U.P. And 4 Others

Counsel for Applicant :- Abhishek Kumar Mishra,Chandrakesh Mishra,Prabha Shanker Chaturvedi

Counsel for Opposite Party :- G.A.,Pradeep Kumar Yadav,Prakash Chandra Trivedi,Ravindra Kumar Mishra

Hon'ble Rajeev Misra,J.

Heard Mr. D.S. Mishra, the learned Senior Counsel assisted by Mr. Abhishek Kumar Mishra and Mr. Prabha Shanker Chaturvedi, the learned counsel for applicant, the learned AGA for State and Mr. Ajay Kumar Yadav, Advocate holding brief of Mr. Pradeep Kumar Yadav, learned counsel for first informant-opposite party 2.

Present application under section 482 Cr.P.C. has been filed challenging the order dated 11.10.2022 passed by Additional District and Sessions Judge/ Special Judge, POCSO Act, Allahabad, arising out of Case Crime No. 558 of 2022, under Sections 376, 506, 342 IPC and 3/4 POCSO Act, Police Station-Soraon, District- Prayagraj, whereby judicial remand of applicant has been extended till 15.10.2022 as well as with a prayer that application dated 15.09.2022 submitted by applicant seeking recall of the order dated 11.10.2022 be decided.

It is submitted by learned Senior Counsel for applicant that in the FIR dated 09.08.2022 giving rise to present criminal proceedings, the age of the prosecutrix namely 'X minor' has been mentioned as 15 years. Subsequently, applicant obtained certificate from the institution which the prosecutrix had attended for first time. As per said certificate issued by Principal of concerned institution her date of birth as recorded in school records is 03.03.2002. As such on the date of occurrence, the prosecutrix was aged about 20 years. It is then argued by learned Senior Counsel that

in view of above, by no stretch of imagination, offence under Section 3/4 POCSO Act can be said to have been committed by present applicant.

Learned Senior Counsel for the applicant further contends that in the light of aforesaid facts, applicant filed an application dated 15.09.2022 before the court below that applicant be not sent to judicial remand under Section 3/4 POCSO Act as no offence is made out. However, court below by means of order dated 11.10.2022 rejected the same and sent applicant for judicial remand up to 15.10.2022.

On the above premise, learned counsel for applicant submits that since no offence under Section 3/4 POCSO Act is made out against applicant, therefore, judicial remand extended by concerned Special Court is manifestly illegal and without jurisdiction. Even otherwise, the entire proceedings against applicant under Section 3/4 POSCO Act cannot be sustained and therefore liable to be quashed by this Court.

Per contra, the learned A.G.A. and Mr. Ajay Kumar Yadav, the learned counsel for opposite party- 2 have opposed this application. However, they could not dislodge the factual and legal submissions urged by learned Senior Counsel for applicant at this stage.

Having heard the learned Senior Counsel for applicant, learned A.G.A. for State, learned counsel for opposite party-2 and upon perusal of record, matter requires consideration.

Notice on behalf of opposite party-1 has been accepted by learned AGA. Mr. Pradeep Kumar Yadav, Advocate has put in appearance on behalf of opposite party-3. They pray for and are granted three weeks time to file counter affidavit. Applicant will have one week thereafter to file rejoinder affidavit.

Put up this case as fresh on 23.02.2023.

Till 23.02.2023, further proceedings against applicant in Case Crime No. 558 of 2022, under Sections 376, 506, 342 IPC and 3/4 POCSO Act, Police Station-Soraon, District- Prayagraj, shall remain stayed.

Order Date :- 23.1.2023
A.Kr. "

13. In the peculiar circumstances of this case, though we find that there is no quarrel with the law regarding invoking the jurisdiction of High Court under Article 226 of the Constitution of India that availability of alternative remedy is not an absolute bar. However, equally settled is the law that Courts ought to be extremely slow in exercising its extraordinary jurisdiction if effective alternative statutory remedy is available. In the present case, we find that the petitioner has already invoked the provisions of Section 482 Cr.P.C., which is an effective statutory remedy, therefore, it is not the question where preliminary objection is being raised solely on the ground that effective statutory remedy is available. In fact, objection is that admittedly, the effective alternative statutory remedy has already been availed of by the petitioner, which is still pending and is being pursued by the petitioner. Therefore, reply to the objection that effective statutory remedy has already been availed of, merely by asserting that the

alternative remedy is not an absolute bar, in our opinion, is of no help to the petitioner as admittedly the same has already been availed of. On this admitted fact, the objection is liable to be sustained. Moreover, so far as the validity and legality of the order dated 11.10.2022 is concerned, this Court cannot, in a petition under Article 226 of the Constitution, sit in appeal over the same.

14. Another argument from the petitioner's side has been that petitioner is in illegal custody as no valid remand order has been passed nor is on the record. If remand order is illegal, the natural consequence of the same is that the custody is also illegal for illegal custody there is remedy of habeas corpus. As the petitioner is detained in illegal custody against the legal process in violation of his constitutional rights under Article 21 of the Constitution of India. He deserves to be set at liberty forthwith. On the other hand, learned A.G.A. has submitted that the petitioner is in custody by judicial order which is valid one, therefore, against the valid custody the writ of habeas corpus is not maintainable because the petitioner is in judicial custody in accordance with the established procedure as provided under Cr.P.C.

15. Counsel for the petitioner has relied on the case of **Ram Narayan Singh (supra)** in which it was observed and held :-

"Detention of a person in custody after the expiry of remand order, without any fresh order of remand committing him to further custody while adjourning the case under S. 344, Cr.P.C. is illegal. - Adjournment of case - No order remanding accused to custody Legality of detention- Habeas corpus -Criminal Procedure Code, S.344."

16. Another case relied upon by the counsel for the petitioner is **Keshav Singh (supra)** in which petitioner was admitted on bail in petition filed under Article 226 of the Constitution of India, para 17 of which is relevant :-

"17. The petitioner is not entitled to challenge the commitment either on the ground of violation or the principles of natural justice or on the ground. that the facts found by the Legislative Assembly do not amount to its contempt. Once we come to the conclusion that the Legislative Assembly has the power and Jurisdiction to commit for its contempt and to impose the sentence passed on the petitioner, we cannot go into the question of the correctness, propriety or legality of the commitment. This Court cannot, in a petition under Article 226 of the Constitution, sit in appeal over the decision of the Legislative Assembly committing the petitioner for its contempt. The legislative Assembly is the master of its own procedure and is the sole judge of the question whether its contempt has been committed or not. In this connection, we may mention that learned counsel for the petitioner also contended that Rules 74 and 76 of the Rules of Procedure and Conduct of Business of the U. P. Legislative Assembly are ultra vires, Rule 74 reads as follows:"

17. In **Gautam Navlakha v. National Investigation Agency 2021 0 Supreme (SC) 334,** regarding writ of habeas corpus and judicial custody, the Apex Court observed and held :-

"61. A Habeas Corpus petition is one seeking redress in the case of illegal

detention. It is intended to be a most expeditious remedy as liberty is at stake. Whether a Habeas Corpus petition lies when a person is remanded to judicial custody or police custody is not res integra. We may notice only two judgments of this court. In Manubhai Ratilal Patel v. State of Gujarat and others,11. We may notice paragraph 24.

"(24) The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner." However, the Court also held as follows:

"31. It is well-accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in B. Ramachandra Rao [(1972) 3 SCC 256 : 1972 SCC (Cri) 481 : AIR 1971 SC 2197] and Kanu Sanyal [(1974) 4 SCC 141 : 1974 SCC (Cri) 280] , the court is required to scrutinise the legality or otherwise of the order of detention which has been passed.

Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted."

62. One of us (U.U. Lalit, J.) speaking for a Bench of two, followed the aforesaid line of thought in the decision of Serious Fraud Investigation Office and Ors. vs. Rahul Modi and Ors.12 and held as follows:

"(21) The act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition." We may also notice paragraph 19 from the same judgment.

"(19) The law is thus clear that "in habeas corpus proceedings a court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings".

63. Thus, we would hold as follows: If the remand is absolutely illegal or the remand is afflicted with the vice of lack of jurisdiction, a Habeas Corpus petition would indeed lie. Equally, if an order of remand is passed in an absolutely mechanical manner, the person affected

can seek the remedy of Habeas Corpus. Barring such situations, a Habeas Corpus petition will not lie."

18. In **Surjeet Singh v. State of U.P. 1984 ALL. L. J. 375**, full bench of this Court regarding whether the word '**custody**' used in Section 309 (2) Cr.P.C. means imprisonment both legal and illegal observed and held as under :-

"7. A plain reading of the abovementioned section shows that the power to remand the accused by a warrant is given to the Court if the accused is in custody. The aforesaid section does not mention that the accused must be in legal custody when the power to remand by a warrant can be exercised. In the above mentioned cases it is only mentioned that 'custody' means legal custody. No reason has been given in them for holding that custody means legal custody. The cardinal principle of interpretation of statutes is that words used in a statute must be given their ordinary, normal and grammatical meaning. Their ordinary meaning must neither be enlarged nor restricted unless it is necessary for harmonious construction. In London Rubber Co. Ltd. v. Durex Products Incorporated it has been observed:

Indeed, it is the duty of the Court to give full effect to the language used by the legislature. It has no power either to give that language a wider nor narrower meaning than the literal one, unless other provisions of the Act compel it to give such other meaning.

10. In Niranjan Singh v. Prabhakar Rajaram Kharote, it was held:

"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."

12. Section 41(1)(e) is as follows:

"41(1) any police officer may without an order from a Magistrate and without a warrant, arrest any person. (c) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody."

19. In **Urooj Abbas v. State of U.P. 1971 0 Supreme (All) 211**, this court regarding order of remand observed and held as under :-

"17. The second point raised by the learned Counsel is that it is mandatory on the part of a Magistrate, while remanding a prisoner to jail, to pass a separate or independent order remanding him to jail custody, as the mere issue of a warrant of remand will not be sufficient in law. He placed reliance for this proposition on Atiq Ahmad v. The State, an unreported decision of a Division Bench of this Court, of which I was a member. In Ram Narayan Singh's case, the Supreme Court had to deal with the validity of detention of an accused in respect of whom no order of the Magistrate remanding him to custody was placed before the Court, Four slips of

paper were produced but the Court did not take any notice of these documents because they were not produced at the proper stage. That decision, therefore, cannot be taken to be an authority for the proposition that a warrant of remand alone is insufficient. In Ojha's case, an observation was certainly made that a remand, without a specific order of remand, was invalid and illegal. With due respect, however, I am unable to agree to that view. The contention put forward by the learned Counsel, to my mind, does not flow from the language used in Section 344 (1-A). Criminal P. C. This section says that if. from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in cus-tody. It is only a postponement or adjournment which requires an order in writing and the reasons therefor, and not the act of remanding, which, if I may say so, can be evidenced by a mere warrant of remand, signed by the Magistrate. The decision in Atiq Ahmad's case, Cri. Misc. Case No. 737 of 1969, D/- 27-10-1969 (All) does not deal with the point now before us as it turned upon the invalidity of the warrant itself. The question whether a separate order of remand is or is not necessary came up for decision Fn re Kunjan Nadar, AIR 1955 Trav-Co 74 : 1955 Cri LJ 740 where Koshi, C. J. dealing with the matter observed thus :

The reasons to be stated as per the above provision are the reasons for the adjournment of the case and not the reasons for the remand. When a person charged with the commission of a non-bailable offence is produced before the Court unless he is admitted to bail the Court remands him to custody. This is done as a matter of course and is the only way to make him available for trial."

20. I**n Sunil Kumar Sharma v. State (Nct of Delhi)** decided on 27.06.2005, Delhi High Court has held as under :-

"16. These considerations convince me that the court is not required or expected to go into the lawfulness of the custody of the accused before remand under section 309. The only question with which the court is concerned is whether it is necessary to further detain the accused in custody. It must heed the future and not the past. For purposes of that Section it is enough that the accused is physically in custody, as opposed to being free. The legality of the custody is of no moment."

Lastly, the decision of the Allahabad High Court in Surjeet Singh v. State of U.P. : 1984 All. L. J. 375 (FB) requires some discussion. The question before the Full Bench of that court was whether the word "custody" used in Section 309, CrPC, means imprisonment both legal and illegal? This was answered in the affirmative. The Full Bench held:

"In view of the normal meaning of the word "custody" actual or physical imprisonment of a person both legal and illegal amounts to his being in custody. By restricting the meaning of the word "custody" in S. 309(2), Cr.P.C., to only legal imprisonment the normal meaning is obviously curtailed. It is not at all necessary for the harmonious construction of the provisions of the code of criminal

procedure to restrict the meaning of the word "custody" in S. 309(2), Cr.P.C., to legal imprisonment only. In fact, grave consequences follow if this restriction is placed on the meaning of the word "custody" for once the custody of the accused becomes illegal by his being confined in jail without a valid order or warrant of remand due to mistake of the Court it would become powerless to remand the accused to custody under S. 309(2), Cr.P.C., and rectify its error."

"The word "custody" in Section 309, Cr.P.C., in our opinion therefore, means physical imprisonment as distinct from being on bail. Even if the accused is in prison after his arrest in a criminal case without an order or warrant of remand by a competent Court he is in custody as distinct from being on bail. The word "custody" therefore embraces both legal imprisonment as well as illegal imprisonment."

"The Court is, therefore, competent to remand the accused to custody under S. 309(2), Cr.P.C., even if he is in illegal imprisonment. It can thus rectify its mistake and transform his illegal imprisonment into legal imprisonment."

Clearly, on the day when a remand order is made under section 309(2) CrPC it is not necessary that the petitioner/accused must have been in "lawful" custody. It is sufficient if he was in custody. In the context of the facts of the present case, even if we assume that the remand order was made on 26.4.2005 and not on 25.4.2005 and that the petitioner's custody between 25.4.2005 and 26.4.2005 was unlawful, it would not militate against the Magistrate's power to pass a valid order of remand under section 309 CrPC on 26.4.2005 when the accused was produced before him. It is also not necessary to go into the second ground urged by the learned counsel for the petitioner with regard to the remand order of 26.4.2005 being ex facie illegal on account of it being allegedly for a period of 16 days (i.e., "exceeding fifteen days"). This is so because subsequent remand orders passed under section 309 CrPC have legitimized the custody of the petitioner as of today."

21. In **Saquib Abdul Hamid Nachan And Ors v. State of Maharashtra (2006) 108 BOMLR 339, 2006 CriLJ 2196**, the Bombay High Court has held as under :-

"11. The Special Court, while holding the inquiry, acts as a Magistrate and obviously Section 309 would enable the Magistrate/Special Court to remand the accused to the custody till the inquiry to be made is complete and the Special Court, if after taking cognizance of the offence or commencement of trial, finds it necessary or advisable to postpone or adjourn any inquiry or trial, it may, from time to time, for the reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may by a warrant remand the accused if in custody. By following the law laid down in Lakshmi Brahman's case (Supra), it is evident that the order of remand passed by the Special Court on 22/7/2003, in the instant case, is an order passed under Section 309(2) of Cr.P.C. and the said order specifically states that the accused have been remanded to judicial custody until the disposal of the case. This is a valid and legal order passed under Section 309(2) of Cr.P.C. until the disposal of the case and in no way the detention of the petitioners is vitiated on account of their not being

presented before the Special Court, even though the trial of the Special Case has been presently stayed. The contentions that inspite of the stay operating against the trial of the case, the petitioners are required to be presented before the Special Judge and unless the Court passes the order of remand on each such day of attendance, their detention is illegal or unconstitutional, Page 350 cannot be accepted. Section 309(2) of Cr.P.C. empowers the Special Court to pass the remand order until the disposal of the Special Case. It is pertinent to note that the order of dispensation of attendance passed under Section 317(1) of Cr.P.C. as well as the order of remand passed on 22/7/2003 and held by us to be an order under Section 309(2) of the Code are not under challenge in this petition nor were they challenged at any time in the past. We have also noted from the record that the order passed under Section 317(1) of Cr.P.C. was subsequently revoked on 17/11/2003 as the accused were directed to be produced before the Special Court on 24/11/2003 and the accused continued to remain present on the basis of the production warrants signed by the Sheristedar, City Civil and Sessions Court, Gr. Bombay till 10/10/2005 and this goes to show that the accused were aware about the remand order having been passed on 22/7/2003 till the completion of the trial. . We, therefore, hold that the contentions of the petitioners that they are held in detention as at present illegally or in violation of their rights under Article 21 of the Constitution cannot be accepted as they have no force in law and, therefore, this petition must fail.""

22. In **Manubhai Ratilal Patel v. State of Gujarat & Ors [2013 1 SCC 314],** regarding writ of habeas corpus not entertainable when petitioner is in judicial custody, the Apex observed and held

"32. Coming to the case at hand, it is evincible that the arrest had taken place a day prior to the passing of order of stay. It is also manifest that the order of remand was passed by the learned Magistrate after considering the allegations in the FIR but not in a routine or mechanical manner. It has to be borne in mind that the effect of the order of the High Court regarding stay of investigation could only have bearing on the action of the investigating agency. The order of remand which is a judicial act, as we perceive, does not suffer from any infirmity. The only ground that was highlighted before the High Court as well as before this Court is that once there is stay of investigation, the order of remand is sensitively susceptible and, therefore, as a logical corollary, the detention is unsustainable. It is worthy to note that the investigation had already commenced and as a resultant consequence, the accused was arrested. Thus, we are disposed to think that the order of remand cannot be regarded as untenable in law. It is well accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in the cases of B.R. Rao (supra) and Kanu Sanyal (supra), the court is required to scrutinize the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of

habeas corpus cannot be granted. It is apposite to note that the investigation, as has been dealt with in various authorities of this Court, is neither an inquiry nor trial. It is within the exclusive domain of the police to investigate and is independent of any control by the Magistrate. The sphere of activity is clear cut and well demarcated. Thus viewed, we do not perceive any error in the order passed by the High Court refusing to grant a writ of habeas corpus as the detention by virtue of the judicial order passed by the Magistrate remanding the accused to custody is valid in law."

23. In **Saurabh Kumar v. Jailor, Koneila Jail & Anr. [2014 13 SCC 436]**, the Apex Court (per : N.V. Ramana, J.) has held as under :-

"13. It is clear from the said narration of facts that the petitioner is in judicial custody by virtue of an order passed by the Judicial Magistrate. The same is further ensured from the Original Record which this Court has, by order dated 9th April, 2014, called for from the Court of Additional Chief Judicial Magistrate, Dalsingsarai, District Samastipur, Bihar. Hence, the contention of the learned counsel for the petitioner that there was illegal detention without any case is incorrect. Therefore, the relief sought for by the petitioner cannot be granted. Even though there are several other issues raised in the Writ Petition, in view of the facts narrated above, there is no need for us to go into those issues. However, the petitioner is at liberty to make an application for his release in Criminal Case No. 129/13 pending before the Court of the learned Addl. Chief Judicial Magistrate, Dalsingsarai."

Per : T.S. Thakur, J. has held as under :-

"6. The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for offences, cognizance whereof has already been taken by the competent Court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of Habeas Corpus is, in the circumstances, totally misplaced. Having said that, we are of the view that the petitioner could and indeed ought to have filed an application for grant of bail which prayer could be allowed by the Court below, having regard to the nature of the offences allegedly committed by the petitioner and the attendant circumstances. The petitioner has for whatever reasons chosen not to do so. He, instead, has been advised to file the present petition in this Court which is no substitute for his enlargement from custody. We are also of the view that the Magistrate has acted rather mechanically in remanding the accused petitioner herein to judicial custody without so much as making sure that the remaining accused persons are quickly served with the process of the Court and/or produced before the Court for an early disposal of the matter. The Magistrate appears to have taken the process in a cavalier fashion that betrays his insensitivity towards denial of personal liberty of a citizen who is languishing in jail because the police have taken no action for the apprehension and production of the other accused persons. This kind of apathy is regrettable to say the least. We also find it difficult to accept the contention that the other accused persons who all belong to one family have absconded. The nature of the offences alleged to have been

committed is also not so serious as to probablise the version of the respondent that the accused have indeed absconded. Suffice it to say that the petitioner is free to make an application for the grant of bail to the Court concerned who shall consider the same no sooner the same is filed and pass appropriate orders thereon expeditiously."

24. In the **State of Maharashtra v. Tasneem Rizwan Siddiquee [AIR 2018 SC (Criminal) 1449],** the Apex Court has held as under :-

"9. The question as to whether a writ of habeas corpus could be maintained in respect of a person who is in police custody pursuant to a remand order passed by the jurisdictional Magistrate in connection with the offence under investigation, this issue has been considered in the case of Saurabh Kumar through his father Vs. Jailor, Koneila Jail and Anr., 1 and Manubhai Ratilal Patel Vs. State of Gujarat and Ors. 2 It is no more res integra. In the present case, admittedly, when the writ petition for issuance of a writ of habeas corpus was (2014) 13 SCC 436 (2013) 1 SCC 314 filed by the respondent on 18th/19th March, 2018 and decided by the High Court on 21st March, 2018 her husband Rizwan Alam Siddique was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No.I31 vide order dated 17th March, 2018 and which police remand was to enure till 23 rd March, 2018. Further, without challenging the stated order of the Magistrate, a writ petition was filed limited to the relief of habeas corpus. In that view of the matter, it was not a case of continued illegal detention but the incumbent was in judicial custody by virtue of an order passed by the jurisdictional Magistrate, which was in force, granting police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued. "

25. Thus, from the conjoint reading of all the above mentioned case laws, the legal position is clear that a writ of habeas corpus cannot be entertained when a person is committed to judicial custody or police custody by a competent court by an order, which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or is wholly illegal.

26. From the record, it is observed that petitioner is accused in S.S.T. 326 of 2022 arising out of Case Crime No. 558 of 2022, under section 376, 506, 342 I.P.C. and Section 3/4 POCSO Act, P.S. Soraon, District Prayagraj. He is named accused in the FIR and has been in judicial custody after submission of charge-sheet and cognizance taken, his remand has been changed to under section 309(2) CrPC from under section 167 CrPC. Later on, proceedings of the aforesaid Special S.S.T. 326 of 2022 have been stayed by the Court vide order dated 23.01.2023 in Application U/S 482 No. 37471 of 2022. Order dated 07.02.2023 is as follows :

''पत्रावली पेश हुई। पुकार करायी गयी। अभियुक्त युवराज यादव की से अप्लीकेशन अन्तर्गत धारा 482 नम्बर 37471/22 युवराज बनाम स्टेट आफ यू.पी. एवं 4 अन्य में माननीय उच्च न्यायालय के आदेश दिनांक 23.01.23 अभियुक्त द्वारा आज प्रस्तुत किया गया। उक्त आदेश का अवलोकन किया गया। उक्त आदेश के अनुसार माननीय उच्च न्यायालय द्वारा अं० धारा 376, 506, 342 भा०द०सं० व धारा ¾ पाक्सो एक्ट, थाना सोरांव जिला प्रयागराज की कार्यवाही स्थगित की गयी है। अतः माननीय न्यायालय द्वारा अप्लीकेशन अन्तर्गत धारा 482 नंबर 37471/22 युवराज यादव बनाम स्टेट आफ यू.पी. एवं 4 अन्य

में पारित दिनांक 23.01.23 के अनुपालन में कार्यवाही स्थगित की जाती है। पत्रावली दिनांक 04.03.23 को वास्ते एफ०ओ० पेश हो।''

27. There is no dispute with regard to the argument put forward by the counsel for the petitioner that remand order cannot be passed without application of mind and it must not be in a routine and mechanical manner. But all the same, it does not require that the order sheet should look like, a judgment delivered after full trial. In this view of the matter, we find that since the remand order authorising the detention of the accused to District Jail, Prayagraj is valid, within jurisdiction, after considering the stay order passed by this Court, the detention of the accused cannot be said to invalid on account of certain irregularities if any occurring in the earlier remand orders and the accused cannot get the benefit of such technical errors. We further held that the reasons contemplated in Section 309(2) Cr.P.C. for adjournment need not be detailed one. They should merely indicate as to why the proceedings in the Court on a particular date were adjourned. It is sufficient to show that proceedings of the S.S.T. No.326 of 2022 arising out of Case Crime No.558 of 2022, under section 376, 506, 342 I.P.C. and Section 3/4 POCSO Act, P.S. Soraon, District Prayagraj have been stayed by the order of this Court in Application No.37471 of 2022 under section 482 CrPC which is still operating. Therefore, if this much of indication is available from the record, the inference shall be that full compliance of Section 309(2) CrPC has been made and the accused is in legal custody vide valid remand order passed within jurisdiction and cannot get any benefit of it.

28. Lastly, there has been arguments on behalf of the petitioner that the petitioner is in illegal custody as remand order under section 309(2) Cr.P.C. has not been extended till date by the trial Court. From the case law discussed above, it is settled that if there is any irregularity found in remanding the accused under section 167 and 309(2) CrPC, the said irregularity may be rectified, the time it is brought to the notice of the Court concerned. It is not evident from the record that it has been brought to the notice of the court concerned that there is a illegality/ irregularity in extending the remand of the accused under section 309 (2) CrPC, moreover there is no duration fixed by the Court or the statute for the rectification of illegality/ irregularity of the remand order. Therefore, in the special facts and circumstances of this case the argument advanced by the counsel for the petitioner is not tenable.

29. At the cost of repetition it is reiterated that Article 21 clearly provides protection of life and personal liberty, however, it has clearly provided that no person shall be deprived of his life or personal liberty "except according to procedure established by law".

30. In the present case, the stand taken by the State while raising objection to the present petition is that the petitioner is in judicial / legal custody under the valid order of remand, which is the procedure established by law. It is clearly reflected from the record that the petitioner has already invoked provisions of Section 482 Cr.P.C. before the court. Thus, he has availed the effective statutory remedy and thus, has put the criminal administration of justice into motion and as per settled law writ of habeas corpus cannot be issued to set the same at knaught.

31. To sum up, it can be said that the petitioner has already invoked provisions of

Section 482 Cr.P.C., hence administration of criminal justice has already come into play and the same cannot be set at knaught by simultaneously invoking extra-ordinary remedy under Article 226 of the Constitution of India, which may be a remedy of right but as per settled law cannot be issued as a matter of course. Moreover, when corpus is in legal custody under valid remand order, the present writ petition is not be maintainable as per the law settled by the Apex Court as well as the High Courts.

32. Consequently, in view of the discussions made hereinabove objection raised by the State that the present petition is not maintainable as the petitioner has already invoked provisions of Section 482 Cr.P.C. and have approached the court, is upheld.

33. Present petition, accordingly, stands **dismissed**.

34. However, it is made clear that observations made in the aforesaid judgment shall have no bearing on any other pending or future proceedings

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(2023) 6 ILRA 838
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.05.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ-C No. 581 of 2010

Nanku & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Dr. L.P. Mishra, Sri Rajieu Kumar Tripathi

Counsel for the Respondents:
C.S.C., Sri Jai Kumar, Sri Pankaj Gupta, Sri Y.K. Mishra

Civil Law- Civil Law-Code of Civil Procedure-1908-Order 9 Rule 13, Order 17 Rule 2-General Rules Civil-89-A- Order sheet of the Court concerned shows that the transferee Court has not recorded any satisfaction that the defendants were informed of the transfer as required as per sub-rule 4 of Rule 89-A of GRC-If evidence or a substantial portion of evidence of "any party" has been adduced and "such party" fails to appear on any date to which the hearing of suit is adjourned then in that eventuality, the application on behalf of the said party under Order 9 Rule 13 CPC would not be maintainable. The expression "any party" and expression "such party" are relevant. In this case, the evidence of Gaon Sabha was recorded in the revenue Court of Extra Officer-Ist, District Bahraich (transferee Court) on 26.05.1995 but how the witness of Gaon Sabha, daughter-in-law of original plaintiff-Devta Deen, came to know about the pendency of case in the revenue Court of Extra Officer Ist, Bahraich, is not clear from the record, as observed hereinabove. However, the evidence of St. of U.P. (defendant in suit) was not adduced.

No notice regarding transfer of the case, in issue, was ever served or received or issued or notified and the St.ment of witness of St. of U.P. (one of the defendants), who filed the separate written St.ment, was not recorded, as such the application was maintainable under Order 9 Rule 13 CPC and rightly allowed by and affirmed by the Revisional Court concerned.

Petition dismissed. (E-15)

List of Cases cited:

1. G. Ratna Raj (Dead) by Legal Representatives Vs Sri Muthukumarasamy Permanent Fund Ltd. & anr.reported in 2019 (11) SCC 301.

2. Sri Pitamber Prasad Vs Sohan Lal & ors. reported in 1956 SCC OnLine All 182.

3. M.S. Khalsa Vs Chiranji Lal reported in 1975 SCC OnLine All 364.

4. Prakash Chander Manchanda & ors.Vs Janki Manchanda reported in AIR 1987 SC 42

5. Balbir Singh Chauhan Vs Vijai Kumar Agarwal reported in 1986 SCC OnLine All 694

6. Akttaryar Khan Vs Azahar Yar Khan reported in 1993 SCC OnLine All 156

7. Sikandar Vs Akhalak reported in 2008 SCC OnLine All 140

8. Writ Petition No. 1899 (MS) of 2012 (Jaggan Nath & ors. Vs The District Judge, Barabanki & ors.)

9. Anamika MishraVersus St. of U.P. & anr.reported in 2019 SCC OnLine All 4599

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Dr. L.P.Mihsra, learned Senior Member of Bar assisted by Sri Rajieu Kumar Tripathi, learned counsel for the petitioners and Sri Hemant Kumar Pandey, learned counsel for the State of U.P. as also Sri Pankaj Gupta, learned counsel for the respondent No. 7/Land Management Committee concerned.

2. Initially, by means of the present petition, petitioners have assailed the order dated 22.12.2009 passed by the respondent No.4-Tehsildar, Mahsi, District-Bahraich, whereby Tehsildar, Mahsi, directed the Revenue Inspector of the vicinity to take possession of the land (gatas in issue mentioned in the order) and place the proposal of allotment of land to eligible persons, and consequential relief was also sought. Thereafter, the petition was amended. It was for the purposes of assailing the orders dated 14.12.2009 and 24.02.2010 passed by the respondent No. 9-Commissioner, Devi Patan Mandal, Gonda and respondent No.10-Sub Divisional Magistrate, Bahraich, respectively.

3. By the impugned order dated 14.12.2009, respondent No.10-Sub Divisional Magistrate, Bahraich allowed the application dated 27.03.2008 preferred under Order 9 Rule 13 CPC by State of U.P. and Gaon Sabha-Bhabhnauti Shankarpur through D.G.C. Revenue, District-Bahraich as also another application for restoration of the case, which was filed by one Rajit Ram. The order dated 14.12.2009 was assailed by the petitioners in the Revision No. 130, which was filed under Section 333 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short "Act of 1950"). The revision filed by the petitioners in relation to the application preferred by D.G.C. Revenue was dismissed by the impugned order dated 24.02.2010.

4. It would not be out of place to point out here that the issue related to limitation in filing the application under Order 9 Rule 13 CPC has not been pressed before this Court. It is in view of the fact that the Revision No. 131 was filed assailing the order dated 07.12.2009, whereby the S.D.O. concerned observed that the issue of limitation would be considered at the stage of passing the final order. Thereafter, both the revisions were clubbed and decided by the revisional authority/respondent No.9-Commissioner, Devi Patan Mandal, Gonda by the common order dated 24.02.2010.

5. At this stage, this Court feels it appropriate to reproduce the main relief(s) sought in the present petition:-

"(i) Issue a writ order or direction in the nature of certiorari, quashing the impugned order dated 22.12.2009 passed by the Tehsildar, Mahsi, District Bahraich, as contained in Annexure No.19.

(i)(a) Issue a writ, order or direction in the nature of certiorari quashing the impugned orders dated 14.12.2009 and 24.02.2010 respectively passed by opp-partes nos. 9 & 10, as contained in Annexure Nos.15 & 25, respectively.

(ii) Issue a writ, order or direction in the nature of mandamus, commanding the opposite parties, to adhere to the Rules of Law and enforce the same and not to act in violation of the order dated 21.12.2009 passed by the Commissioner, Devipatan Mandal, Gonda, in Revision No. 366 under Section 333 of the U.P. Zamindari Abolition & Land Reforms Act, 1950, and not to interfere in the peaceful cultivator possession and harvesting the crops standing-over the disputed land of khata no. 172, situate in Village Babhnauti Shankerpur, Pargana-Fakharpur, Tehsil-Mahsi, District Bahraich by the petitioners.

(iii) Issue a writ, order or direction in the nature of mandamus, commanding the opp-parties, not to destroy the standing crops and tress and also not to dispossess the petitioners from the disputed land of Khata No. 172, situate in Village Babhnauti Shankerpur, Pargana-Fakharpur, Tehsil-Mahsi, District Bahraich, and, thereby, not to carry on the proceedings of allotment during the pendency of the Suit."

6. Needless to say that vide order dated 28.03.2023, the original record of the case was summoned, which is before this Court.

7. Facts, in brief, of the case which are relevant for the purposes of the disposal of the case, are as under:-

(i) A Suit No. 881/194/143 (in short "Suit") for declaration was filed under Section 229-B of the Act of 1950 by original plaintiff namely Devta Deen, predecessor in interest of petitioners.

(ii) In the plaint, the Gaon Sabha-Babhnauti Shankerpur, Pargana-Fakharpur, Tehsil-Mahsi, District-Bahraich, has been impleaded through Gopal Singh, Village Pradhan and State of U.P. has been impleaded through District Magistrate, Bahraich.

(iii) The suit was filed, as appears from the record, before the Assistant Sub Divisional Officer (K), 'K' refers to 'Kaiserganj', District-Bahraich.

(iv) It transpires from the record that after service of notice, the written statement was filed by the Gaon Sabha which bears the signature of Gopal Singh, Village Pradhan. It also appears from the written statement of Gaon Sabha that the plaint case was opposed. (v) Another written statement bearing signature of Shiv Naryan Singh, Advocate Panel Lawyer/Sub D.G.C. (Mall) was also filed wherefrom also it appears that the plaint case was opposed. This written statement, as appears from the record, is a proforma written statement and in the same, name of the Gaon Sabha has not been indicated.

(vi) From the aforesaid facts, it can be deduced that opposing the claim of original plaintiff- Devta Deen, one written statement was filed by Gaon Sabha and another written statement was filed by the State of U.P.

(vii) At this stage, it would be appropriate to indicate that from the record, it appears that the Vakalatnama(s) were filed by some Advocates on behalf of Gaon Sabha.

(viii) It also transpires from the record that the case for declaration of rights under Section 229-B of the Act of 1950 filed by Devta Deen was transferred on several occasions and the Suit was proceeded. However, to the view of this Court, these facts and dates are not relevant. The last few dates and the order(s) passed on the said dates are relevant. It is in view of the fact that prior to final decision in the matter vide order dated 31.05.1995, which was recalled vide order dated 14.12.2009, the case was transferred to the revenue Court of S.D.O. (K) and thereafter, to the revenue Court of Extra Officer Ist, Bahraich, who passed the final order dated 31.06.1995 and one of the pleas of State of U.P. and Gaon Sabha in the application preferred under Order 9 Rule 13 CPC for recalling the final order dated 31.05.1995 passed in Suit was to the effect that the applicants were not aware about the pendency of Suit in the revenue Court concerned. The said relevant part of the application reads as "सेवा में निवेदन है कि मुकदमा इब्तिदाई श्रीमानजी की न्यायालय से दिनांक 31.05.95 ई0 को एक पक्षीय रूप से निर्गत हुई है उक्त वाद की कोई जानकारी आवेदक गण किसी भी प्रकार विधिक रूप से नही हुई"

(ix) One fact, which appears from the impugned order dated 14.12.2009, is that at the time of recording the statement of witnesses and passing final order dated 31.05.1995, Lallan, petitioner No. 4, (who was substituted in suit) son of original plaintiff- Devta Deen was the Pradhan of village concerned and Up-pradhan was his wife Smt. Rama Devi, who supported the plaint case in her statement, which was recorded on 26.05.1995, after transfer of case in revenue Court of Extra Officer Ist, Bahraich.

(x) The relevant order(s), to the view of this Court, passed in the case are on reproduction are as under:-

"31-01-95

प्रस्तुत। वादी हाजिर अदालत पत्रावली ैक्व ;ज्ञद्ध के नयायालय में स्थानान्तरण हेतु प्रस्तुत हुई।

अतः आदेश हुआ कि पत्रावली 12.02.95 को पेश हो।

ह0 अपठनीय

12-02-95 .....

8-3-95 . .....

29-03-85 .....

1-4-95 .....

11-4-95 .....

29-4-95 .....

13-5-95 .....

14-5-95 .....

15-5-95 . .....

17-5-95 …….

प्रस्तुत। पुकार कराई गई पक्ष हाजिर आये। च्ॅण् 1 रामहेतु व च्ॅ 2 ननकऊ का बयान कराया गया साक्ष्य समाप्त।

अतः प्रतिवादी साक्ष्य हेतु दिनांक 26.5.95 पेश हो।

ह0 अपठनीय

जिलाधिकारी महोदय के आदेश दि0 05. 5.95 के अनुपालन में पत्रावली अति0 अधि0 प्रथम के न्यायालय पर हस्तान्तरित की जाती है पक्ष दिनांक 26.5.95 अति0 अधि0 प्रथम के न्याया0 पर उपस्थित हों।

ह0 अपठनीय
20-1-95

26-5-95

पत्रावली न्यायालय SDO (महसी) से प्राप्त होकर पेश हुई। पुकार कराई गई– द्वितीय पक्ष की तरफ से प्रधान गांव **अपठनीय** के साक्ष्य अंकित किए गए सा0 समाप्त हुए।

पत्रावली वास्ते बहस दिनांक 28.5.95 को पेश हो।

ह0 अपठनीय

28.5.95

प्रस्तुत। पुकार पर वादी मय अधिवक्ता हाजिर आए। बहस सुनी गयी।

पत्रावली वास्ते आदेश दि0 31.5.95 को पेश हो।

ह0 अपठनीय

31.5.95

पत्रावली पेश हुई। बहस हो चुकी है। मैंने पत्रावली का अध्ययन मनन कर अवलोकन किया। दावा वादी डिक्री किया जाता है। 2 किता आदेश संलग्न पत्रावली है। वाद आवश्यक कार्यवाही पत्रावली दाखिल दफ्तर हो।

ह0 अपठनीय
EO-I
31-5-95"

(xi) What reflects from the order sheet of the case including the orders, quoted above, is as under:-

(a) From the order dated 31.01.1995, it appears that the paper book of the Suit, in issue, was received from the S.D.O. (K), 'K' refers to 'Kaiserganj', in the Court of S.D.O., Mahsi on 31.01.1995.

(b) After receiving the file in the revenue Court of S.D.O., Mahsi, the parties appeared on different dates and on 17.05.1995, the statement(s) of PW-1/Ramhetu and PW-2/Nankau were recorded and the case was fixed for 26.05.1995 for evidence of defendants/opposite parties.

(c) Vide order dated 05.05.1995 passed by the District Magistrate, the Suit was transferred from revenue Court of S.D.O., Mahsi, District- Bahraich to Extra Officer Ist, District- Bahraich and based upon the same, the order sheet was drawn directing the parties to appear on 26.05.1995 before the revenue Court of Extra Officer Ist, District- Bahraich and this order appears to be passed on 21.01.1995.

(d) The date i.e. 21.01.1995 appears to be inadvertently mentioned. It is in view of the fact(s) that the order dated 31.01.1995 shows that the paper book of Suit, in issue, was received from revenue Court of S.D.O., (K) in revenue Court of S.D.O., Mahsi on 31.01.1995 and on 17.05.1995, the statement(s) of witnesses of PW-1 & PW-2 were recorded. Thus, it appears that the order dated 05.05.1995 passed by the District Magistrate transferring the case was not received prior to proceedings carried out on 17.05.1995 fixing next date as 26.05.1995 for recording evidence of defendants/opposite parties. If it was received prior to 17.05.1995 then in that eventuality the

statements of witnesses were not recorded on 17.05.1995.

(e) Between 17.05.1995 and 26.05.1995, the dates fixed in the case, the order of District Magistrate dated 05.05.1995 was not received in revenue Court of S.D.O., Mahsi and upon receiving the order dated 05.05.1995 of District Magistrate transferring the case to the revenue Court of Extra Officer Ist, Bahraich, an order bearing date as 21.01.1995 (wrongly indicated) was passed directing the parties to appear in the revenue Court of Extra Officer Ist on 26.05.1995, the date already fixed vide order dated 17.05.1995.

(f) From the aforesaid, it is apparent that on 21.01.1995 (wrongly indicated), the parties were not present and accordingly, it can be deduced that the parties were not aware regarding transfer of the case.

(g) Notice regarding transfer of case to revenue Court of Extra Officer Ist was neither issued, nor notified nor the parties were informed by the S.D.O., Mahsi or Extra Officer Ist regarding transfer and pendency of case in the Court of Extra Officer Ist.

(h) On 26.05.1995, the statement of witness (Smt. Rama Devi, daughter-in-law of original plaintiff-Devta Deen) of one defendant to the Suit namely "Gaon Sabha" was recorded but it is not clear from the order sheet/proceedings drawn by the concerned revenue Courts that how and in what manner, this witness of defendant-Gaon Sabha namely Smt. Rama Devi w/o Lallan s/o Devta Deen (original plaintiff), who supported the plaint case, came to know about the pendency of the case in revenue Court of Extra Officer Ist.

(i) The order sheet drawn by the Court on 31.01.1995 to 31.05.1995 does not bear the signature of counsel representing Gaon Sabha and also of the counsel representing State of U.P.

8. In the aforesaid background of the case, Dr. L.P. Mishra, learned Senior Member of the Bar assisted by Sri Rajieu Kumar Tripathi, learned counsel representing the petitioners stated that two applications were preferred for recalling the order dated 31.05.1995 under Order 9 Rule 13 CPC. One by Gaon Sabha through Rajit Ram and another by D.G.C. Revenue, which indicates that the same was preferred by the State of U.P. and Gaon Sabha. Both these applications were allowed by the impugned order dated 14.12.2009 by the respondent No. 10/Sub-Divisional Magistrate, Bahraich, though, the same were not maintainable under Order 9 Rule 13 CPC in view of explanation to Rule 2 of Order 17 CPC as also Order 9 Rule 6 CPC read with Order 17 Rule 1 & 2 CPC particularly the explanation to the same. It is for the reason that the case was transferred from S.D.O. (K) to the Court of S.D.O., Mahsi as appears from the order dated 31.01.1995, which is available on the record of the concerned Authority and after the said transfer, the statements of PW-1 & PW-2 were recorded on 17.05.1995 fixing 26.05.1995 for recording the statement/evidence of defendants and thereafter, though, the case was transferred to the revenue Court of Extra Officer, Ist from the Court of S.D.O. Mahsi, as appears from the order sheet dated 26.05.1995, the evidence of defendant to the suit namely Gaon Sabha concerned was recorded on 26.05.1995 itself and the explanation appended to Rule 2 of Order 17 CPC shows that if sufficient evidence has been adduced by the party then on his behalf, the

application would not be maintainable under Order 9 Rule 13 CPC. Thus, the order passed by the Sub-Divisional Magistrate dated 14.12.2009 is not sustainable.

9. Further submission is that the order dated 14.12.2009 was challenged before the Revisional Authority by means of Revision Nos. 130 and 131. The Revisional Authority decided the revision by an order dated 24.02.2010, which is also impugned in this petition. The operative portion of this order indicates that the revision was allowed against the respondent/Rajit Ram and the same was dismissed with regard to the application dated 27.03.2008 preferred by the D.G.C, Revenue under Order 9 Rule 13 CPC on behalf of State of U.P. and Gaon Sabha, which was allowed vide order dated 14.12.2009.

10. Sri Mishra further stated that the aforesaid aspect of the case, which is based upon the fact that sufficient evidence of defendant-Gaon Sabha was recorded after transfer of the case from S.D.O, Mahsi to Extra Officer, Ist, Bahraich and accordinlgy, the application under Order 9 Rule 13 CPC was not maintainable was overlooked by the Revisional Authority, though, the same ought to have been considered, as such, the order dated 24.02.2010 is also liable to be interfered with by this Court.

11. Sri Mishra also indicated some facts on the merits of the case including regarding initiation of proceedings twice against the original plaintiff- Devata Deen, which were initiated by the Gaon Sabha under Section 229-B of the Act of 1950. However, to the view of this Court, the factual aspect of the case is not necessary to be dealt with. It is in view of the issue involved in the present case. As such, the said part of the arguments is not being made part of this judgment.

12. Sri Mishra in support of his contentions has placed reliance on the following judgment(s) passed in the case(s) of:-

1. G. Ratna Raj (Dead) by Legal Representatives Vs. Sri Muthukumarasamy Permanent Fund Ltd. and another reported in 2019 (11) SCC 301.

2. B. Janakiramaiah Chetty Vs. A.K. Parthasarthi and others reported in (2003) 5 SCC 641.

3. Sri Pitamber Prasad Vs. Sohan Lal & others reported in 1956 SCC OnLine All 182.

4. Smt. Saroj and other Vs. State of U.P. and others reported in [2018 (138) RD 282].

5. Rame Gowda (dead) by LRs. Vs. M. Varadappa Naidu (dead) by LRs. and another reported in (2004) 1 SCC 769.

6. Ram Rattan and others Vs. State of U.P. reported in (1977) 1 SCC 188.

7. Civil Appeal No. 4257 of 2009 [Poona Ram Vs. Moti Ram (dead) Th. LRS. And ORS.].

8. Puran Singh and others Vs. State of Punjab reported in (1975) 4 SCC 518.

9. Electrosteel Castings Limited Vs. UV Asset Reconstruction Company

Limited And Others reported in (2022) 2 SCC 573.

10. My Palace Mutually Aided Co-operative Society Vs. B. Mahesh and Others reported in 2022 SCC OnLine SC 1063.

11. M.S. Khalsa Vs. Chiranji Lal reported in 1975 SCC OnLine All 364.

13. To the view of this Court, reference to the following judgments would be sufficient as the same are on the issue raised/involved in the instant case, which is based upon explanation to Rule 2 of Order 17 CPC.

(i) G. Ratna Raj (Dead) by Legal Representatives Vs. Sri Muthukumarasamy Permanent Fund Ltd. and another reported in 2019 (11) SCC 301.

(ii) Sri Pitamber Prasad Vs. Sohan Lal & others reported in 1956 SCC OnLine All 182.

(iii) M.S. Khalsa Vs. Chiranji Lal reported in 1975 SCC OnLine All 364.

14. Relevant paragraphs of the judgment passed in the case of **G. Ratna Raj (Dead)** (supra) referred by Sri Mishra are as under:-

"14. In our opinion, the question involved in these appeals is required to be decided keeping in view the provisions of Order 9 Rule 6(1)(a) and Order 17 Rules 2 and 3 of the Code.

"Order 9 Rule 6(1)(a)

6. Procedure when only plaintiff appears.— (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

(a) When summons duly served.— If it is proved that the summons was duly served, the Court may make an order that the suit be heard ex parte;"

15. Rule 6(1)(a) provides that where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then if the summons is held duly served on the defendant, the Court may make an order that the suit be heard ex parte.

16. Order 17 Rules 2 and 3 read as under:

Order 17 Rules 2 and 3

2. Procedure if parties fail to appear on day fixed.*—Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit.*

Explanation.—Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

*3. **Court may proceed notwithstanding either party fails to produce evidence, etc.**— Where any party to a suit to whom time has been granted*

fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default—

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under Rule 2."

17. Order 17 Rule 2 of the Code provides that where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit.

18. The Explanation appended to Order 17 Rule 2 of the Code provides that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the court may, in its discretion, proceed with the case as if such party was present.

20. The scope of Order 17 Rule 2 and Order 17 Rule 3 of the Code came up for consideration before this Court in B. Janakiramaiah Chetty v. A.K. Parthasarthi [B. Janakiramaiah Chetty v. A.K. Parthasarthi, (2003) 5 SCC 641] wherein Arijit Pasayat, J., speaking for the Bench held in paras 7 to 10 as under : (SCC pp. 645-46)

"7. In order to determine whether the remedy under Order 9 is lost or not what is necessary to be seen is whether in the first instance the Court had resorted to the Explanation of Rule 2.

8. The Explanation permits the court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the court is to be exercised in a given circumstance. For application of the provision, the court has to satisfy itself that : (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day; and (c) the day is one to which the hearing of the suit is adjourned. Rule 2 permits the court to adopt any of the modes provided in Order 9 or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the rule, conferring discretion on the court to act under the specified circumstance i.e. where evidence or a substantial portion of evidence of any party has been already recorded and such party fails to appear on the date to which hearing of the suit has been adjourned. If such is the factual situation, the court may in its discretion deem as if such party was present. Under Order 9 Rule 3 the court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6 and 8. We are primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation are "proceed with the case". Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the court or not.

9. In Rule 2, the expression used is "make such order as it thinks fit", as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17 Rule 3(b), the only course open to the court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the Rule. While Rule 2 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the court to decide the suit forthwith. The basic distinction between the two Rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

10. The crucial expression in the Explanation is 'where the evidence or a substantial portion of the evidence of a party'. There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The court while acting under the Explanation may proceed with the case if that prima facie is the position. The court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision.""

15. Relevant paragraphs of the judgment passed in the case of **Sri Pitamber Prasad** (supra) referred by Sri Mishra, on reproduction, read as under:-

"3. On a consideration of the case law and the relevant provisions of the Code of Civil Procedure it appears to us that the contention of the learned counsel for the respondent is correct. In all cases in which in the absence of one of the parties a final order has been passed against him in a case on an adjourned date, there are always two questions to be considered:

(1) What was the Court empowered to do—to proceed under O. IX or to decide on merits?

(2) What has the Court actually done— has it proceeded under Order IX or decided on merits

4. First as to the power of the Court.

5. Order XVII of the Code of Civil Procedure refers to adjournments.

Rule 1 authorises the court at any stage of the suit to adjourn the case from time to time if sufficient cause is shown. Rule 2 as amended by this Court and as it stands at present is as follows:—

"Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX, or make such other order as it thinks fit. Where the evidence, or a substantial portion of the evidence, of any party has already been recorded, and such party fails to appear on such day, the Court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits.

Explanation:—"No party shall be deemed to have failed to appear if he is either present or is represented in court by an agent or pleader, though engaged for the purpose of making an application."

6. Rule 2, therefore, deals with a case in which one of the parties in fact fails to appear on an adjourned hearing. If no evidence, or a substantial portion of the evidence of the absent party has been recorded then the court may pass any one of two orders, i.e., (a) if the plaintiff is absent, dismiss the suit for default under O. IX, Rule 8 and if the defendant is absent, decree the suit ex parte under Order IX, Rules 6, 11 or 12, or (b) it may make such other order as it thinks fit, i.e., adjourn case.

7. If, however, evidence or a substantial portion of the evidence of a party has been recorded and such party fails to appear on the date fixed, the court may proceed to decide the case on merits, even though the party is absent, or it may pass any of the orders mentioned above, i.e. an order under O. IX, or an order of adjournment.

8. The explanation states the circumstances under which a party is not to be deemed to have failed to appear. If the case falls under the Explanation the party concerned cannot be considered to be absent, and no order under O. IX can be passed, and the court may either adjourn the case or decide it on merits.

9. Rule 3 as originally enacted by the Legislature was as follows:

"Where, in a case to which Rule 2 does not apply, any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance, of his witnesses, or to perform any other act, necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith."

10. This was amended by the Allahabad High Court by notification No. 6324/35(a) dated December 2, 1926 to read as follows:—

"Where any party to a suit, to whom time has been granted, fails without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, whether such party is present or not, proceed to decide the suit on the merits."

11. As amended, therefore, a suit could be decided on the merits under this

rule even though the party was absent. By an amendment dated 1-7-1944 this amendment was cancelled by the Court and the original rule as enacted by the Legislature was restored. When this original rule was restored it was held in one case by a Division Bench of this Court (see Qudrutullah v. Md. Karim Khan11), chat this rule did not apply when a party to whom time had been granted was absent and that it applied only when the party concerned was present. But in Sri Kishen v. Radha Kishen2 another Division Bench held that the rule could apply even when the party concerned was absent provided that the conditions laid down in the rule were satisfied. This conflict of opinion was however avoided by a later amendment of the rule made in the year 1953 by which it was made clear that the rule did not apply when the party concerned was absent. Thus as Rule 3 stands at present in this Court it can apply only when the party concerned is present on the adjourned date or is deemed to be present under the explanation to Rule 2 and he fails to do things for which the adjournment was granted to him and in such a case the court may decide the case on the merits or adjourn it but has no power to pass an order under O. 9.

12. There is a difference between dismissing or decreeing the suit under O. IX and decreeing or dismissing the suit on merits. In the former case, an application for restoration of the suit or for setting aside the ex parte decree lies to the court which passed the order. In the latter case, no such application can be made and the aggrieved party must proceed either by means of an application for review or by means of an appeal to a higher Court."

16. Relevant paragraphs of the judgment passed in the case of M.S. Khalsa (supra), as indicated by Sri Mishra, are as under:-

"51. The explanation added by this Court, by a fiction, makes a party present (where his counsel makes an adjournment application). When a party is deemed to be present, the same position follows as when he is actually present but does not participate in the hearing. Since he is present, the Court cannot proceed ex parte. The hearing will naturally be on merits and if the suit is decided on that day, the decree will be on merits, which cannot be set aside on an application under Order IX, Rule 9 or 13, C.P.C.

77. Order IX, Rule 13, authorises the defendant to apply to the court by which the decree was passed for an order to set it aside "in any case in which a decree is passed **ex parte** against a defendant". Order IX, Rule 6(1)(a) entitles the court to proceed ex parte where the plaintiff appears and the defendant does not appear when the suit is called on for hearing."

17. In the above referred judgments of this Court, Rule 2 of Order 17 CPC as amended by this Court was also taken note of.

18. Based upon the aforesaid judgment, Sri Mishra also stated that where the evidence or substantial portion of evidence of a party has been recorded and such party fails to appear on the date to which the hearing of the suit has been adjourned, the Court may in its discretion proceed with the case as if such party was present. In the instant case, sufficient evidence of the defendant-Gaon Sabha was recorded and being so, it is presumed that the party concerned was present before the Court and was having due knowledge of

the proceedings and for this reason, the application preferred under Order 9 Rule 13 CPC was not maintainable.

19. He further submitted that explanation to Rule 2 of Order 17 added by this Court, by a fiction, makes a party present (where his counsel makes an adjournment application). When a party is deemed to be present, the same position follows as when he is actually present but does not participate in the hearing. Since he is present, the Court cannot proceed ex parte. The hearing will naturally be on merits and if the suit is decided on that day, the decree will be on merits, which cannot be set aside on an application under Order IX, Rule 9 or 13, C.P.C. and then in that eventuality, the judgment would be appealable and being so, an application for setting aside the judgment by calling it an ex-parte judgment would not be maintainable.

20. He further submitted that the application under Order 9 Rule 13 CPC would be maintainable only if the concerned party satisfies the Court the summon was not duly served and on account of the same, he failed to appear on the date fixed or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. As such, this case would not be covered under Order 9 Rule 13 CPC. It has been indicated by the Hon'ble Apex Court that for the purposes of making an application under Order 9 Rule 13 CPC, the concerned has to show the sufficient cause of non-appearance. In the instant case, the witness of defendant had appeared and she was duly examined and also cross examined, thus, the present case would fall under explanation to Rule 2 of Order 17 CPC. In this view of the matter, the present petition is liable to be allowed and the orders impugned are liable to be set aside.

21. Opposing the present petition, Sri Hemant Kumar Pandey, learned State Counsel and Sri Pankaj Gupta, learned Counsel appearing for opposite party No.7/Gaon Sabha concerned stated that the application under Order 9 Rule 13 CPC was maintainable as no notice was served upon the Gaon Sabha concerned as also on the State of U.P., after transfer of the case from the revenue Court of S.D.O., Mahsi to Extra Officer- Ist, Bahraich.

22. It is also stated from the side opposite that the case was initially filed in the Court of A.S.D.O.(K) and thereafter on several times, it was transferred. On some occasions, the notice was served and on other, it was not served. However, after being transferred from the revenue Court of S.D.O., Mahsi, no notice was served on the Gaon Sabha or the State of U.P. indicating that now the case would proceed in the court of Extra Officer- Ist, Bahraich. As such, the application was maintainable.

23. It is also submitted that sufficient cause on the date of non-appearance has to be shown and as in the present case, no notice was served and on coming to know about the ex-parte final order dated 31.05.1995, an application was preferred under Order 9 Rule 13 CPC through DGC, Revenue, Bahraich for restoration of the case and hearing the case on merits. As such the application was well within the time. It is from the date of knowledge of order dated 31.05.1995, which as per the application is of 27.03.2008 and on the same day i.e. 27.03.2008, the application under Order 9 Rule 13 CPC was moved.

24. Learned State Counsel based upon the provisions as envisaged under Rule 89-A of General Rules, 1957 stated that after transfer, the transferring Court is under obligation to satisfy itself that as to whether the notice regarding transfer of the case has been served on the parties to the proceedings. In this case, there is no indication regarding service of notice on contesting parties in the order sheet drawn on 26.05.1995 i.e. after receiving the file in the revenue Court of Extra Officer-Ist, Bahraich from the revenue Court of S.D.O., Mahsi. He further submitted that this provision is mandatory in nature and should be complied with in letter and spirit. In support of his submissions, Sri Pandey has placed reliance on the following judgment(s):-

1. Vandana Patel Vs. Phoolkali and Ors. reported in AIR 2010 All 2.

2. Vijai Singh and Ors. Vs. IInd Additional District Judge, Muzaffarnagar and Ors. reported in MANU/UP/1359/1992.

3. State of U.P. Vs. Dy. Director of Consolidation and Ors. reported in AIR 1996 SC 2432.

4. Balbir Singh Chauhan v. Vijai Kumar Agarwal reported in 1986 SCC OnLine All 694.

5. Judgment dated 04.04.2016 passed by this Court in Matters Under Article 227 No. 2026 of 2016 (Ram Naresh Vs. Hari Nam Prasad).

6. G.P. Srivastava Vs. R.K. Raizada and Ors. reported in AIR 2000 SC 1221.

7. Sushil Kumar Sabharwal Vs. Gurpreet Singh and Ors. reported in AIR 2002 SC 2370.

8. Vinod Kumar Pandey and Ors. Vs. State of U.P. and Ors. reported in MANU/UP/1038/2005.

9. Avadhesh Kumar and Ors. Vs. District Magistrate, Lko. and Ors. reported in MANU/UP/2566/2022.

10. Akttaryar Khan Vs. Azahar Yar Khan reported in 1993 SCC OnLine All 156.

11. Bishan Singh Vs. The IXth Addl. District Judge, Agra and Ors. reported in MANU/UP/1871/1996.

12. Ram Padarath Vs. Chiraunji Devi reported in MANU/UP/2689/2014.

13. Poonam Gupta and Ors. Vs. Anil Agarwal reported in MANU/UP/5483/2018.

14. State of U.P. and Ors. Vs. Sunil Kumar Bajpai and Ors. reported in MANU/UP/1002/1989.

15. Anamika MishraVersus State of U.P. and Another reported in 2019 SCC OnLine All 4599.

16. Saurabh Agarwal Vs. Additional Commissioner (Judicial) Agra Mandal, Agra and Ors. reported in MANU/UP/2350/2011.

17. Mumtaz Ahmad and Ors. Vs. Deputy Director of Consolidation, Lucknow and Ors. reported in MANU/UP/2315/2015.

18. Prakash Chander Manchanda and Ors. Vs. Janki Manchanda reported in AIR 1987 SC 42.

19. Order dated 16.09.1988 passed in Civil Misc. Writ Petition No. 8587 of 1988 (Krishna Kumar Sharma Vs. Raj Garg and Ors.).

25. In nutshell, it is stated by the side opposite that in absence of any notice, the Court proceeded to decide the case, as such, the order dated 14.12.2009 affirmed by the order dated 24.02.2010 is justified and no interference of this Court is required in the matter.

26. It is also stated by learned counsel for the side opposite that in written statement, which was filed by Gaon Sabha, the claim of the original plaintiff- Devta Deen was opposed. However, the evidence indicates that after being transferred to the revenue Court of Extra Officer-Ist, Bahraich, the case was of original plaintiff was admitted by the Pradhan of Gaon Sabha namely Rama Devi w/o Lallan s/o of Devta Deen (original plaintiff). In this regard, reference has been made to the observations made by S.D.O./respondent No. 10 in the order dated 14.12.2009. It would be apt to indicate here that this aspect of the case has not been disputed by the counsel for the petitioners.

27. Based upon the aforesaid, it has also been submitted that Lallan was the plaintiff, as he was substituted after the death of original plaintiff Devta Deen, when the final order dated 31.05.1995 was passed and his wife Rama Devi deposed as a witness of Gaon Sabha before the revenue Court of Extra Offier- Ist and there is no indication in the order dated 26.05.1995 regarding service of notice on the parties to the litigation. All these facts indicate that there was no notice to the parties to the suit regarding pendency of suit in the revenue Court of Extra Officer- Ist and judgment/final order dated 31.05.1995 is a collusive order. In these circumstances, the present petition is liable to be dismissed.

28. All the judgments referred by Sri Hemant Kumar Pandey, learned State counsel, to the view of this Court, are not liable to be referred in detail in this case. The judgments which are relevant to the view of this Court are referred herein below:-

29. In the case of **Prakash Chander Manchanda and Ors. Vs. Janki Manchanda** reported in **AIR 1987 SC 42**, the Hon'ble Apex Court has observed as under:-

"6. In some decisions, the High Courts have gone to the extent of saying that even if the trial court disposes of the matter as if it was disposing it on merits under Order 17 Rule 3 still if the party against whom the decision was pronounced was absent it could not be treated to be a disposal in accordance with Order 17 Rule 3 and provisions of Order 9 will be available to such a party either for restoration or for setting aside an ex parte decree. Learned counsel placed before us a number of decisions of various High Courts on this aspect of the matter. But in our opinion in view of the amendment to these two rules which have been made by 1976 amendment of the Code of Civil Procedure it is not disputed that to the facts of this case, Code of Civil Procedure as amended will be applicable and therefore it is not necessary for us to go into that question. Order 17 Rule 2 and Rule 3 as they now stand reads:

"Order 17, Rule 2. Procedure if parties fail to appear on day fixed.—Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit.

Explanation.—Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.

Order 17 Rule 3. Court may proceed notwithstanding either party fails to produce evidence, etc.—Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default,—

(a) if the parties are present, proceed to decide the suit forthwith, or

(b) if the parties are, or any of them is, absent proceed under Rule 2."

It is clear that in cases where a party is absent the only course as mentioned in Order 17 Rule 3(b) is to proceed under Rule 2. It is therefore clear that in absence of the defendant, the court had no option but to proceed under Rule 2. Similarly the language of Rule 2 as it now stands also clearly lays down that if any one of the parties fails to appear, the court has to proceed to dispose of the suit in one of the modes directed under Order 9. The explanation to Rule 2 gives a discretion to the court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9 of the Code of Civil Procedure. It is therefore clear that after this amendment in Order 17 Rules 2 and 3 of the Code of Civil Procedure there remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on October 30, 1985 the case was called nobody was present for the defendant. It is also clear that till that date the plaintiff's evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that up to the date i.e. October 30, 1985 when the trial court closed the case of defendant there was no evidence on record on behalf of the defendant. In this view of the matter therefore the explanation to Order 17 Rule 2 was not applicable at all. Apparently when the defendant was absent Order 17 Rule 2 only permitted the court to proceed to dispose of the matter in any one of the modes provided under Order 9.

7. It is also clear that Order 17 Rule 3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant. In this view of the matter it could not be disputed that the

court when proceeded to dispose of the suit on merits had committed an error. Unfortunately even on the review application, the learned trial court went on in the controversy about Order 17 Rules 2 and 3 which existed before the amendment and rejected the review application and on appeal, the High Court also unfortunately dismissed the appeal in limine by one word."

30. In the case of **Balbir Singh Chauhan v. Vijai Kumar Agarwal** reported in **1986 SCC OnLine All 694,** this Court considered Rule 89-A of General Rules (Civil) meant for Civil Courts subordinate of this Court and observed as under:-

"7. It has been contended by the learned counsel for the applicant that no information either to the applicant or to his counsel was ever given as regards the transfer of the suit. The court below, thus, illegally proceeded to dispose of the suit ex parte in the absence of the applicant. There is merit in this submission. Rule 89A of the General Rules (Civil) meant for Civil Courts subordinate to High Court, which is reproduced herein below, provide for the transfer or withdrawal of cases.

"89A(1) When a case, i.e. a suit, appeal or other proceedings in which a date for attendance of a party or the parties in a particular Court has been fixed, is transferred from that court to another, the former court shall record the order of transfer in the order-sheet and get it signed by counsel of the party or parties; if any party is unrepresented information shall be sent to his registered address. The case shall be called out by the other court on the date already fixed by the transferring court and the presence of the parties noted.

(2) A note to the effect that a party or the parties have been informed in accordance with sub-rule (1) shall be made on the record by the transferring court.

(3) Where cases are transferred in a large number the court from which they are transferred shall, besides following the procedure laid down in sub-rule (1), draw up a list mentioning in it the numbers and years of the cases and the names of the parties and their counsel, and shall cause one copy of it to be pasted on the notice board of the local bar association for information of the members of the bar and another copy to be pasted on the notice-board of the court for information of the general public. It shall also be sent to the other court along with the records of the transferred cases, a copy of the list (or relevant extract of it), the other court shall paste it on its own notice-board. If the other court is situated in a different place in which there is another bar association, an extra copy of the list shall be sent to it for being pasted on the notice board of the bar association.

(4) The court to which cases are transferred shall not proceed without satisfying itself that the parties or their counsel, as the case may be, have been informed of the transfer."

8. Sub-rule (1) of Rule 89A lays down the manner and the procedure to be adopted in the event of the transfer of a case from one court to another. This case was fixed on 18-2-86. An order for the transfer of the case was made on 21-2-86 apparently in the absence of the parties. Though no doubt it was ordered that the case be taken up on 18-3-86, the date fixed by the transferring Court, it was incumbent on the transferring Court to have satisfied

itself that the parties or their counsel have been informed and the presence of the parties noted on the date. It was likewise necessary as provided under sub-rule (2) of Rule 89A that a note to the effect that the party or parties have been informed of the transfer was also made. On the margin of the order sheet the date 18-3-86 has been indicated and the names of the counsel of the parties have been shown clearly for a purpose to inform them. No information was ever sent. However, without satisfying itself even the transferee Court proceeded without recording its satisfaction that the parties of their counsel have been informed of such transfer. The Court instead of satisfying itself proceeded to dispose of the case ex parte recording the absence of the applicant (defendant). With all the haste the statement of the opposite party (plaintiff) was recorded and the judgment and order decreeing the suit ex parte was passed on that very date i.e. 18-3-86. It is, thus, clear that the transferring Court as well as the transferee Court, both, ignored the provisions of Rule 89 A of General Rules (Civil) much to the prejudice of the applicant. The Court while decreeing the suit ex parte has, thus, committed an error which would be deemed to be an error of the Court and for which no party can be penalised. It may not be out of place to mention here that in the present circumstances when the dearth of accommodations is enveloping the people tenancy naturally becomes a valuable right. Every person has to be given an opportunity to safeguard the attack on his tenancy. Prudence would require exercising caution while proceeding to dispose of a suit involving tenancy of a person and particularly at his back. The courts must assure themselves that adequate opportunity of contesting the eviction is afforded to a tenant and orders for the eviction of such tenant shall be resorted to only when it is found that the tenant is guilty of some laches or inaction or is deliberately trying to avoid participation in the proceeding.

9. The court below while disposing of the application under Order 9, Rule 13, C.P.C. has itself held that the applicant was not informed about the hearing of the case before the transferee Court on 18-3-1986 and had sufficiently made out a case for his non-appearance on the date fixed. It can further be added that the applicant cannot be held guilty of laches or inaction when the affidavit filed by the applicant in support of his application under Order 9, Rule 13, C.P.C. as well as the affidavit filed in this Court that immediately on coming to know on 19-4-86 about the transfer of the case an application was filed on 21-4-86 (20-4-86 being Sunday) and was registered on 23-4-86. When an error or mistake having been committed by the Court had been realised it would have been more appropriate to have undone the error and correct the mistake. While exercising inherent powers it was the duty of the Court to have set aside the ex parte decree and recourse to the exercise of powers should have been achieved instead of maintaining that compliance to section 17 of the Provincial Small Cause Courts Act was necessary.

10. In view of a singular fact that the counsel for the parties were not informed and in particular the counsel for the defendant about the transfer of the case from the court of the District Judge to the Court of 8th Additional District Judge, it cannot be deemed that the defendant was absent and the Court was not competent to proceed in disposing of the suit ex parte in default of the applicant. A mistake or error

had crept in on account of an act of the Court and it was incumbent on the Court to have rectified its mistake. Placed in such situation even an application under Order 9, Rule 13, C.P.C. was not necessary and strictly such provisions were not applicable. On the facts of the case no application as provided was required nor the defendant was required to comply with the provisions of section 17 of the Act. Having been apprised of such facts and the notice being brought of such facts to the knowledge of the Court it ought to have itself set aside the ex parte decree. The principle of "actus curiae neminem gravabit" i.e. an act of Court shall prejudice no one, is strictly applicable and fully attracted to the facts of the instant case. In the case of *Munnoo v. Smt. Champakafi*, 1979 All LJ 534 a similar view was taken by this Court, where it was held that where for the lack of the information to the defendant's counsel of the change in the-date the suit proceeded, it cannot be deemed that the Court disposed of the suit on a date which was fixed for the hearing of suit and consequently, the provisions of Order 9, Rule 13, C.P.C. were not applicable. It was further held that in such circumstances the defendant-applicants were not required to comply with the provisions of section 17 of the Provincial Small Cause Courts Act. In the case of *Mohammad Ali v. Governor General in Counci*l, AIR 1949 All 36 this Court has held that where without any notice of the date of hearing to the respondents the appeal was dismissed, such dismissal of appeal would not be under Order 41, Rule 17. The provisions of Article 168 of the Limitation Act, 1908 would not apply while claiming setting aside of such a dismissal order. A learned Judge of this Court held in the case of *Mohammad Ali v. Governor General in Council* (Supra) as under:—

"It is always open to Court and ought to be open to the Court to rectify its error. This is what the Court has done."

11. In the case of Bhagwati Prasad v. Ram Roop Tewari, AIR 1962 All 622 the same principle has been laid by this Court.

12. The dictum of law in the cases cited above is fully applicable to the facts of this case. It is clear that the suit was heard and decreed ex parte in the absence of the applicant (defendant) as no notice was either given to the applicant nor to his counsel either by the transferring Court or by the transferee Court. The absence of the applicant was neither deliberate nor can he be held to be negligent in pursuing the case. The absence of the defendant was caused on account of a mistake of the Court. Naturally the applicant cannot be allowed to suffer for such a mistake, error or omission of the Court and the applicant cannot be blamed for his non-appearance. The application under Order 9, Rule 13, C.P.C. ought not to have been rejected by the Court below. The court below, thus, erred to exercise jurisdiction which otherwise vested in it by law in rejecting the application on the ground that the application under Order 9, Rule 13, C.P.C. did not satisfy the requirements of Section 17 of the Provincial Small Cause Courts Act Learned counsel for the opposite party Sri S.M. Dayal has in a very straight forward manner conceded to the propositions of law but has mildly stuck to his submission that where the statute provides for express provisions for setting aside an ex parte decree inherent power of the Court cannot be invoked. I do not find much substance in this submission in view of the fact that the Courts have always the power to rectify their mistakes or errors and

a party cannot be penalised for the same. The Court is fully competent while invoking its inherent power to set at naught the wrong done to a party on account of its mistakes. Learned counsel for the opposite party then placed reliance on the case of G.D. Mukerji v. Shiv Kumar Gupta, (1983) 2 All Ren Cas 315. This citation is of no avail to the opposite party as the facts in that case are at variance with the controversy involved in the present case. It was found in the case of Lt. Commander, G.D. Mukerji v. Shiv Kumar Gupta (supra) that the applicant was served but on account of certain preoccupations he could not attend to his case. There was no mistake of the Court in that case and as such it was necessary that while filing an application under Order 9, Rule 13, C.P.C. compliance of section 17 has to be resorted to. This case is equally distinguishable from the facts as are revealing in the present case."

31. In the case of **Akttaryar Khan Vs. Azahar Yar Khan** reported in **1993 SCC OnLine All 156**, this Court observed as under:-

"It was further submitted that in the impugned order the court below has stated that the transferee court had also issued summons to the defendant-applicants and consequently the requirement of the provisions of Rule 89A of the General Rules (Civil) was complied with and the submission made on behalf of the defendant-applicants was not sustainable. Rule 89A of the General Rules (Civil) on which strong reliance has been placed, reads as follows:—

"Rule 89A(1) When a case i.e. a suit, appeal or other proceedings in which a date for attendance of a party or the parties in a particular court has been fixed, is transferred from that court to another, the former court shall record the order of transfer in the order sheet and get it signed by the counsel of the party or parties, if any party is unrepresented, information shall be sent to his registered address. The case shall be called out by the other court on the date already fixed by the transferring court and the presence of the parties noted.

(2) A note to the effect that a party or the parties have been informed in accordance with sub-rule (1) shall be made on the record by the transferring court.

(3) Where the cases are transferred in a large number the courts from which they are transferred shall, besides following the procedure laid down in sub-rule (1), draw up a list mentioning in it the numbers and years of the cases and the names of the parties and their counsel, and shall cause one copy of it to be pasted on the notice board of the local bar association for information of the members of the bar and another copy to be pasted on the notice board of the court for information of the general public. It shall also Send to the other court along with the records of the transferred cases, a copy of the list (or relevant extract of it); the other court shall paste it on its own notice board. If the other court is situated in a different place in which there is another bar association, an extra copy of the list shall be sent to it for being pasted on the notice board of the bar association.

(4) The court to which cases are transferred shall not proceed without satisfying itself that the parties or their counsel, as the case may be, have been informed of the transfer".

5. Applying the provisions of the Rule 89A of the General Rules (Civil) quoted above, in the facts of the present case, it would be noticed from the order sheet (a copy of which has been filed along with the affidavit filed in support of the stay application) that the suit was registered on 8-10-1991 in the court of the District Judge, Bareilly and 11-11-1991 was fixed for the appearance of the defendants for which summons were issued. On 30-10-1991 the case was transferred to the court of IIIrd Additional District Judge where it was received on 2-11-1991. On the same day the transferee court ordered the case to be put up on the date fixed i.e. 11-11-1991. On 11-11-1991 the Court found that the defendants were absent and no written statement had been filed. Therefore, Court fixed 20-12-1991 for final hearing. On the said date as the court was busy, the case was adjourned for 3-2-1992. On 3-2-1992 lawyers were on strike and 9-4-1992 was fixed for final hearing. From the order sheet of the suit it does not appear that any notice as required under Rule 80A(1) of the General Rules (Civil) was issued to the defendants. It also does not appear from order sheet that as the defendants were unrepresented any information was sent of this transfer to their registered addresses. The transferring court has not recorded that the defendants had been informed about the transfer. The order sheet also does not show that the transferee court has recorded any satisfaction that the defendants had been informed of the transfer, as required under sub-rule (4) of Rule 89A. Thus from the facts of the present case it is evident that there has been no compliance of Rule 89A of the General Rules (Civil). Learned counsel for the plaintiff-opposite party has, however, contended that when cases are transferred a general notice is pasted on the notice board of the court for information and also on the notice board of the local bar association and this would be deemed to be sufficient information as required under Rule 89A of the General Rules (Civil). He has also contended that in the penultimate paragraph of the impugned order the court has mentioned that the transferee court had sent summons to the defendants and hence also compliance of Rule 89A had been made. I am, however, unable to agree with the submission made by the learned counsel for the plaintiff opposite party. From the perusal of sub-rule (3) of Rule 89A of the General Rules (Civil) it would be evident that the transferor court is required to follow the procedure laid down in sub-rule (1) of Rule 89A of the Rules and, over and above, it shall also cause a copy of the list pasted on the notice board but this is done only when a large number of cases are transferred from the transferor court to some other court. Here, apart from the fact that the requirements of sub-rule (1) of Rule 89A have not been complied with there is no finding or evidence to show that the notice was pasted on the notice board for information regarding the transfer of the case. From the order sheet of the suit it also does not appear any summons were issued by the transferee court to the defendants and the stray observation in the penultimate paragraph of the order appears to have been made by the court under some misapprehension. I, therefore, agree with the learned counsel for the defendant applicants that there has been no compliance of the provisions of Rule 89A of the General Rules (Civil). So far as the reasoning given by the court below that compliance of Section 17(1) proviso of the Small Cause Courts Act was mandatory and the ex parte decree could not be set aside as the said provisions had not been complied with by the defendant-applicants, learned counsel for the

applicants has placed strong reliance upon the case of *Balbir Singh Chauhan* (supra). In the said case a suit for ejectment and arrears of rent was filed against the defendants which was transferred to another court but no information of the transfer was given to the parties. The suit was decreed ex parte and thereafter the defendants filed an application under Order 9, Rule 13, C.P.C. The court found the reason for the absence of the defendants as sufficient but dismissed the application on the ground of non-compliance of the provisions of Section 17(1) proviso of the Small Cause Courts Act. This Court held that, in the facts of the case, the court itself was at fault for not informing the counsel or the party regarding the transfer of the suit as required under Rule 89A of the General Rules (Civil) and under such situation neither any application under Order 9, Rule 13, C.P.C. was required nor was the compliance of Section 17(1) of the Small Cause Courts Act required. The court was required to set aside the ex parte decree in exercise of its inherent powers under Section 151, C.P.C. and failure to do so vitiates the decision and amounts to an erroneous exercise of jurisdiction. The decision of this case does support the contention of the learned counsel for the defendant-applicants. Learned counsel for the plaintiff-opposite party has failed to show any other decision in which a contrary view has been taken. I, therefore, find sufficient force in the submissions made by the learned counsel for the defendant-applicants."

32. Relevant paragraphs of the judgment passed in the case of **Sikandar Versus Akhalak** reported in **2008 SCC OnLine All 140** are reproduced below:-

"It is not in dispute that the Trial Court passed an order on 11th May, 2000 that the suit shall proceed ex-parte against the defendant. it is the contention of the learned Senior Counsel for the petitioner that even though the order to proceed ex-parte may have become final between the parties, yet the Court was obliged to comply with the provisions of Rule 89-A of the Rules and in support of his contention he has placed reliance upon the decision of this Court in Ashtosh Shrotriya (supra). Rule 89-A of the Rules is as follows:

"89-A. Procedure to be followed on transfer or withdrawal of cases.—(1) When a case, i.e. a suit, appeal of other proceedings in which a date for attendance of a party or the parties in a particular Court has been fixed, is transferred from the Court to another, the former Court shall record the order of transfer in the order-sheet and get it signed by Counsel of the party or parties, if any party is unrepresented information shall be sent to his registered address. The case shall be called out by the other Court on the date already fixed by the transferring Court and the presence of the parties noted.

(2) A more to the effect that a party or the parties have been informed in accordance with sub-rule (1) shall be made on the record by the transferring Court.

(3) Where cases are transferred in a large number the Court from which they are transferred shall besides following the procedure laid down in sub-rule (1), draw up a list mentioning in it the numbers and years of the cases and the names of the parties and their Counsel, and shall cause one copy of it to be posted on the notice-board of the local bar association for information of the members of the bar and another copy to be posted on the notice-board of the Court for information of the

general public. It shall also send to the other Court along with records of the transferred cases, a copy of the list (or relevant extract of it), the other Court shall post it on its own notice-board. If the other Court is situated in a different place in which there is another bar association, an extra copy of the list shall be sent to it for being posted on the notice-board of the bar association.

(4) The Court to which cases are transferred shall not proceed without satisfying itself that the parties or their Counsel, as the case may be, have been informed of the transfer.

(5) In sub-rule (1) to (4) 'transfer' includes withdrawal of a case."

8. This Court in Ashtosh Shrotriya (supra) in connection with Rule 89-A of the Rules observed as follows:

"The points for consideration in the instant case are as to what construction and meaning has to be assigned to the expression 'suit be heard ex-parte' under Order IX, Rule 6 of the Code, and as to whether the learned District Judge could transfer the case or the suit in violation of the provisions of Rule 89-A of the General Rules (Civil); and as to whether the grounds enumerated in section 115 of the Code have been made out for interference by this Court.

…….

The expression 'that the suit be heard ex-parte' as adopted by the legislature under Rule 6(1)(a) of Order IX of the Code simply means that the Court may proceed to hear the different stages of the suit ex parte, but certainly not to decide it on merits ex-parte. To suit it differently, the object of the expression 'that the suit be heard ex-parte' is not to pass an ex-parte decree.

9. In Sangram Singh v. Election Tribunal, Kotah,2 their lordships of the Supreme Court observed as under:

"As we have already observed, out laws of procedure are based on the principle that, as far as possible, no proceeding in a Court of law should be conducted to the detriment of a person in his absence. There are of course exceptions, and this is one of them. When the defendant has been served and has been afforded an opportunity of appearing, then, if he does not appear, the Court may proceed in his absence. But, be it noted, the Court is not directed to make an ex-parte order.

Of course the fact that it is proceeding 'ex-parte' will be recorded in the minutes of its proceedings but that it is merely a statement of the fact and is not an order made against the defendant in the sense of an 'ex-parte' decree or other 'ex-parte' order which the Court is authorised to male. All that rule 6(1)(a) does is remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority, merely to proceed in the absence of one of the parties. The contrast in language between Rule 7 and Rule 13 emphasises this."

The aforesaid observation does not indicate that any proceeding in a Court may be conducted to the detriment of a person and the meaning of the expression 'that the suit be heard ex-parte' is not that the Court may pass an ex-parte decree or order. In any event, the expression does not

convey the meaning that the defendant applicant should be precluded from participating in the preceding of the suit. In view of the ration of this case, it is abundantly clear that the order to proceed ex-parte does not preclude the defendant from participating in further proceeding of the suit.

Rule 89-A of the General Rules (Civil) has been framed with a view to do justice between the parties and to inform the other side whenever an order transferring a case from one Court to another Court has been made. The Court transferring the case has been enjoined the duty to record the order of transfer in the order-sheet and to get it signed by the Counsel of the parties. In the present case, the order does not appear to have been passed on the order-sheet and the parties or their Counsel were not called upon to sign the order so that they could have the information that the case was being transferred to some other Court. This has also been provided under Rule 89-A of the General Rules (Civil) that the information about the transfer of the case has to be sent to the party concerned at its registered address. The court to which the case was transferred is under obligation to enquire the presence of the parties and the same has to be noted. Sub-rule (4) of Rule 89-A also provides that the Court to which the case is transferred shall not proceed without satisfying itself that the parties have been informed. This procedure was not followed and the Court to which the case was transferred i.e. XIth Additional District Judge, did not ascertain as to whether defendant applicant was informed about the transfer of the case. Thus, when the case is transferred from one Court to another, the procedure laid down in Rule 89-A has to be followed so that the principles of natural justice are sufficiently complied with.

In the present case, neither the first Court making the transfer not the transferee Court appear to have performed its duties and the transferee Court appears to have proceeded to decide the matter in violation of the provisions of Rule 89-A of the General Rules (Civil). In such a situation, the impugned order having been passed without ascertaining as to whether the Counsel for the defendant was informed about the order of transfer or without ascertaining as to whether both the parties have been informed about the date fixed in the transferee Court was manifestly erroneous and the Courts below have certainly exercised their jurisdiction illegally and with material irregularity. Consequently, the decision rendered is against the procedure provided and cannot be sustained.

……

In the present case, the case was transferred from the Court of District Judge to the Court of XIth Additional District Judge without any information to the defendant or his Counsel as contemplated by Rule 89-A of the General Rules (Civil) and it would certainly constitute sufficient cause for non-appearance."

(Emphasis supplied)"

33. This Court in the judgment passed in **Writ Petition No. 1899 (MS) of 2012** (**Jaggan Nath and others Vs. The District Judge, Barabanki and others)** observed as under:-

"Rule 89-A (1) reads as under :-

Procedure to be followed on transfer or withdrawal of cases:-

(1)"When a case, i.e, a suit, appeal or other proceedings in which a date for attendance of a party or the parties in a particular court has been fixed is transferred from that court to another, the former court shall record the order of transfer in the order sheet and get it signed by counsel of the party or parties; if any party is unrepresented information shall be sent to his registered address. The case shall be called out by the other court on the date already fixed by the transferring court and the presence of the parties noted."

In the case of Reena Sadh Vs. Anjana Enterprises (2009) (1060 RD 725 Hon'ble the Supreme Court has held that Rule 89-A is mandatory. Therefore, it has to be held requiring the strict compliance of the same."

34. In the judgment passed in the case of **Anamika MishraVersus State of U.P. and Another** reported in **2019 SCC OnLine All 4599**, it has been held that:-

"7. Natural justice is an important concept in administrative law. In the words of Megarry J it is “justice that is simple and elementary, as distinct from justice that is complex, sophisticated and technical”. The principles of natural justice or fundamental rules of procedure for administrative action are neither fixed nor prescribed in any code. They are better known than described and easier proclaimed than defined.

8. Natural justice is another name for common-sense justice. Rules of natural justice are not codified cannone. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

9. The expressions “natural justice” and “Legal justice” do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant's defense.

10. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. There principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity,

the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed. against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". the classic exposition of Sir Edward Coke of natural justice requires to "vocate, interrogate and adjudicate". In the celebrated case of Cooper v. Wandsworth Board of Works the principles was thus stated:

"Even God himself did not pass sentence upon Adam before he was called upon to make his defense. 'Adam' (says God), 'where art thou? hast thou not eaten of the tree whereof, I commanded thee that thou shouldest not eat."

11. Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

12. It is not possible to define precisely and scientifically the expression "natural justice". Though highly attractive and potential, it is a vague and ambiguous concept and, having been criticised as "sadly lacking in precision, has been consigned more than once to the lumber-room. It is a confused and unwarranted concept and encroaches on the field of ethics. Though eminent judges have at times used the phrase "the principles of natural justice", even now the concept differs widely in countries usually described as civilised.

13. It is true that the concept of natural justice is not very clear and therefore, it is not possible to define it; yet the principles of natural justice are accepted and enforced. In reply to the aforesaid criticism against natural justice, Lord Reid in the historical decision of Ridge v. Baldwin, (1963) 2 All ER 66 (HL) observed:

"In Modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist?"

Further, Natural justice is a branch of public law. It is a formidable weapon which can be wielded to secure justice to citizens. Rules of natural justice are "basic values" which a man has cherished throughout the ages. They are embedded in our constitutional framework and their pristine glory and primacy cannot be allowed to be submerged by exigencies of particular situations or cases. Principles of natural justice control all actions of public authorities by applying rules relating to reasonableness, good faith and justice, equity and good conscience. Natural justice is a part of law which relates to administration of justice. Rules of natural justice are indeed great assurances of justice and fairness.

The golden rule which stands firmly established is that the doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice. Its essence is good conscience in a given situation; nothing more-but nothing less.

As Lord Denning in the case of *Kandaa v. Govt. of Malaya*, 1962 AC 322 observed that "if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused person to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them."

Hon'ble the Apex Court in the case of *Bishambhar Nath Kohli v. State of U.P.*, AIR 1955 SC 65 held that "in revision proceedings, the Custodian General accepted new evidence produced by one party, but no opportunity was given to the other side to meet with the same. The Supreme Court held that the principles of natural justice were violated."

14. The Supreme Court in the case of Ramji Dass v. Mohan Singh, 1978 ARC 496 has held that as far as possible, Courts' discretion should be exercised in favour of hearing and not to shut out hearing. In that case the appeal was filed against an ex parte decree after eight years and the District Court as well as the High Court had rejected the matter on the ground of delay. However, setting aside the order of the High Court, Hon'ble Justice V.R. Krishna Iyer observed as under:

"… we are inclined to the view that, as far as possible, Courts' discretion should be exercised in favour of hearing and not to shut out hearing. Therefore, we think that the order of the High Court should not have been passed in the interest of Justice which always informs the power under S. 115 C.P.C. …"

35. Considered the submissions made by the learned counsel for the parties and perused the record as also considered the judgments, referred above.

36. In the aforesaid background of the case, the question before this Court is as to whether the application under Order 9 Rule 13 CPC, in issue, was maintainable in the light of the submissions made on behalf of the petitioners, which are based upon the explanation appended to Rule 2 of Order 17.

37. The answer to the aforesaid question is 'yes'. Reasons for the same are as under:-

(i) Before proceeding to consider the main issue involved, this Court finds it appropriate to observe regarding applicability of Rule 89-A of General Rule Civil (GRC).

(ii) Rule 89-A of General Rule Civil (GRC) would be applicable in the Courts subordinate to High Courts. However, as the procedure embodied under Rule 89-A of GRC is based on the principle audi alteram partem and actus Curiae neminem gravabit, this Court is of the view that the procedure embodied under Rule 89-A of GRC would also apply in the case before the revenue Court including the case, in issue, decided by the Extra Officer-Ist, Bahraich.

(iii) The procedure embodied under Rule 89-A of GRC, as already observed, would apply in the present case also and the same is liable to be taken note of in the light of the facts of the present case particularly the order sheet of the case, which is available before this Court. It may be noted that the facts related to order sheet have already been indicated in preceding paras of this judgment, as such, most relevant facts are to be taken note of.

(iv) Vide order dated 05.05.1995 passed by District Magistrate, the suit was transferred from revenue Court of S.D.O., Mahsi, District Bahraich to Extra Officer-Ist, District Bahraich. On 17.05.1995 in the revenue Court of S.D.O., Mahsi, District Bahraich, the statement(s) of PW-1/Ramhetu and PW-2/Nankau were recorded and the case was fixed for 26.05.1995 for evidence of defendants/opposite parties (Gaon Sabha and State of U.P.).

(v) It reflects from the aforesaid that the order dated 05.05.1995 passed by the District Magistrate transferring the suit from revenue Court of S.D.O., Mahsi, District Bahraich to Extra Officer-Ist, District Bahraich was received in the revenue Court of S.D.O., Mahsi, District Bahraich after 17.05.1995, the date on which the statement(s) of witnesses of plaintiff were recorded, and the case was adjourned for 26.05.1995 for evidence of defendants/opposite parties.

(vi) From the aforesaid, it is also apparent that on 17.05.1995, the parties were neither informed nor were having any knowledge regarding transfer of case from revenue Court of S.D.O., Mahsi, District Bahraich to Extra Officer-Ist, District Bahraich.

(vii) From the order sheet of the trial Court, it is apparent that no notice was issued by the transferor or transferee Court to the parties to the suit including the defendants namely Gaon Sabha and State of U.P., who preferred the application under Order 9 Rule 13 C.P.C., which was allowed vide order dated 14.12.2009 affirmed vide order dated 24.02.2010, impugned in this petition.

(viii) The order sheet of the Court concerned also shows that the transferee Court has not recorded any satisfaction that the defendants were informed of the transfer as required as per sub-rule 4 of Rule 89-A of GRC. It does not appear from the order sheet that the defendants were informed about the transfer of the case on their registered address.

(ix) Thus, in view of the aforesaid facts, this Court finds that there is non-compliance of procedure embodied under Rule 89-A of GRC.

(x) Further, if it is presumed that it is a case of general transfer and service would be deemed to be sufficient if notice regarding transfer is pasted on notice board of local Bar Association, then in that eventuality, the petitioners were under obligation to plead accordingly, however, in the instant case, nothing has been pleaded by the petitioners based upon which it can be presumed that the provisions of Rule 89-A GRC were complied with.

(xi) In addition, in the order sheet as also in the final judgment dated 31.05.1995 passed by the revenue Court of Extra Officer-Ist, District Bahraich, there is no finding that the notice was pasted on notice board for information regarding transfer of case. From the order sheet, it does not reflect that the summons were issued to the parties to the litigation including the contesting defendants namely Gaon Sabha and State of U.P.

(xii) It would be appropriate to refer that Gaon Sabha in its separate written statement opposed the claim of original plaintiff- Devta Deen and from the statement recorded on 26.05.1995 of Smt.

Rama Devi w/o Lallan s/o Devta Deen (original plaintiff), it is apparent that this witness of Gaon Sabha admitted the claim of original plaintiff.

(xiii) No doubt, the statement of witness of Gaon Sabha was recorded but it is not clear from the order sheet/proceedings drawn by the concerned revenue Courts that how and in what manner the said witness of defendant/Gaon Sabha came to know about the pendency of case in revenue Court of Extra Officer-Ist, District Bahraich particularly in view of the fact that on 17.05.1995 when the proceedings were concluded in the revenue Court of S.D.O., Mahsi, District Bahraich even the said revenue Court was not aware about the order of District Magistrate dated 05.05.1995 transferring the case from revenue Court of S.D.O., Mahsi, District Bahraich to Extra Officer-Ist, District Bahraich. Moreover, the order sheet drawn by the Courts on 31.01.1995 to 31.05.1995 does not bear the signature of counsel representing the Gaon Sabha as also that of State of U.P.

(xiv) Regarding the submissions of learned counsel for the petitioners based upon explanation to Rule 2 of Order 17, this Court finds that as per explanation, if evidence or a substantial portion of evidence of "any party" has been adduced and "such party" fails to appear on any date to which the hearing of suit is adjourned then in that eventuality, the application on behalf of the said party under Order 9 Rule 13 CPC would not be maintainable. The expression "any party" and expression "such party" are relevant. In this case, the evidence of Gaon Sabha was recorded in the revenue Court of Extra Officer-Ist, District Bahraich (transferee Court) on 26.05.1995 but how the witness of Gaon Sabha, daughter-in-law of original plaintiff-Devta Deen, came to know about the pendency of case in the revenue Court of Extra Officer Ist, Bahraich, is not clear from the record, as observed hereinabove. However, the evidence of State of U.P. (defendant in suit) was not adduced.

(xv) From the aforesaid, it is evident that no notice regarding transfer of the case, in issue, was ever served or received or issued or notified and the statement of witness of State of U.P. (one of the defendants), who filed the separate written statement, was not recorded, as such, to the view of this Court, the application was maintainable under Order 9 Rule 13 CPC and rightly allowed by the revenue Court concerned affirmed by the Revisional Court concerned and being so, this Court finds no merit in this petition challenging the orders impugned.

38. In regard to relief(s) No. (i), (iii) & (iv), this Court is of the view that for protecting the rights/possession over the property/land, which is subject matter of the suit, in issue, during the pendency of the suit, the petitioners are having statutory remedy under Section 229-D of the Act of 1950 and for which they can prefer an application. As such, this Court is not inclined to grant the relief(s) No. (i), (iii) & (iv) in exercise of power under Article 226 of the Constitution of India.

39. It is provided that if an application is preferred by the petitioners seeking interim protection, the Court concerned shall consider and dispose of the same strictly as per law, after providing proper opportunity of hearing to the parties, within a period of two months from the date of preferring the application. For a period of two months, as an interim protection was granted by this Court on 20.03.2023, which

is continuing, the petitioners shall not be dispossessed from the property, in issue.

39. In view of the age of litigation, it is further provided that the revenue Court concerned shall conclude the proceedings within a period of one year from the date of production of certified copy of this order. For concluding the proceedings within the time specified, the revenue Court concerned shall avoid unnecessary adjournments.

40. With the aforesaid, the petition is **dismissed.** Costs made easy.

(2023) 6 ILRA 867
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-C No. 747 of 2023

C/M Shri Paras Nath Anusuchit Prathmik Pathshala Thru. Its Manager & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Girish Chandra Verma

Counsel for the Respondents:
C.S.C.

A. Constitution of India,1950 - Article 226 - Territorial Jurisdiction - When cause of action arises at more than one place - Principles of Dominus Litis - Forum Conveniens – Principles of Forum Non Conveniens – In a civil proceeding, when cause of action arises at more than one place, the plaintiff is the Dominus Litis, it is the plaintiff/petitioner who has discretion to choose the place where he desires to file the petition. However, this discretion is not absolute. An exception arises based on the principle of Forum Non Conveniens, the court can determine the convenient forum and impose conditions in the interest of justice for the exercise of such jurisdiction. Court, in appropriate cases, can exercise its inherent jurisdiction to fix the forum, considering convenience of parties, witnesses, the court, and other relevant factors impacting the proceedings. Once petitioner choose a forum, he should normally adhere to it unless valid reasons justify a change. Shifting forums disrupts judicial efficiency, and hopping between forums would be highly inconvenient to the functioning of the court (Para 12, 18).

B. United Provinces High Court (Amalgamation) Order, 1948, Clause 14 – Chief Justice while sitting at Lucknow can transfer a writ petition from Lucknow to Allahabad. However, neither under the High Court Rules nor under the United Provinces High Court (Amalgamation) Order, 1948, does the Chief Justice have any power to transfer a case from Allahabad to Lucknow (Para 14).

C. In the present case, petitioners had the option to approach either the High Court at Allahabad or at Lucknow. In three previous proceedings, petitioners chose the High Court at Allahabad for filing their writ petitions and contempt applications. Last petition filed at Allahabad was subsequently withdrawn by them. However, it was unclear under what circumstances, and with what liberty, if any, the petition was allowed to be withdrawn. Court found it appropriate to refuse the exercise of its discretionary jurisdiction in permitting the petitioners to maintain the present writ petition at Lucknow. Court held that Allahabad was the appropriate forum for the petition. (Para 20)

Dismissed. (E-5)

List of Cases cited:

1. Sri Nasiruddin Vs St. Transport Appellate Tribunal (1975) 2 SCC 671

2. U.P. Rashtriya Chini Mill Adhikari Parishad, Lucknow Vs St. of U.P. & ors.(1995) 4 SCC 738

3. Navinchandra N. Majithia Vs St. of Mah. & ors.(2000) 7 SCC 640

4. Rajendran Chingaravelu Vs R.K. Mishra, Additional Commissioner of Income Tax & ors.(2010) 1 SCC 457

5. Nawal Kishore Sharma Vs U.O.I. .& ors.(2014) 9 SCC 329

6. Nitya Nand Tiwari Vs St. of U.P. & ors.(1994) LCD 1181

7. Ashok Kumar Arora Vs St. of U.P. (Special Appeal No.285 of 2021) decided on 19.8.2021

8. Kusum Ingots & Alloys Ltd. Vs U.O.I. & anr.(2004) 6 SCC 254

9. Krishna Veni Nagam Vs Harish Nagam, (2017) 4 SCC 150

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

1. The petitioners, two educational institutions, which are running primary schools, have approached this Court for a mandamus commanding State respondents i.e. Additional Chief Secretary/Principal Secretary, Department of Social Welfare, U.P., Lucknow to issue order for grant-in-aid as per decision dated 20.9.2019 taken by respondent no.1 and by Minister of the department.

2. The facts of case including previous litigation between parties, in brief, are that petitioner nos.1 and 3, which are educational societies established in the years 1971 and 1981 respectively, claimed that their institutions are entitled to be brought under grant-in-aid list. The institutions run by them were in District Gorakhpur, which was later on bifurcated and now institutions are in newly created District Maharajganj. The said institutions were recognized since the years 1982 and 1986 respectively. Since their representations were not being decided, hence, they filed Writ-C No.62957 of 2017 "Committee of Management Shri Paras Nath Anusuchit Prathmik Pathshala and another vs. State of U.P. and others" at Allahabad. The said writ petition was disposed of by order dated 5.1.2018, requiring respondent-authority to decide representation of petitioners. Since the said direction was not being complied with by respondents and representation of petitioners remained pending, petitioners filed Contempt Application (Civil) No.6170 of 2019 "Committee of Management Shri Paras Nath Anusuchit Prathmik Pathshala and another vs. Sri Manoj Singh, Secretary, Social Welfare Department, Government of U.P." again at Allahabad. The Court issued contempt notices against the respondents. It appears that thereafter respondents proceeded to consider the case of petitioners and administrative approval was also granted by Principal Secretary concerned on 20.9.2019 and it also appears that the same was also approved by the Minister concerned. Thereafter, Principal Secretary on 24.1.2020 passed an order rejecting the claim of petitioners directing the office not to issue a final order on the basis of earlier administrative order. Against the said order dated 24.1.2020, petitioners filed Writ-C No.7120 of 2020 again at Allahabad.

3. The petitioners claim that they were not aware about order dated 20.9.2019 and on gaining knowledge of the said fact, they moved an application for withdrawal of Writ-C No.7120 of 2020 filed at Allahabad. The said petition was

dismissed as withdrawn on 14.7.2022. Thereafter, petitioners preferred present writ petition before this Court at Lucknow on becoming aware of order dated 20.9.2019. Present writ petition before this Court was filed on 23.1.2023.

4. In the given circumstances, at the very outset, learned Standing Counsel raises preliminary objections that since petitioners had filed their earlier three petitions at Allahabad and has thus chosen the jurisdiction at Allahabad, it was not open for them to file their 4th petition at Lucknow, therefore, this Court should refuse to exercise its discretionary jurisdiction on the principles of forum non conveniens. He further submits that prayers and orders of earlier petition are not before this Court, more particularly whether earlier petition was withdrawn with any liberty or not, and thus, this Court should not entertain the present petition.

5. Replying the same, Sri G.C. Verma, learned counsel for petitioners submits that petitioners are master of their petition. The petitioners' institutions are situated at District Maharajganj, which falls within the jurisdiction of High Court sitting at Allahabad while State Government is at Lucknow, therefore, for a mandamus to the respondent authorities, which are having their office at Lucknow, cause of action has to be treated as arising at both the places and thus, being dominus litis, it is the sole discretion of petitioners where they desire to file their writ petition. In support of his submissions, he has placed reliance upon following cases:

(i) Sri Nasiruddin vs. State Transport Appellate Tribunal (1975) 2 SCC 671;

(ii) U.P. Rashtriya Chini Mill Adhikari Parishad, Lucknow vs. State of U.P. and others (1995) 4 SCC 738;

(iii) Navinchandra N. Majithia vs. State of Maharashtra and others (2000) 7 SCC 640;

(iv) Rajendran Chingaravelu vs. R.K. Mishra, Additional Commissioner of Income Tax and others (2010) 1 SCC 457;

(v) Nawal Kishore Sharma vs. Union of India and others (2014) 9 SCC 329;

(vi) Nitya Nand Tiwari vs. State of U.P. and others (1994) LCD 1181; and

(vii) Ashok Kumar Arora vs. State of U.P. (Special Appeal No.285 of 2021) decided on 19.8.2021.

6. Learned Standing Counsel, opposing the writ petition, submits that principles of dominus litis would not apply in the present case. He places reliance upon following cases:

(***i) Kusum Ingots & Alloys Ltd. vs. Union of India and another*** (2004) 6 SCC 254; and

(ii) ***Krishna Veni Nagam vs. Harish Nagam***, (2017) 4 SCC 150.

7. I have heard learned counsel for parties and perused the record.

8. So far as judgments relied upon by learned counsel for petitioners are concerned, all of them are on the issue that where jurisdiction lies at more than one places, it is the discretion of petitioners being master of proceedings to file a

petition at a place of their choice. Suffice is to refer to the judgment of Supreme Court in ***Sri Nasiruddin*** (supra). Relevant Paragraphs 24, 25, 37, 38 and 39 of the said judgment read:

"24. The fourth question on which the High Court expressed its opinion is on the meaning of "cases arising in such areas in Oudh". The High Court expressed the following views. A distinction arises between criminal cases on the one hand and writ petitions under Article the other. The contention based on Article 225 that Lucknow Bench will not have jurisdiction under Article 226 is wrong because the jurisdiction of the High Court is not only the jurisdiction exercisable before the Constitution came into force but also the jurisdiction which could be on the High Court in future. The Lucknow Bench, therefore, jurisdiction under Article 226.

25. Though the Lucknow Bench can exercise jurisdiction under Articles 226, 227 and 228, there is limitation on such jurisdiction as far as the Lucknow Bench is concerned. The Lucknow Bench will have jurisdiction under Article 226 only in cases where the right of the petitioner arose first within the Oudh areas. Where an original order passed outside the Oudh areas has been reversed or modified or confirmed at a place within the Oudh areas it is not the place where the ultimate or the appellate order is passed that will attract jurisdiction of the Lucknow Bench. In most cases where an appeal or revision will lie to the State Government, the order will be made at Lucknow. In all such cases, if it be held that the place where a case can be said to arise is where the ultimate or appellate order is passed by the authority, the Judges at Lucknow would then have jurisdiction even though the controversy originally arose and the original order was made by an authority outside the specified Oudh areas. In all cases a writ petition filed in the High Court would be a case arising at Lucknow. It is on this reasoning that the High Court strictly confined the jurisdiction of the Lucknow Bench under Article 226 to the right which the petitioner pursues throughout the original proceedings, the appellate proceedings and thereafter in the High Court. The right of the petitioner is the right which first arose and if the place where the right first arose will be within the Oudh areas then the Lucknow Bench will have jurisdiction.

37. The conclusion as well as the reasoning of the High Court is incorrect. It is unsound because the expression "cause of action" in an application under Article 226 would be as the expression is understood and if the cause of action arose because of the appellate order or the revisional order which came to be passed at Lucknow then Lucknow would have jurisdiction though the original order was passed at a place outside the areas in Oudh. It may be that the original order was in favour of the person applying for a writ. In such case an adverse appellate order might be the cause of action. The expression "cause of action" is well-known. If the cause of action arises wholly or in part at a place within the specified Oudh areas, the Lucknow Bench will have jurisdiction. If the cause of action arises wholly within the specified Oudh areas, it is indisputable that the Lucknow Bench would have exclusive jurisdiction in such a matter. If the cause of action arises in part within the specified areas in Oudh it would be open to the litigant who is the dominus litis to have his forum conveniens. The litigant has the right to go to a court where

part of his cause of action arises. In such cases, it is incorrect to say that the litigant chooses any particular court. The choice is by reason of the jurisdiction of the court being attracted by part of cause of action arising within the jurisdiction of the court. Similarly, if the cause of action can be said to have arisen partly within specified areas in Oudh and partly outside the specified Oudh areas, the litigant will have the choice to institute proceedings either at Allahabad or Lucknow. The court will find out in each case

38. To sum up. Our conclusions are as follows. First, there is no permanent seat of the High Court at Allahabad. The seats at Allahabad and at Lucknow may be changed in accordance with the provisions of the Order. Second, the Chief Justice of the High Court has no power to increase or decrease the areas in Oudh from time to time. The areas in Oudh have been determined once by the Chief Justice and, therefore, there is no scope for changing the areas. Third, the Chief Justice has power under the second proviso to para 14 of the Order to direct in his discretion that any case or class of cases arising in Oudh areas shall be heard at Allahabad. Any case or class of cases are those which are instituted at Lucknow. The interpretation given by the High Court that the word "heard" confers powers on the Chief Justice to order that any case or class of cases arising in Oudh areas shall be instituted or filed at Allahabad, instead of Lucknow is wrong. The word "heard" means that cases which have already been instituted or filed at Lucknow may in the discretion of the Chief Justice under the second proviso to para 14 of the Order be directed to be heard at Allahabad. Fourth, the expression "cause of action" with regard to a civil matters means that it should be left to the litigant to institute cases at Lucknow Bench or at Allahabad Bench according to the cause of action arising wholly or in part within either of the areas. If the cause of action arises wholly within Oudh areas then the Lucknow Bench will have jurisdiction. Similarly, if the cause of action arises wholly outside the specified areas in Oudh then Allahabad will have jurisdiction. If the cause of action in part arises in the specified Oudh areas and part of the cause of action arises outside the specified areas, it will be open to the litigant to frame the case appropriately to attract the jurisdiction either at Lucknow or at Allahabad. Fifth, a criminal case arises when the offence has been committed or otherwise as provided in the Criminal Procedure Code. That will attract the jurisdiction of the Court at Allahabad or Lucknow. In some cases depending on the facts and the provision regarding jurisdiction, it may arise in either place.

39. Applications under Article 226 will similarly lie either at Lucknow or at Allahabad as the applicant will allege that the whole of cause of action or part of the cause of action arose at Lucknow within the specified areas of Oudh or part of the cause of action arose at a place outside the specified Oudh areas."

9. Rest of the judgments relied upon by learned counsel for petitioners also follow the same principles. No doubt, it is settled that when cause of action arises at more than one place, it is the plaintiff/petitioner, who has a discretion to choose the place where he desires to file petition. However, the said discretion cannot be said to be absolute. Exception is drawn to the same on the principles of forum non conveniens.

10. In ***Kusum Ingots & Alloys Ltd. (supra)***, the Supreme Court while dealing with the issue of cause of action, in Para 30 held:

"Forum conveniens

30. We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens. [See Bhagat Singh Bugga v. Dewan Jagbir Sawhney [AIR 1941 Cal 670 : ILR (1941) 1 Cal 490] , Madanlal Jalan v. Madanlal [(1945) 49 CWN 357 : AIR 1949 Cal 495] , Bharat Coking Coal Ltd. v. Jharia Talkies & Cold Storage (P) Ltd. [1997 CWN 122] , S.S. Jain & Co. v. Union of India [(1994) 1 CHN 445] and New Horizons Ltd. v. Union of India [AIR 1994 Del 126]."

11. In ***Krishna Veni Nagam*** (supra), the Supreme Court in Para 13 held:

"13. We have considered the above suggestions. In this respect, we may also refer to the doctrine of forum non conveniens which can be applied in matrimonial proceedings for advancing interest of justice. Under the said doctrine, the court exercises its inherent jurisdiction to stay proceedings at a forum which is considered not to be convenient and there is any other forum which is considered to be more convenient for the interest of all the parties at the ends of justice. In Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd. [Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd., (2003) 4 SCC 341] this Court observed : (SCC pp. 356-57, para 19)

"19. In Spiliada Maritime case [Spiliada Maritime Corpn. v. Cansulex Ltd., (1986) 3 All ER 843 : 1987 AC 460 : (1986) 3 WLR 972 (HL)] the House of Lords laid down the following principle : (All ER p. 844a)

'The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice.…'

The criteria to determine which was a more appropriate forum, for the purpose of ordering stay of the suit, the court would look for that forum with which the action had the most real and substantial connection in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court, it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate, the court would normally grant a stay unless there were circumstances militating against a stay. It was noted that as the dispute concerning the contract in which the proper law was English law, it meant that England was the appropriate forum in which the case could be more suitably tried."

(emphasis in original)

Though these observations have been made in the context of granting anti-suit injunction, the principle can be followed in regulating the exercise of jurisdiction of the court where proceedings are instituted. In a civil proceeding, the plaintiff is the dominus litis but if more than one court has jurisdiction, court can determine which is the convenient forum and lay down conditions in the interest of justice subject to which its jurisdiction may be availed [Kusum Ingots & Alloys Ltd. v. Union of India, (2004) 6 SCC 254, para 30] ." (emphasis added)

12. From the aforesaid judgments in ***Kusum Ingots & Alloys Ltd.*** (supra) and ***Krishna Veni Nagam*** (supra), Supreme Court has held that plaintiff/petitioner alone does not have exclusive discretion to choose jurisdiction when the same lies at multiple places. In appropriate cases, Court can exercise its inherent jurisdiction and fix jurisdiction taking into consideration the convenience of parties, witnesses, Court and any other relevant factors, which would impact the proceedings.

13. In the present case, petitioners could approach either High Court at Allahabad or at Lucknow. In earlier three proceedings, petitioners chose High Court at Allahabad for filing their writ petitions and contempt application and last petition filed at Allahabad was withdrawn by them. It is not clear as to under what circumstances and with what liberty, if any, said petition was permitted to be withdrawn.

14. The unique position with regard to High Court Allahabad is that under Clause 14 of the United Provinces High Court (Amalgamation) Order, 1948, the Chief Justice while sitting at Lucknow can transfer a writ petition from Lucknow to Allahabad. However, neither under the High Court Rules nor under the United Provinces High Court (Amalgamation) Order, 1948, the Chief Justice is having any power to transfer a case from Allahabad to Lucknow.

15. In the present case, this Court is not in a position to summon the files/records from Allahabad. The petitioners have not filed details of prayers made in their earlier petitions, withdrawal application filed by them in Writ-C No.7120 of 2020 and ground taken therein, and order passed in earlier writ petition. In absence of the same, this Court is unable to decide as to whether withdrawal of earlier writ petition is in circumstances in which present writ petition can be filed or present writ petition would be barred by withdrawal of earlier writ petition, and without deciding the same, this Court cannot proceed. Court is also unable to peruse orders and pleadings of petitioners' other two petitions.

16. This type of disputes are frequently occurring before this Court. The difficulty faced by the Court, in the aforesaid circumstances, where a case cannot be transferred from Allahabad to Lucknow while they can be transferred from Lucknow to Allahabad only when Chief Justice of High Court sitting at Lucknow passes an order under Clause 14 of the United Provinces High Court (Amalgamation) Order, 1948, creates unnecessary hurdle in disposal of cases, if jurisdiction is changed from one place to another by the parties to the dispute. It needs to be solved.

17. Merely because petitioners have a right to file writ petition before any Court

of their choice either at Allahabad or Lucknow, it does not give them a kangaroo right to hop around jurisdiction at their whims. It is not only their convenience, which is to be looked into, but convenience of all related is also relevant, including that of Court. Facts of this case are a glaring example of the same. The difficulty being faced by this Court is created by petitioners only.

18. The petitioners have a choice to invoke jurisdiction of the Court either at Allahabad or at Lucknow and once they have exercised the said choice, parties should restrict themselves to their initial choice of forum while filing later petitions. Hopping around forum would be highly inconvenient to the working of the Court as in the present case. Once petitioners choose jurisdiction, out of many available, in normal course, they should stick to the same, unless they can explain reasons for changing the same.

19. It was repeatedly put to learned counsel for petitioners to explain as to why after repeatedly choosing High Court at Allahabad, petitioners have chosen Lucknow for filing present writ petition. Learned counsel for petitioners only replied that it is the discretion and choice of petitioners and this Court cannot interfere in the same. This Court is not satisfied with the reply of learned counsel for petitioners.

20. In the given facts and circumstances where it is not clear to this Court as to whether primary question with regard to maintainability is involved in view of withdrawal of earlier writ petition, which appears to be without any liberty, this Court finds it appropriate to refuse to exercise its discretionary jurisdiction in permitting the petitioners to maintain present writ petition at Lucknow and finds Allahabad as appropriate forum for this petition.

21. It was also offered to learned counsel for petitioners if he would like to get the matter listed before the Chief Justice under Clause 14 of the United Provinces High Court (Amalgamation) Order, 1948 for transfer of present petition to Allahabad. Learned counsel for petitioners refused the offer and again reiterated that it is petitioners' right to choose jurisdiction and they cannot be forced out of Lucknow.

22. Since this Court is not inclined to entertain this writ petition at Lucknow, therefore, present writ petition is ***dismissed.*** It shall, however, be open for petitioners, in case they so desire, to file a petition at Allahabad.

(2023) 6 ILRA 874
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 12616 of 2023

Tech. Mahindra Ltd., G.B. Nagar ...Petitioner

Versus

The Presiding Officer, Labour Court, Noida & Ors. ...Respondents

Counsel for the Petitioner:
Gunjan Jadwani, Sri Chandrika Patel, Sri M.S. Vinayak, Sri Karunanidhi Yadav

Counsel for the Respondents:
C.S.C., Sri Shekhar Srivastava

A. Labour Law – Termination – Principle of natural justice – Application – No charge sheet was supplied nor any disciplinary

inquiry was conducted – Effect – Labour Court allowed the claim of workman – Legality challenged by employer – Held, prior to termination of services of a workman the minimum mandatory requirement is to inform him of the charges by issuing charge sheet followed by domestic inquiry where the workmen has an opportunity to present his justification against the charges levelled against him – It is only after sufficient opportunity is given to the workman can his services be terminated – *Shri Karan Singh's case* relied upon. (Para 7 and 14)

B. Labour Law – Writ – Ground of latches raised for the first time – Permissibility – Labour court proceedings was initiated after a period of 4 years from the date when his services were terminated – No ground regarding latches was raised before the labour court – Effect – Held, the petitioners not having raised the plea of latches before the labour court and before this Court as well as there being no pleadings or grounds raised by the petitioner in the present writ petition, precludes this Court from adjudicating the said issue. (Para 15)

C. Constitution of India,1950 – Article 226 – Judicial review – Scope – The power exercised by the High Court under Article 226, while judicially reviewing the order of labour court, is limited to the examining the procedural impropriety or an error apparent on the face – It is also settled proposition of Law is that the power of judicial review under article 226 is not against the decision but the decision-making process. (Para 15)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Punjab & Sindh Bank & ors. Vs Sakattar Singh; (2001) 1 Supreme Court Cases 214

2. Regional Manager, Bank of Baroda Vs Anita Nandrajog; 2009 (9) SCC 462.

3. Dinesh Kumar Singh Vs Presiding Officer, Labour Court, Agra; 2005 ALL LJ 732

4. Writ C No. 39842 of 2019; Shri Karan Singh Vs Presiding Officer, Labour Court & anr.

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

1. Heard Sri M. S. Vinayak, learned counsel for the petitioner, Sri Karunanidhi Yadav as well as learned Standing counsel for respondent no.s 1 and 2, Sri Shekhar Srivastava for respondent No.3-workman.

2. By means of the present writ petition the petitioner has assailed the award dated 24.11.2022 passed by Presiding Officer, Labour Court, Noida, District Gautam Buddha Nagar, U.P. whereby allowing the claim of respondent No.3-workman.

3. The facts in brief arising in the present case are that respondent No.3 was employed on the post of Assistant in Grade GO at the establishment of the petitioner company at Pune, Maharashtra and was issued appointment letter on 30.3.2004. As per the appointment letter he was to work in Noida and it was further provided that the services of respondent NO.3 would be terminated by either party by serving prior written notice. It was further provided in the appointment letter that the services of the respondent-workman would be transferable and he could be transferred to any of the establishments of the petitioner whether in India or abroad. The petitioner continued to work since the date of his appointment till 5.12.2008 when his services were transferred to Chennai Branch of the petitioner. He was asked to join at Chennai by 11.12.2008. Respondent No.3 did not join at Chennai and according to the petitioner he had remained absent unauthorisedly. He was asked by means of

letter dated 15.12.2008 as well as 22.12.2009 to join at Chennai failing which it will be assumed that he is not interested in continuing with his services and his services will be dispensed with. Despite the fact that the respondent did not join at Chennai an order of termination was passed on 2.1.2009. As per the order of 2nd January, 2009 issued by Group Manager, Human Resources it was stated that ample opportunity was given to the respondent to report at Chennai office but he has neither reported nor made any communication and, therefore, his services are terminated with immediate effect.

4. Respondent No.3 being aggrieved by the termination order dated 2nd January, 2009 raised an industrial dispute before Labour Court, Noida, which was duly referred and according to the reference it was stated that respondent No.3 was working on the post of driver and his services have been terminated with effect from 2nd January, 2009 and the labour court was called upon to test the validity of the termination order. Notices were issued to the petitioner who appeared and opposed the claim of the respondent. In the written submissions filed before the Labour Court it was stated that the respondent was appointed on 30.3.2004 and was transferred to Chennai office vide order dated 5.12.2008 he was supposed to report by 11th December, 2008 but he did not report to the said office. It is further stated that by not joining at Chennai office the respondent had violated the company's disciplinary policy. Even previously on a number of occasions he has also been given warning letters to join his duties and he has also absented himself from 5.12.2008 without prior intimation to the petitioner's Manager. It was further stated that as per the company policy the petitioner, in fact, had paid final amount to the petitioner. It was further stated that termination of the respondent was legal as per the company policy.

5. The Labour Court after considering the said response as well as the evidence adduced by the workman as well as by the petitioner had allowed the claim of the workman and while allowing the said claim the Labour Court has recorded that the workman was appointed with petitioner organization since 30.3.2004 on daily wages of Rs.11261/- per month. It has further been stated that allegations were levelled by the workman that the petitioner has not given him due wages and he has been asked to work for more than the normal working hours and even the wages for the overtime were due to the respondent also not paid to him. It was further stated that in the claim, that no notice or opportunity of hearing was given to the workman prior to termination of his services. It was also averred that the respondents was a permanent employee and raised his demands by writing several letters to the petitioner none of which was responded to and consequently after termination of services, having no other remedy, had approached the Labour Court raising his grievances.

6. Learned Labour court has also considered the arguments of the petitioner with regard to the fact that the respondent had been transferred to Chennai office vide order dated 5.12.2008 and was required to join by 11.12.2008 but the respondent-workman did not comply with the order of transfer and several warning letters were also given to him for joining which also were not obeyed by him and consequently it was concluded that the respondent is not willing to work with the petitioner

company and also considering the fact that during this period he did not make request for leave it was concluded that he is not interested in his employment and has, in fact, abandoned the same. After coming to the conclusion that the workman has abandoned his services his dues were duly calculated and paid on 2.1.2009 treating him to have resigned on 16.12.2008.

7. Before the Labour Court the respondent/workman had examined himself supporting his claim while on behalf of the petitioner one Mr. Mukul Sah of the company was duly examined. The Labour Court was persuaded by the fact that admittedly no charge sheet was supplied nor any disciplinary inquiry conducted prior to termination of his services which is in gross violation of the principles of natural justice which was mandatory before terminating his services. It is on the aforesaid premises that the labour court has allowed the claim of the respondent - workman and directed the petitioner to allow claim of the workman within two months and reinstate the workmen in service with full back wages and other benefits to which he is entitled.

8. The first ground which falls for consideration of this Court is as to whether in the facts and circumstances of the present case the respondent workman had abandoned his services and also whether the petitioner was justified in terminating the same. Learned counsel for the petitioner, while assailing the said award has submitted that the said award is illegal and arbitrary in as much as the contentions of the petitioner were not considered by the labour court in its true perspective. He has submitted that once it has come on record that the respondent workman did not join in pursuance of the order of transfer and had absented himself without any leave then it was deemed that he would have abandoned his services and they were fully competent and it was within their jurisdiction to terminate the services of the respondent workman. In support of his submissions learned counsel for the petitioner has relied upon series of judgments. The first is the case of ***Punjab and Sindh Bank and others Vs. Sakattar Singh, (2001) 1 Supreme Court Cases 214*** as well as ***Regional Manager, Bank of Baroda Vs. Anita Nandrajog, 2009 (9) SCC 462***. In both these matters where the workman had remained unauthorized absent and did not report for duty within thirty days as per the conditions contained in clause XVI of IV of the bipartite settlement, their services were terminated and the said termination was upheld by the Supreme Court relying upon the bipartite settlement entered into between the workers union and the bank.

9. Learned counsel for the respondents has opposed the contention of the petitioner. He submits that it is settled principles of law that in case the services of the workman is required to be terminated then statutory provisions contained in Section 6N and 6(P) of the Industrial Disputed Act, 1947 have to be followed. According to Section 6N it is clearly provided that either one month's notice has to be given in writing citing the reasons for retrenchment and wages in lieu of the notice have to be granted. The reasons for termination are stated in the order of termination according to which the petitioner did not join in pursuance of this transfer and consequently his services were terminated. Admittedly no domestic inquiry was conducted by the petitioner, nor any show cause notice was given to the workman prior to termination of his service. The notice which was given by the

petitioner to the respondent -workman on 15.12.2008 or 22.12.2008 cannot be held to be a notice given during the domestic inquiry. They were only the notices requiring him to join at Chennai.

10. Considering the submissions made by the petitioner that they were justified in terminating the services on the ground of abandonment of service, it is noticed that the respondent workman stopped reporting for work from the date of his transfer i.e 05/12/2008. The petitioner had sent 2 notices on 15/12/2008 and on 22/12/2008, but he still did not report for work and consequently by order dated 02/01/2009 the order of termination was passed. It is noticed that the respondent workman did not report for work for nearly 3 weeks, when the order of termination was passed. It is further noticed that there is difference between absent from duty and abandonment of service. The claim entitlement for terminating the services of the employee on the grounds of an abandonment of service, it has to be proved that the services have been abandoned by the workman, for which there should be evidence on record indicating the same. Mere absence from duty for a few days or nearly 3 weeks as in the present case cannot be held to be abandonment of service.

11. The petitioner has relied upon the judgement of the Supreme Court in the case of ***Punjab and Sindh Bank and others Vs. Sakattar Singh, (2001) 1 Supreme Court Cases 214*** as well as ***Regional Manager, Bank of Baroda Vs. Anita Nandrajog, 2009 (9) SCC 462.*** In both these matters where the workman had remained unauthorized absent and did not report for duty within thirty days as per the conditions contained in clause XVI of IV of the bipartite settlement, their services were terminated and the said termination was upheld by the Supreme Court relying upon the bipartite settlement entered into between the workers union and the bank. In the said case Supreme Court was amplifying the agreement of bipartite settlement where there was specific stipulation with regard to termination of services of the workman who absented himself from the duty beyond a particular period which were also prescribed within bipartite settlement and accordingly the orders of the bank for termination of services of the employee who absent themselves for more than the prescribed period in the bipartite agreement was upheld by the Supreme Court.

12. I have gone through the aforesaid judgments and am of the considered opinion that the said decision are clearly distinguishable from the facts of the present case where no such stipulation or contract exists between the workman and the petitioner where it is provided that in case he absents himself more than a particular period he will be deemed to have abandoned his services and it shall be open for the employer to terminate his services.

13. Learned counsel for the petitioner has further relied upon the judgment of a coordinate Bench of this Court in the case of ***Dinesh Kumar Singh Vs. Presiding Officer, Labour Court, Agra reported in 2005 ALL LJ 732***. In the said case the employer had stated that he had never terminated the services of the workman who had, in fact had himself abandoned his service. Even in the said case labour court has also given a categorical finding that the petitioner therein had abandoned his services and the services had never been terminated and, hence it was concluded that

there was no retrenchment of the services of the workman. The said case is distinguishable on facts as in the present case the order of termination has been passed by the petitioner on 02.01.2009. The said letter is titled as order of termination it has been clearly stated that the service of the petitioner stand terminated. Once an order of termination has being passed, it's validity would be looked into by the Labour court, and in the present case, the labour court has concluded that the order of termination is illegal and arbitrary as no opportunity of hearing or any domestic enquiry held prior to passing of the said order.

14. I find force in the contention made on behalf of the respondent that even if it was assumed that the workman had abandoned his services it was mandatory for the petitioner to have conducted a domestic inquiry before terminating his services. Even abandonment of service is disputed question of fact which is to be proved, which could have been done in a domestic inquiry could have been conducted by the petitioner. In support of his submissions in this regard he has relied upon the judgment of this Court in the case of ***Shri Karan Singh Vs. Presiding Officer, Labour Court and another,*** passed in Writ C No.39842 of 2019. Prior to termination of services of a workman the minimum mandatory requirement is to inform him of the charges by issuing charge sheet followed by domestic inquiry where the workmen has an opportunity to present his justification against the charges levelled against him. It is only after sufficient opportunity is given to the workman can his services be terminated. The action taken by the petitioner in terminating the services of the respondent in absence of such an enquiry and without granting any opportunity of hearing is illegal and arbitrary and in violation of principles of natural justice as rightly held by the labour court, and consequently, there is no infirmity in the impugned order.

15. Learned counsel for the petitioner has also assailed the award on the ground that the same is barred by principle of latches inasmuch as the proceedings were initiated before the labour court after a period of 4 years from the date when his services were terminated. We have considered the objections raised by the petitioner opposing the claim preferred by the respondent workman and find that no ground regarding delay and latches was raised by the petitioner before the labour court, and hence the labour court did not have an opportunity to examine the said contention. Even before this Court in the instant writ petition there is no ground of latches raised by the petitioner in assailing the award of the labour court, and therefore there is no occasion for this Court to examine the contention raised by the petitioner inasmuch as the same was not taken before the labour court, nor is there any pleading in this regard in the present writ petition to examine the same. The power exercised by this Court under Article 226 of the Constitution of India, while judicially reviewing the order of labour court, is limited to the examining the procedural impropriety or an error apparent on the face. It is also settled proposition of law is that the power of judicial review under article 226 is not against the decision but the decision-making process. The petitioners not having raised the plea of latches before the labour court and before this Court as well as there being no pleadings or grounds raised by the petitioner in the present writ petition, precludes this Court from adjudicating the

said issue. Accordingly, the arguments of the petitioner in this regard are rejected.

16. Lastly, it is submitted by learned counsel for the petitioner that the matter has been settled between the petitioner and the respondent workman inasmuch as a full and final settlement of the dispute has been arrived at between the petitioner and the respondents, hence, the writ petition deserves to be allowed. In support of his submissions, he relied upon the document titled as "full and final settlement" annexed with the writ petition. A perusal of the said document indicates that an amount of ₹ 18,763/- is due to the respondent workman, which includes various service benefits including conveyance allowance, house rent allowance personal allowance etc. there is no proof whether it has actually been paid to the respondent workman or not. The said documents also contains a receipt but the same is unsigned, which clearly indicates the same has not been accepted by the respondent workman, or it was never tendered by the petitioner to the workmen. It is further noticed that in the objections filed by the petitioner before the labour court in paragraph No. 10 stated that:-

"Further, as per policy of the company if so Respondent company had prepared applicant's full & final settlement and given outstanding full & final amount to the applicant ".

17. There is clearly a variation in the stand of the petitioner before the labour court and before this Court. Before the labour court there was no mention that the full and final settlement has been accepted by the respondent workman, and in paragraph 21 of the instant writ petition it has been stated that the workman has signed a voucher in due acceptance of his dues on 14/01/2009. The document Annexed in support of the said averments does not include any signed document by the respondent rather an unsigned document has been annexed. Clearly, from the above it was not expected from the petitioner to make false assertions before this Court. In case the respondent had in fact signed the said full & final settlement the same should have been produced before the labour Court as well as this Court. Before the labour court it was never stated that the workmen had accepted the full and final settlement, and this changed stand before this Court, clearly appears to be an afterthought and contrary to the material on record, and not worthy of being considered in favour of petitioner. In absence of acceptance of the said settlement by the workman it cannot be considered to be an agreement or a settlement. The arguments of the petitioner in this regard also rejected.

18. In light of the above, the writ petition is bereft of merits and is accordingly **dismissed.**

(2023) 6 ILRA 880
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-C No. 23756 of 2021

Pallavi Soni ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
A.Z. Siddiqui

Counsel for the Respondents:

C.S.C., Atul Kumar Dwivedi

A. Education Law – Dr. Shakuntala Mishra Rehabilitation, UP Act, 2009 – Ph.D. Ordinance, 2014 – Authority of University to issue Ordinance – Source of such authority, questioned – University was unable to place any provision of Law, which empowers the University to issue an ordinance – Effect – Held, as per the St. Act No. 1 of 2009, the University possess power only to frame statute. Thus, on the face of it, the ordinance appears to be without jurisdiction. (Para 8)

B. Education Law – Ph.D. course – Discontinuation – After five years, the petitioner was restrained from completing the course on the ground of irregularity in admission – Legality challenged – Students cannot be made to suffer for the fault of the management of the university – *Ashok Chand Singhvi's* case relied upon – Held, once, the University has granted admission and permitted petitioner to continue for five long years and her Ph.D. course is on the verge of completion, it is now not open for the University to restrain petitioner from completing her course – Even presuming some irregularity did occur at the time of admission in Ph.D. course, the same cannot now be made the basis for denying petitioner from completing her course. (Para 14 and 16)

Writ petition allowed. (E-1)

List of Cases cited:

1. Abha George & ors. Vs All India Institute of Medical Sciences (AIIMS) & anr.; 2022 SCC Online Del 366

2. Javed Akhtar Vs Jamia Hamdard; 2006 SCC Online Del 1504

3. Ashok Chand Singhvi Vs University of Jodhpur & ors.; (1989) 1 SCC 399

4. Rajendra Prasad Mathur Vs Karnataka University & anr.; AIR 1986 Supp. SCC 740

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

1. Heard Sri A.Z. Siddiqui, learned counsel for petitioner, learned Standing Counsel for State and Sri Sudeep Seth, learned Senior Advocate assisted by Sri Atul Kumar Dwivedi, learned counsel for respondent University.

2. Petitioner who is a Ph.D. student of Fine Arts, studying in respondent University has approached this Court by the present writ petition for a mandamus claiming that respondent University is arbitrarily restraining her from completing her Ph.D. course in which she has already put in five years, on the ground that there is some irregularity in her admission.

3. Brief facts of the case are that Dr. Shakuntala Mishra National Rehabilitation University (For Differently Abled) Uttar Pradesh (hereinafter referred to as 'University') was incorporated by State Act No.1 of 2009. A notice was issued by the University for holding admission process for Ph.D through entrance examination on 25.08.2015. Petitioner applied for Ph.D. in Fine Arts and participated in the selection process. After the selection process, petitioner stood fifth in the merit list and since only four vacancies were available for Ph.D. in Fine Arts, therefore, she could not be selected. The Vice-Chancellor of the University meanwhile entertained applications for Ph.D. from NET/GATE/SLATE candidates. Petitioner who had cleared her UGC NET (thrice cleared NET) being qualified also applied and Vice-Chancellor approved her admission on due recommendation made by the selection committee finding her qualified. Petitioner got her admission in November, 2015 and continued her research work. No objection with regard to

her admission was ever raised. It appears that there were certain allegations with regard to working of the then Vice-Chancellor of the University and, thus, he was removed. Petitioner after completion of five years in Ph.D. sought extension of one year for completing her work as prescribed by rules, however, University declined petitioner to continue with research work and for accepting her further fees. University in pursuant to Academic Council resolution dated 11.05.2018 constituted a three member committee on 15.03.2019 to look into the manner in which the erstwhile Vice-Chancellor had permitted admission in Ph.D. courses. On 30.05.2019 the committee submitted an interim report and it appears that on the basis of said report, petitioner and other candidates were required to submit a declaration and affidavit that they were selected through examination and interview. Since, petitioner could not file such an affidavit in the language required by the University, she is not being permitted to continue her research work. Hence, petitioner has filed present writ petition.

4. Learned counsel for petitioner submits that there is no mistake on part of petitioner and she was granted admission by the University authorities in accordance with rules. The admission was not objected to for five years and now when the petitioner is nearly on verge of completing her Ph.D. she is being unnecessarily restrained from completing the same. He places reliance upon the following cases:-

(i) Abha George and Ors vs. All India Institute of Medical Sciences (AIIMS) and Anr., [2022 SCC Online Del 366],

(ii) Javed Akhtar vs Jamia Hamdard [2006 SCC Online Del 1504],

(iii) Ashok Chand Singhvi v. University of Jodhpur and Ors. [(1989) 1 SCC 399] and

(iv) Rajendra Prasad Mathur v. Karnataka University and Anr. [AIR 1986 Supp. SCC 740]

5. Learned counsel for the University submits that as per Ph.D Ordinance of 2014 of the University, admission in Ph.D. course could only be available for four vacancies in Fine Arts after a written examination and interview. Petitioner stood fifth on merit but only four seats in Fine Arts were available, hence, she could not be granted admission in the said selection process. He further submits that Vice-Chancellor of the University has illegally granted admission to the petitioner in violation of rules and therefore, petitioner is now stopped from continuing the said Ph.D.

6. U.G.C. by notification dated 01.06.2009 has provided procedure for selection in M.Phil/Ph.D. Clause 9 and 10 of the same reads as:-

"9. i) समस्त विश्वविद्यालय, मानित विश्वविद्यालय, एवं कालेज/राष्ट्रीय महत्व की संस्थाएं एम.फिल. एवं शोध छात्रों का प्रवेश अपने स्तर पर विश्वविद्यालय, मानित विश्वविद्यालय एवं कालेज/राष्ट्रीय महत्व की संस्थाओं द्वारा आयोजित प्रवेश परीक्षा द्वारा होगा। जो लोग वि.अ.आ./सी. एस.आई.आर. (जे.आर.एफ.) परीक्षा, स्लेट/गेट उत्तीर्ण हैं या शिक्षक अध्ययातिवृत्तियां धारक हैं और जिन्होंने एम.फिल. कार्यक्रम पी.एच.डी. प्रवेश परीक्षा के लिए उत्तीर्ण कर लिया है उनके लिए विश्वविद्यालय अलग से शर्तों का निर्धारण कर सकता है। यही तरीका एम.फिल. कार्यक्रम की प्रवेश परीक्षा में अपनाया जा सकता है।

ii) इसके पश्चात् स्कूल/विभाग/संस्था/विश्वविद्यालय जैसा मामला हो एक साक्षात्कार का आयोजन करेगा।

iii) साक्षात्कार के समय शोध छात्रों से अपेक्षा की जाती है वे अपने शोध रूचि/क्षेत्र पर विचार–विमर्श करें।

iv) पहले से सुनिश्चित की गई छात्रों की संख्या पर ही छात्रों को एम.फिल./पी.एच.डी. कार्यक्रम में प्रवेश दिया जा सकेगा।

10. पी.एच.डी. कार्यक्रम में प्रवेश या तो सीधे या एम.फिल. माध्यम से होगा।'"

7. Learned counsel for respondent University claims that in furtherance of the said guidelines of U.G.C., Ph.D. Ordinance, 2014 is issued by the University. The said ordinance provides for a written examination as well as interview.

8. Learned counsel for the respondent University was asked to place the provision of law under which the said ordinance was issued by the University. He could not place any provision of law which empowers the University to issue an ordinance. As per State Act No.1 of 2009, the University possess power only to frame statute. Thus, on the face of it, the ordinance appears to be without jurisdiction. Even otherwise, the U.G.C. guidelines 9(i) provides that the University can provide for conditions for persons who have cleared C.S.I.R. examination(J.R.F.)/SLATE/GATE/M.Phil. separately from selection to be made through entrance examination. Therefore, it cannot be said that even by the said ordinance, the power of University given by paragraph 9(i) of U.G.C. guidelines is taken away. It is rather in furtherance of the said power that the Academic Council of the University in its 3rd meeting dated 03.10.2015 resolved as follows:-

"ख) उपरोक्त के अतिरिक्त यू.जी.सी. एवं सी.एस.आई.आर. के जे.आर. एफ/गेट/नेट/स्लेट/एम.फिल. धारक तथा सेवारत् अधिकारी एवं ख्यातिलब्ध विशेषज्ञ, जिनका पी–एच.डी. शोध कार्य विश्वविद्यालय एवं समाज के उन्नयन तथा नीति–नियोजन में उपयोगी हो, को पी–एच.डी. में अतिरिक्त सीट का प्राविधान कर सीधे प्रवेश प्रदान करने हेतु कुलपति को अधिकृत किए जाने का मा0 विद्या परिषद् द्वारा निर्णय लिया गया।"

9. By the aforesaid resolution, Academic Council empowered Vice-Chancellor to create extra seats for Ph.D. and grant admission to persons who have cleared J.R.F./GATE/NET/SLATE/M.Phil. The said Academic Councils' resolution was duly acted upon and in furtherance thereof, Vice-Chancellor of the University exercising his powers granted admission to the petitioner in November, 2015. Therefore, submission of learned counsel for the University that the admission granted is in violation of U.G.C. guidelines or the ordinance of the University does not have any force. The Academic Council of the University duly empowered the Vice-Chancellor to grant admission by creating extra seats. The said resolution of the Academic Council holds good till date. Neither any authority of the University till date has objected to the said resolution nor the same is withdrawn as yet. Therefore, Vice-Chancellor was empowered under the said resolution and has granted admission to the petitioner by creating an extra seat in Ph.D. in Fine Arts as petitioner was fully qualified.

10. Learned counsel for respondent University has further drawn attention of the Court to Section 13.1 of the State Act

No.1 of 2009 and claims that it is the Executive Council which possess all these powers with regard to admission etc. and neither the Academic Council nor the Vice-Chancellor has any such power.

11. The relevant sections of Act No.1 of 2009 with regard to powers of concerned authorities of the University reads:-

"13.1 The Executive Council shall be chief executive body of the University.

(2) ***The administration, management and control of the University and the income thereof shall be vested in the Executive Council which shall control and administer the property and funds of the University.***

20. The Academic Council shall be the academic body of the University and Academic Council shall, subject to the provision of this Act and the statutes, have power of control and general regulation of and be responsible for, the maintenance of standards of instructions, education and examination of the University and shall exercise such other powers and perform such other functions as may be conferred upon or assigned to, it by this Act or the statutes, It shall have the right to advise the Executive Council on all academic matters.

22. Subject to the provisions of this Act or the statues, the Academic Council shall in addition to all other powers vested in it, have the following powers, namely:-

(i) in report on any matter referred to or delegated to it by the General Council or the Executive Council;

(ii) to make recommendations to the Executive Council with, regard to the creation, abolition or classification of teaching posts in the University and the qualifications, emoluments and duties attached thereto;

(iii) to formulate and modify or revise schemes for organisation of the faculties and to assign to such faculties their respective subjects and also to report the Executive Council as to the expediency of the abolition or subdivision of any faculty or the combination of one faculty with another;

(iv) to promote research within the University and to require, from time to time, report on such research;

(v) to consider proposals submitted by the faculties,

(vi) to lay norms and to appoint committees for admission to the University;

(vii) to recognise diplomas and degrees of other Universities and Institutions and to determine their equivalence in relation to the diplomas and degree of the University;

(viii) to fix, subject to any conditions accepted by the General Council, the time, mode and conditions of competitions for fellowship, scholarship and other prizes and to award the same;

(ix) to make recommendations to the Executive Council in regard to the appointment of examiners and if necessary their removal and the fixation of their fees, emoluments and travelling and other expenses;

(x) to make arrangements for the conduct of examinations and to fix dates for holding them;

(xi) to declare the results of the various examinations or to appoint committees or officers to do so, and to make recommendations regarding the conferment or grant of degrees, honours, diplomas, licences, titles and marks of honour;

(xii) to award stipends, scholarship, medals and prizes and to make other awards in accordance with the regulations and such other conditions as may be attached to the awards.

(xiii) to publish list of prescribed or recommended text books and to publish syllabus of the prescribed courses of study.

(xiv) to prepare such forms and registers as are, from time to time, prescribed by statutes; and

(xv) to perform, in relation to academic matters, all such duties and to do all such Ordinances as may be necessary for the proper carrying out the provisions of this Act and the statutes.

27(11) The Vice Chancellor shall-

(a) ensure that the provisions of this Act and the statutes are duly observed and shall have all powers as are necessary for that purpose;

(b) ***subject to the specific and general directions of the Executive Council the Vice Chancellor shall exercise all powers of the Executive Council in the management and administration of the University;***

(e) convene the meetings of the General Council, the Executive Council. the Academic Council and shall perform all other Acts, as may be necessary to give effect to the provisions of this Act,

(d) have all powers relating to the proper maintenance of discipline in the University."

12. A perusal of the aforesaid provisions show that though the Executive Council is executive body of the University and is responsible for administration, management and control of the University but Section 27(11)(b) provides that subject to specific and general directions of the Executive Council, the Vice-Chancellor shall exercise all powers of the Executive Council in the management and administration of the University. Therefore, unless there is specific or general directions given by the Executive Council, the Vice-Chancellor has power to administer, manage and control the affairs of the University. Ph.D. Ordinance, 2014 only provides with regard to Ph.D seats to be filled up through selection. The same is silent with regard to persons who have qualified NET/GATE/SLATE etc. There is no direction in the entire ordinance with regard to such persons who are permitted by U.G.C. Regulation 2009 to be admitted by the University as per procedure prescribed by the University. Thus, since there is no specific or general direction given by the Executive Council with regard to such persons it was open for the Vice-Chancellor to take a decision. The Academic Council by its 3rd resolution had proposed that such persons may be admitted by the Vice-Chancellor by creating extra seat and Vice-Chancellor has exercised such power. Since the year 2015 till date the Executive Council has not

reversed the said decision of Academic Council and Vice-Chancellor. Petitioner continued to pursue her Ph.D. in the University for five long years. Executive Council never objected to the same. Thus, it can safely be understood that Executive Council permitted continuation of petitioner in her Ph.D. course. From the above it is clear that there is no illegality found in the admission process of petitioner. Learned counsel for the respondent University could not point any provision of law under which admission of petitioner could be held to be illegal.

13. Now coming to the judgments referred to by counsel for petitioner, in the case of ***Rajendra Prasad Mathur (supra)*** the dispute was of cancellation of admission to the B.E. Course. The High Court allowed the writ petition and the Supreme Court while dismissing the appeals held that:

"8. We accordingly endorse the view taken by the learned Judge and affirmed by the Division Bench of the High Court. But the question still remains whether we should allow the appellants to continue their studies in the respective engineering colleges in which they were admitted. It was strenuously pressed upon us on behalf of the appellants that under the orders initially of the learned Judge and thereafter of this Court they have been pursuing their course of study in the respective engineering colleges and their admissions should not now be disturbed because if they are now thrown out after a period of almost four years since their admission their whole future will be blighted. Now it is true that the appellants were not eligible for admission to the engineering degree course and they had no legitimate claim to such admission. ***But it must be noted that the blame for their wrongful admission must lie more upon the engineering colleges which granted admission than upon the appellants. It is quite possible that the appellants did not know that neither the Higher Secondary Examination of the Secondary Education Board, Rajasthan nor the first year BSc examination of the Rajasthan and Udaipur Universities was recognised as equivalent to the Pre-University Examination of the Pre-University Education Board, Bangalore.*** *The appellants being young students from Rajasthan might have presumed that since they had passed the first year BSc examination of the Rajasthan or Udaipur University or in any event the Higher Secondary Examination of the Secondary Education Board, Rajasthan they were eligible for admission.* ***The fault lies with the engineering colleges which admitted the appellants because the Principals of these engineering colleges must have known that the appellants were not eligible for admission and yet for the sake of capitation fee in some of the cases they granted admission to the appellants. We do not see why the appellants should suffer for the sins of the managements of these engineering colleges. We would therefore, notwithstanding the view taken by us in this Judgment, allow the appellants to continue their studies in the respective engineering colleges in which they were granted admission. But we do feel that against the erring engineering colleges the Karnataka University should take appropriate action because the managements of these engineering colleges have not only admitted students ineligible for admission but thereby deprived an equal number of eligible students from getting admission to the engineering degree course****. We also*

endorse the directions given by the learned Judge in the penultimate paragraph of his Judgment with a view to preventing admission of ineligible students." (emphasis added)

14. Further, in the case of ***Ashok Chand Singhvi (supra)***, where the facts were similar to the current case, the Court observed that students cannot be made to suffer for the fault of the management of the university. The relevant paragraphs of the judgment are as follows:

"14. It is urged by Mr Mehrotra, learned counsel appearing on behalf of the respondents, that the appellant could not be admitted and his admission was illegal. ***There may be some force in the contention of the learned Counsel, but when all facts were before the University and nothing was suppressed by the appellant, would it be proper to penalise the appellant for no fault of his? The admission of the appellant was not made through inadvertence or mistake, but after considering even all objections to the same, as raised by the said Officer-in-Charge, Admissions, in his note. The appellant was communicated with the decision of the Dean as approved by the Vice-Chancellor admitting him to the Second Year BE course.*** *The appellant deposited the requisite fees and started attending classes when he was told that his admission was directed to be put in abeyance until further orders without disclosing to him any reason whatsoever.*

15. ***It is curious that although the admission to the BE degree course of the University is governed by statutes of the University and admission rules, the said resolution of the Syndicate dated 13-12-1970 has also been kept alive. Neither the Dean nor the Vice-Chancellor was aware of the true position, namely, as to whether the said resolution had become infructuous in view of the statutes and the admission rules. A teacher candidate is likely to be misled by the said resolution. It is the duty of the University to see that its statutes, rules and resolutions are clear and unambiguous and do not mislead bona fide candidates. The University should have revoked the said resolution in order to obviate any ambiguity in the matter of admission or included the same in the statutes as part of the admission rules.***

16. When the appellant made the application beyond the last date, his application should not have been entertained. But the application was entertained, presumably on the basis of the said resolution of the Syndicate. The appellant also brought to the notice of the Dean the said resolution and also the implementation of the same by admitting seven teacher candidates.

17. It is submitted on behalf of the University that it was through mistake that the appellant was admitted. We are unable to accept the contention. It has been already noticed that both the Dean and the Vice-Chancellor considered the objections raised by the Officer-in-Charge, Admissions, and thereafter direction for admitting the appellant was made. ***When after considering all facts and circumstances and also the objections by the office to the admission of a candidate, the Vice-Chancellor directs the admission of such a candidate such admission could not be said to have been made through mistake. Assuming that the appellant was admitted through mistake, the appellant not being at fault, it is difficult to sustain***

the order withholding the admission of the appellant. *In this connection, we may refer to a decision of this Court in Rajendra Prasad Mathur v. Karnataka University [1986 Supp SCC 740] . In that case, the appellants were admitted to certain private engineering colleges for the BE degree course, although they were not eligible for admission. In that case, this Court dismissed the appeals preferred by the students whose admissions were subsequently cancelled and the order of cancellation was upheld by the High Court. At the same time, this Court took the view that the fault lay with the engineering colleges which admitted the appellants and that there was no reason why the appellants should suffer for the sins of the management of these engineering colleges. Accordingly, this Court allowed the appellants to continue their studies in the respective engineering colleges in which they were granted admission. The same principle which weighed with this Court in that case should also be applied in the instant case. The appellant was not at fault and we do not see why he should suffer for the mistake committed by the Vice-Chancellor and the Dean of the Faculty of Engineering." (emphasis added)*

15. The said judgments are followed and a similar approach is adopted by the Delhi High Court in the case of ***Abha George (supra),*** the Delhi High Court was of the opinion that:

"18. In Javed Akhtar case [Javed Akhtar v. Jamia Hamdard, 2006 SCC OnLine Del 1504] , a Coordinate Bench of this Court considered a case where the petitioners' candidature was accepted for appearing in the entrance examinations, and they were admitted to the institution concerned. Their admissions were cancelled after they had attended the classes for one month. The facts of the case are very similar to the present case. The question framed by the court was in the following terms:

"21. ... This is not disputed that the petitioners filled the forms for appearing in the entrance examination and gave their correct date of birth. The forms of the petitioners were considered and they were allowed to appear in the examination. After their names appeared, they were called for counselling and after verifying the documents and certificates of the petitioners, they were given admission. The petitioners were issued identity cards after accepting the fees for the course from them and the petitioners were allowed to attend classes for a month and thereafter by communication dated 8-8-2006 the admission of the petitioners have been cancelled. ***Whether Respondent 1 can be allowed to cancel the admission midterm in the facts and circumstances, when the petitioners have not concealed any thing nor produced any documents to mislead Respondent 1? Whether Respondent 1 will be estopped from cancelling the admission of the petitioners in the facts and circumstances?" [Emphasis supplied]***

19. The court answered the question thus:

"38. Therefore, ***while granting the admission if the academic body has acted inattentively and mechanically, then they cannot be allowed to take the plea that the admission was never valid and that the petitioners were ineligible from the very inception and knowing the ineligibility they applied for admission. The respondents cannot be allowed to cancel the admission at their own***

convenience at any time of the year without considering the fact that if they cancel the admission after the session has started then the entire year of the petitioners will be spoiled as the petitioners would not be in a position to take admission in any other college/university. If this fact of their ineligibility for admission was conveyed to them at the very start they would have taken admission in some other college/university.

39. In such situation, in view of the decision in Sangeeta Shrivastava v. U.N. Singh [Sangeeta Shrivastava v. U.N. Singh, 1979 SCC OnLine Del 202], ***the petitioners cannot be penalised for the negligence of authorities. It is important to appreciate that the petitioners in the facts and circumstances cannot be accused of making any false statement or suppressing any relevant fact before anybody.*** *They clearly mentioned their date of birth in the application form for admission, and are not guilty of any fraud or misrepresentation. It was the duty of the university to have scrutinised the application form and the certificates thoroughly before granting admission to the petitioners and permitting them to attend the classes and not having done so they cannot cancel the admission thereafter. By accepting the application form and subsequently granting admission representation was made by the respondents that the petitioners' were eligible for admission and the petitioners' acting upon the same took admission and thus the petitioners' suffered a detriment. Had the respondents not made the representation that the application had been approved and granted admission the petitioners' would have applied and taken admission else where. Therefore the respondents are estopped from pleading that the petitioners were not entitled to a seat from the inception and that the admission is void ab initio and that the admission without fulfilment of the eligibility criteria is a nullity.*

40. In the facts and circumstances of the case ***the respondents cannot be allowed to take advantage of their own wrong and cannot be permitted to take the plea that under the prospectus they had the power to cancel the admission of ineligible student*** *and the principle of estoppel will operate against them. The respondents are estopped from cancelling the admission of the petitioners' and further from preventing them from pursuing the 'pre tib' course in the present facts and circumstances." [Emphasis supplied]*

20. Applying these authorities in the present case, it appears that the petitioners' documents were accepted by the respective centres of Aiims, despite the fact that their qualifying examination results were declared one week later than stipulated in the prospectus. The petitioners have prosecuted their studies for almost two months prior to issuance of the impugned OM dated 18-10-2021. There is no allegation that the petitioners had misrepresented or concealed any information from Aiims —indeed, there cannot be, as the qualifying examination was conducted by Aiims itself. Applying the observations of the Supreme Court in Rajendra Prasad Mathur case [Rajendra Prasad Mathur v. Karnataka University, 1986 Supp SCC 740] , in the present case also, the blame lies more upon the institution than the petitioners. The candidates applied; their results were declared by Aiims, New Delhi; those results were submitted to the regional centres to

which they have been assigned, and they were granted admission. Their admissions were cancelled after they had spent almost two months on the course. The judgment of this Court in Javed Akhtar case [Javed Akhtar v. Jamia Hamdard, 2006 SCC OnLine Del 1504] , in fact, goes further to hold that an academic institution cannot be permitted to cancel admissions after the course had started, at any time during the year, due to prejudice that would be caused to the candidates who were admitted as they would by then be unable to take admission in any other university to which they may have been admitted."

16. Law is, thus, well settled on the issue involved. Once, the University has granted admission and permitted petitioner to continue for five long years and her Ph.D. course is on the verge of completion, it is now not open for the University to restrain petitioner from completing her course. Even presuming some irregularity did occur at the time of admission in Ph.D. course, the same can not now be made the basis for denying petitioner from completing her course. Learned counsel for respondent University could not show from record that petitioner has in any manner misrepresented or played fraud or otherwise was maliciously involved in the said admission process. The decision was taken by the authorities of University in exercise of its powers. Thus, this Court finds that the respondent University cannot restrain petitioner from completing her Ph.D. course and is bound to consider her application for extension of period by one year as per rules.

17. This Court further finds that the country is making its best efforts to grow from a developing nation to a developed one. Repeatedly it is said that to become a developed nation huge research work is required to be conducted within the Country. Now, when the students are pursuing their research work and are at the verge of completion it is highly improper to restrain them from completing their research on legal technicalities. The country is in dire need of research work. Petitioner has put more than five years in her Ph.D. course and is on the verge of submitting the same. Now denial of benefit of said research work to the nation in itself would be a huge loss. In the said circumstances also this Court is inclined to exercise its discretionary jurisdiction in favour of petitioner and against the respondent University.

18. In the given facts and circumstances of the case, the writ petition is ***allowed*** and a mandamus is issued to respondent University to consider the application of petitioner for extension of one year after five years of Ph.D. course and permit her to submit fees in accordance with law. Such a decision shall be taken and communicated to the petitioner by the respondent University within a period of 15 days and accordingly petitioner shall be permitted to complete her Ph.D. course in accordance with law.

(2023) 6 ILRA 890
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-C No. 1001023 of 1999

Oudh Sugar Mills Ltd. ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Dr. R.K. Srivastava

Counsel for the Respondents:
B.B. Saxena, Deepak Seth, Ghaus Beg

A. Tax Law – Central Excise Act, 1944 – Rules 9-B & 10 – Excise duty – Demand notice issued under Rule 10 – Time-barred notice – Rebate – No reference of playing fraud, collusion, willful misSt.ment or suppression of facts to obtain rebate by the petitioner – Only ground taken in the demand notice is that exemption from duty can not exceed the leviable duty itself – No reference to any final assessment carried out by the authorities in support of its demand – Effect – Fulfillment of conditions provided in the Rule 9B of the Rules of 1944 is required to be followed for an assessment to be called as provisional assessment – *National Tobacco's case* relied upon – High Court set aside demand notice holding it suffer from time-barred (Para 6, 8, 12 and 13)

Writ petition allowed. (E-1)

List of Cases cited:

1. Raj Bahadur Narain Singh Sugar Mills Ltd. Vs U.O.I. & ors.; (1997) 6 SCC 81

2. Someshwar Sahakari Sakhar Karkhana Ltd. Vs U.O.I. & ors. 1988 (34) E.L.T. 522 (Bom.)

3. Assistant Collector of Central Excise,Calcutta Division Vs National Tobacco Co. India Ltd.; AIR 1972 SC 2563

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

1. By the pesent writ petition, petitioner is praying for quashing of orders dated 26.08.1992 passed by Assistant Collector, Excise, Sitapur whereby demand for tax liability was confirmed as well as order dated 08.01.1993 passed by Assistant Collector (Appeals), dismissing petitioner's appeal against the order dated 26.08.1992 and order dated 05.02.1999 passed by the Customs, Excise and Gold Appellate Tribunal.

2. Brief facts of the case are that the petitioner company is involved in the manufacturing of sugar, which is subjected to levy of Central Excise. In order to incentivise sugar mills to continue manufacturing during the lean season the Central Government by notification dated 28.04.1978 offered rebate on Central Excise levied on all sugar produced between 01.05.1978 to 30.09.1978 in excess of the average production of the corresponding period of the preceding three years. On 14.08.1978, the earlier notification was modified and the rebate was now applicable on excess production between 01.05.1978 to 15.08.1978. Petitioner too submitted his claim for rebate on excess production for the relevant period. The same was allowed vide order dated 04.10.1978 and a rebate of Rs. 16,79,339.65 was credited into the Personal Ledger Account of the petitioner mill. On 08.04.1980 a demand cum show cause notice under Rule 10 of Central Excise Rules, 1944 (hereinafter referred to as Rules of 1944) was served upon the petitioner for recovery of Rs. 1,65,878.34 allegedly claimed and received by petitioner in excess of actual rebate due to the petitioner mill. On the basis of petitioner's reply, by impugned order dated 26.08.1992 demand of Rs. 1,65,878.34 is confirmed against the petitioner and appellate authorities have also rejected his appeals by impugned orders dated 08.01.1993 and 05.02.1999.

3. Counsel for the petitioner challenges the impugned orders on the ground that the order dated 04.10.1978, approving petitioner's claim for rebate of

Rs. 16,79,339.65 is final and therefore demand notice dated 08.04.1980 for recovery of Rs.1,65,878.34 is time-barred. As per Rule 10 of the Rules of 1944 no demand can be made after a period of six months, while show cause notice for recovery of rebate is issued after almost eighteen months and is therefore clearly time-barred. He further challenges the finding that the order dated 04.10.1978 approving the rebate is passed on the basis of provisional assessment and therefore not hit by the statutory limitation of Rule 10 of the Rules of 1944. He further submits that the limitation of six months is not applicable only on such final assessment which are obtained by fraud, collusion, wilful misstatement or suppression of facts and since it is not alleged in the show cause notice, said Rule is therefore, not applicable in the present case. In support of his case counsel for the petitioner relies upon judgment of the Supreme Court in the case of **Raj Bahadur Narain Singh Sugar Mills Ltd. vs Union of India and Ors.; (1997) 6 SCC 81.**

4. Learned counsel for the respondents, Mr. Deepak Seth opposes the submissions of the counsel for the petitioner and claims that there is no illegality in the impugned order. He submits that order dated 04.10.1978 itself states that it is only a provisional order and therefore is not hit by the limitation prescribed under Rule 10 of the Rules of 1944. Counsel for the respondents submits that facts of the case in **Raj Bahadur (supra)** are distinguishable from the present case as it is with regard to a final order. This fact is evident from paragraph 2 of the judgment which states that appellant's rebate claim has been pre-audited as admissible under the notification. This means that the rebate claim was sanctioned after audit of the records and thus it was not a provisional order. Therefore, he submits that, the contention of counsel for the petitioner that the order dated 04.10.1978 was final, does not hold its ground. Bar placed on demands after six months by Rule 10 of Rules of 1944 is applicable only on final orders of assessment. In support of his argument counsel for the respondent places reliance upon a Division Bench judgment of the Bombay High Court in the case of **Someshwar Sahakari Sakhar Karkhana Ltd. vs. Union of India and Ors. 1988 (34) E.L.T. 522 (Bom.).** The Division Bench of the Bombay High Court was also faced with a similar set of facts where statutory limitation provided under Rule 10 of the Rules of 1944 was invoked by the petitioner against the demand notices. Rejecting the contention of the petitioners, the Bombay High Court held that the order approving the rebate was only a provisional assessment and therefore the demand notice is not barred by limitation.

5 . I have heard counsel for the parties and perused the record with their assistance.

6. A perusal of the demand notice dated 08.04.1980 shows that there is no reference to fraud, collusion, wilful misstatement or suppression of facts by petitioner as grounds for obtaining the rebate by the petitioner. The only ground taken in the demand notice is that exemption from duty can not exceed the leviable duty itself. Relevant portion of the demand cum show cause notice dated 08.04.1980 reads,

"*Whereas it appears that M/S Oudh Sugar Mills Ltd., Hargaon Distt. Sitapur (L.4 No. 15/Sug/Bly/54) have*

contravened the provisi-ons of Rule 10 of Central Excise Rules, 1944 in as much as they have claimed and received excess rebate of Rs. 1,65,878.34 Paise on 23379.83 Qtls. on free sale of sugar during the year 1977-78 un-der Notification No. 108/78 Dated 28.4.78 as per details given below. This is in violation of the principles laid down by the Government of India, Ministry of Finance that an exemption from duty can not exceed the leviable duty itself. In this case M/S Oudh Sugar Mills Ltd., Hargaon have claimed and received Rebate at a level higher than the Excise duty, which is to be refunded/ deposited by M/S Oudh Sugar Mills Ltd., Hargaon under Rule 10 of Central Ex cise Rules, 1944."

7. Supreme Court in the case of **Raj Bahadur (supra)** has held such notices to be in violation of Rule 10 of the Rules of 1944. Relevant paragraphs of judgment in the case of **Raj Bahadur (supra)** reads:

*"3. On 30-7-1979 the Superintendent, Central Excise, Hardwar, issued to the appellants a notice. It stated that the appellants "were erroneously sanctioned rebate of Rs 15,59,252.18 ... as against Rs 12,90,966.42 on excess production of 62,022.76 quintals of sugar achieved during the period from 1-5-1978 to 15-8-1978 ...". The notice set out the details of the rebate granted and the details of clearances and stated that, from these details, "it is obvious that the factory has availed exemption in excess by Rs 2,68,285.76 which was not admissible to them". The appellants were required to show cause why such excess rebate "granted to them erroneo*usly should not be recovered from them under Rule 10 of the Central Excise Rules, 1944".

4. The appellants showed cause and contended that the notice was time-barred under Rule 10. The period of six months by which time the notice to demand the amount back should have been issued expired on 17-4-1979. Since the notice had been issued on 30-7-1979, which was beyond the period of six months, the demand was time-barred. The notice did not mention that the refund of duty had been obtained by fraud, collusion, wilful misstatement or suppression of fact, which attracted the limitation period of five years. The entire data having been divulged to the authorities at the time the claim was preferred, there was no justification for the notice after the period of six months. The reply to the notice also dealt with the merits of the claim to the rebate.

5. On 10-2-1983 the Assistant Collector of Central Excise, Saharanpur, confirmed the demand made by the notice. He dealt first with the merits of the claim to rebate and then stated:

"Since the amount of rebate was much more than the duty actually paid the party should have informed the department about this fact and also should have themselves paid the excess amount by making a debit entry in the P/L A/C and the .206 free sale sugar which they have cleared as levy sugar and enjoyed the rebate @ Rs 54 instead of Rs 9.60 was incorrect. This fact they should have also informed the department and by concealing all these facts they have made wilful misstatement and suppressed the fact with the intention to evade payment of duty. The show-cause notice issued under Rule 10 was also correct as the same was in force at the time of issue of show-cause notice."

.....

.....

9. We have set out the relevant parts of the show-cause notice. It speaks of an erroneously granted rebate. There is no mention in it of any collusion, wilful misstatement or suppression of fact by the appellants for the purposes of availing of the larger period of five years for the issuance of a notice under Rule 10. The party to whom a show-cause notice under Rule 10 is issued must be made aware that the allegation against him is of collusion or wilful misstatement or suppression of fact. This is a requirement of natural justice. It is also the law, laid down by this Court in CCE v. H.M.M. Ltd. [1995 Supp (3) SCC 322 : (1995) 76 ELT 497] It has been said there with reference to Section 11-A of the Central Excises and Salt Act, 1944, which replaced Rule 10, that if the authorities propose to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions and omissions stated in the proviso is committed to extend the period from six months to five years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the authorities. The defaults enumerated in the proviso were more than one and if the authorities placed reliance on the proviso, it had to be specifically stated in the show-cause notice which was the allegation against the assessee falling within the four corners of the said proviso.

10. In view of the fact that the notice fails to refer to any of the acts of commission or omission enumerated in the relevant proviso to Rule 10, the notice, given more than six months after the date of the order of refund, is time-barred. Put differently, the Superintendent who issued it had no authority to do so."

8. Thus failure of the excise tax authority to lay out the grounds for extending the limitation period is a sufficient ground for quashing such demand notices and therefore further proceedings on the basis of such faulty notices are without jurisdiction. The judgment of the Division Bench of Bombay High Court in the case of Someshwar **Sahakari Sakhar Karkhana Ltd. (Supra)** also does not hold good in the light of aforesaid judgment of Supreme Court in the case of **Raj Bahadur (Supra).**

9. The next submission of learned counsel for respondents is that order dated 04.10.1978 by which rebate was granted was a provisional order and not a final order, therefore, the period of limitation as well as condition of Rule 10 of Rules of 1944 was not required to be fulfilled. He further submits that Rule 10 of Rules of 1944 would apply only in case of final order. For the said purposes he relied upon the language of the said order dated 04.10.1978.

10. Learned counsel for the petitioner disputes the same and submits that the said order dated 04.10.1978 is a final order. The aforesaid order dated 04.10.1978 reads as follows:-

"1. In terms of Govt. of India Notification No. 108/78-CE dated 28.4.78 M/s Oudh Sugar Mills Hargaon are provisionally allowed rebate on the quantity asnoted on reverse of sugar produced in excess during the months of May 78 to Sept.78 against levy sugar and free sale sugar respectively. The amount should be credited in the Personal Ledger A/c. by the factory asbasic excise duty.

2. It should be ensured that the entire quantity produced during the months May to Sept. 78 is cleared from the factory andif there is any loss due to any reson the quantitiy of rebate may be reduced accordingly.

3. The particulars of adjustment of rebate claim in personal ledger account may please be reported to this office as well as the Supdt. Central Excise MOR II Sitapur and the Chief Accounts Officer Central Excise, Allahabad.

4. Before the rebate is credited to the Personal Ledger account the jurisdictional superintendent may please be approached for the purpose."

11. A perusal of 1st & 2nd paragraphs of the said order dated 04.10.1978, shows that the order is provisional only to the extent it states to clear the entire quantity produced during the months of May to September, 1978 is concerned and in case any lesser quantity is cleared from the factory than the quantity produced during the months of May to September, 1978, the loss due to the same may be reduced accordingly. Therefore, except for the said condition the order with regard to the rebate granted to the petitioner is final. It cannot by any stretch of imagination be a grant of provisional rebate. Hence, the said order is a final order. Thus, this submission of counsel for the respondents also does not have any force.

12. Even otherwise counsel for the tax authority could not produce any final assessment before this Court. Further provisional assessment is provided under Rule 9B of the Rules of 1944. As per the same, instance of provisional assessment arises when (a) the assessee is unable to determine the value of excisable goods and (b) when the asessee is unable to determine the correct classification of the goods. Before approving the provisional assessment, the assessee is also asked to furnish a security bond. In the present case, learned counsel for the authorities could not show any such bond or order approving the provisional assessment. The demand cum show cause notice is issued under Rule 10, but there is no reference to any final assessment carried out by the authorities in support of its demand. In the case of **Assistant Collector of Central Excise, Calcutta Division vs. National Tobacco Co. India Ltd.; AIR 1972 SC 2563,** a three judges bench of the Supreme Court has held that fullfilment of conditions provided in the Rule 9B of the Rules of 1944 is required to be followed for an assessment to be called as provisional assessment. Relevant paragraph of the judgment in the case of National Tobacco (supra) reads,

"27. However, on a consideration of the arguments raised on the merits of that point, we find it is difficult to hold that there was a provisional assessment. CEGAT has adverted to certain reasons for arriving at such a finding. Rule 9-B of the Central Excise Rules has been quoted in the impugned judgment. The title of the rule is "Provisional Assessment", in which situations are detailed when provisional assessment could be made. CEGAT pointed out in the judgment certain admissions made by the Department such as the absence of any express order of provisional assessment as required under Rule 9-B, absence of any circumstance for making a provisional assessment and that it was not stated in the show cause notice that the assessment made during the relevant period was provisional. The Assistant collector had treated the

assessment as provisional solely on the premise that the matter was sub judice and hence "all the assessment for the period April 1981 to 15.3.1983 were, therefore, made provisional". CEGAT has rightly found that the said yardstick was hardly sufficient to make an assessment provisional."

13. In light of the aforesaid, demand cum show cause notice dated 08.04.1980 is held to be time-barred and therefore impugned orders dated 26.08.1992, 08.01.1993 and 05.02.1999 passed on the basis of the said time-barred notice are hereby set aside.

14, Writ petition is ***allowed***.

15. The respondents are directed to refund the money deposited by the petitioner in accordance with law.

(2023) 6 ILRA 896
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-C No. 1002443 of 2012

Principal M.R. Jaipuria School , Lko. ...Petitioner

Versus

Deputy Transport Commissioner Passenger Tax Lko & Ors. ...Respondents

Counsel for the Petitioner:
Ghaus Beg

Counsel for the Respondents:
C.S.C.

A. Motor Vehicle Law – UP Motor Vehicles Taxation Act, 1997 – Section 4(3) – School Bus Registration – Seizure – Allegation of carrying wedding guest without permission – No opportunity of hearing was given – Mistake has been accepted by the motor vehicle owner/ petitioner – Effect – Tax imposed – Legality challenged – Held, tax is assessed on the basis of owner's application accepting his guilt – Hence, there was no requirement of providing any opportunity of hearing to the petitioner. (Para 5 and 6)

B. Motor Vehicle Law – Motor Vehicles Act, 1988 – UP Motor Vehicles Taxation Act, 1997 – Violation – Two separate proceeding under the Act of 1988 as well under the Act of 1997 were initiated for the same act – Permissibility – Held, there are two separate Acts i.e. Motor Vehicles Act, 1988 and UP Motor Vehicles Taxation Act, 1997, which are violated by the act of petitioner, therefore, proceedings under both the Acts are bound to be held. (Para 7)

C. Motor Vehicle Law – Motor Vehicles Act, 1988 – Section 2(47) – UP Motor Vehicles Taxation Act, 1997 – Section 2(n) – Word 'Transport Vehicle' – Scope and applicability – Under the Taxation Act of 1997, a transport vehicle is merely a good carriage and a public service vehicle. The word 'public vehicle' only includes vehicles in which passengers are carrying on rent – School bus is not covered within the definition of 'public service vehicle' under the Taxation Act of 1997 – Thus, school bus is not a transport vehicle so far as the Taxation Act of 1997 is concerned while the same is a transport vehicle under the Act of 1988 – While the Act of 1988 is a Central Act, the Taxation Act of 1997 is a St. Act, which provides for taxation on transport and commercial vehicles – Since the scope and subject matter of both the aforesaid Laws deal with entirely separate subjects, it would not be proper to borrow definition while the same is already provided under the Act. (Para 11, 13 and 14)

Writ petition dismissed. (E-1)

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

1. Heard learned counsel for petitioner and learned Standing Counsel for the State.

2. By the present writ petition, petitioner is challenging order dated 06.02.2010 whereby a school bus registered in the name of petitioner is seized, order dated 15.01.2011 whereby tax liability has been fixed on the petitioner and order dated 09.02.2012 whereby appeal against the same is also rejected.

3. Brief facts of the case are that a school bus bearing registration number UP42A8602, registered in the name of Principal M. R. Jaipuria School was seized by Assistant Regional Transport Officer, Raebareli on 06.02.2010 near Bacchrawan, Raebareli. One of the charges levelled included carrying wedding guests without any permit for the same. Petitioner's bus had a permit for carrying "school children only". This alleged act was in violation of section 4(3) of the U.P. Motor Vehicles Taxation Act, 1997 (for short 'the Taxation Act of 1997') and as such by order dated 15.01.2011, petitioner was held liable to pay taxes for using the school bus as transport vehicle without any permit. Petitioner preferred an appeal against the same which was also dismissed by order dated 09.02.2012.

4. Learned counsel for petitioner challenges the validity of impugned orders on following grounds:

(i) petitioner was not given any opportunity of hearing before passing the final assessment order dated 15.1.2011;

(ii) there are two proceedings; one under the U.P. Motor Vehicles Act, 1988 (for short 'the Act of 1988') and another under the Taxation Act of 1997 initiated against the petitioner and two proceedings for the same offence cannot be initiated; and

(iii) that the respondent-authorities have wrongly taken the definition of the word 'transport vehicle' from the Taxation Act of 1997 and the same ought to have been as provided under the Act of 1988.

5. So far as the first submission of learned counsel for petitioner with regard to opportunity of hearing before passing the impugned order dated 15.1.2011 is concerned, the appellate authority has considered the same and given a finding that petitioner/appellant had moved an application of acceptance of his mistake and tax is assessed on the basis of the said acceptance of petitioner. Hence, there was no requirement of providing any opportunity of hearing to the petitioner.

6. Learned counsel for petitioner could not dispute the said finding as he could not show that the tax is assessed on the basis of his application accepting his guilt. Therefore, the said submission of learned counsel for petitioner has no force and is rejected.

7. So far as second submission of learned counsel for petitioner that two proceedings are initiated against the petitioner for the same act is concerned, there are two separate Acts i.e. U.P. Motor Vehicles Act, 1988 and U.P. Motor Vehicles Taxation Act, 1997, which are violated by the act of petitioner, therefore, proceedings under both the Acts are bound to be held.

8. Learned counsel for petitioner could not show any provision of law or

rulings in support of his submission whereby when an act of a person violates two separate Acts, a general law and a tax law, two separate proceedings cannot be initiated. Hence, the second submission of learned counsel for petitioner also has no force and is rejected.

9. Now, coming to the third submission of learned counsel for petitioner that authorities were required to take definition of 'transport vehicle' as provided under Section 2(47) of the Act of 1988 and not under Section 2(n) of the Taxation Act of 1997 is concerned, it is necessary to peruse the relevant provisions also.

10. Section 2(47) of the Act of 1988 provides:

"2(47) "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private services vehicle."

The said definition takes within the scope public service vehicle, goods carriage as well as educational institution bus or private service vehicle. The said definition is entirely different from the definition of word 'transport vehicle' provided under Section 2(n) of the Taxation Act of 1997, which reads:

"2(n) "transport vehicle" means a good carriage or a public service vehicle."

11. Under the Taxation Act of 1997, a transport vehicle is merely a good carriage and a public service vehicle. The word 'public service vehicle' is further defined by Section 2(35) of the Act of 1988, which reads:

"2(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage."

Therefore, the word 'public vehicle' only includes vehicles in which passengers are carrying on rent. School bus is not covered within the definition of 'public service vehicle' under the Taxation Act of 1997 and, therefore, is not covered within the definition of 'transport vehicle'. Thus, school bus is not a transport vehicle so far as the Taxation Act of 1997 is concerned while the same is a transport vehicle under the Act of 1988.

12. Section 2(o) of the Taxation Act of 1997 provides:

"2(o) words and expressions used but not defined in this Act and defined in the Motor Vehicles Act, 1988 shall have the respective meaning assigned to them in that Act."

As per aforesaid Section 2(o), only those definitions are required to be borrowed from the Act of 1988 which are not provided under the Taxation Act of 1997.

13. Since definition of 'transport vehicle' is vehicle provided by the Taxation Act of 1997, the same cannot be borrowed from the Act of 1988. Even otherwise, both the Acts are operating in entirely separate fields while the Act of 1988 is a Central Act enacted to consolidate laws relating to the Act of 1988, which is applicable throughout the country and the Taxation Act of 1997 is a State Act, which provides

for taxation on transport and commercial vehicles.

14. Therefore, since the scope and subject matter of both the aforesaid laws deal with entirely separate subjects, it would not be proper to borrow definition while the same is already provided under the Act. In case Legislature so desired, it would not have provided a separate definition of the word 'transport vehicle' under the Taxation Act of 1997. Therefore, the said submission of learned counsel for petitioner also does not have any force.

15. In view of aforesaid, there is no force in present writ petition. It is accordingly ***dismissed.***

(2023) 6 ILRA 899
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 218 of 2022

Vijay Narayan ...Petitioner
Versus
Dy. Director of Consolidation, Basti & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anand Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Ashutosh Pandey, Sri Pankaj Kumar Gupta

A. Civil Law - U.P. Consolidation of Holdings Act, 1953-Sections 11, 12 & 52-The appeal u/s 11 of the Act filed by contesting respondents cannot be entertained as contesting respondents being private persons were not parties to the proceeding before Consolidation officer nor contesting respondents have title in respect to disputed plot rather their stand is that they are protecting the State/Gaon Sabha property, as such, there was no question of condonation of delay in filing the appeal and fixing the same for decision on merit-The continuance of the appellate proceeding at the instance of contesting respondents on the ground that by impugned order only delay in filing appeal has been condoned and rest matter will be decided later on will be abuse of process of law-an objection u/s 9-A(2) of the Act cannot be filed by private person as procedure has been prescribed under para -128 of Gaon Sabha Manual for conducting or initiating proceeding in respect of Gaon Sabha Property.-Hence the impugned order is liable to be set aside.(Para 1 to 16)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Dodram Vs Collector Peelibheet (2014) 125 RD 333

2. Tripal Singh S/o Sone Lal Vs St. of U.P. & ors. (2006) Vol. 1 AWC 205

3. Ram Jiavan & Addl Commr. Vindhyachal Mandal Mirzapur & ors.. (2014) 124 RD 2019

4. Smt. Sukhjinder Jeet Kaur & ors. Vs DDC, Rampur & ors. (2003) 94 RD 79

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Anand Kumar Srivastava, Counsel for the petitioner, Mr. Ashutosh Pandey, Counsel for respondent no. 3, learned Standing Counsel for the State-respondents and Mr. Pankaj Kumar Gupta, Counsel for respondent no. 7, Gaon Sabha.

2. Brief facts of the case are that name of the petitioner was ordered to be recorded

in the revenue records vide order dated 4.9.1976 passed by the Assistant Consolidation Officer in case No. 425 under Section 12 of the U.P.C.H. Act in respect to plot No. 60, New Nos. 176, 177, 302, 303 and 304 situated in Village Marvat Tappa Puraina Pargana Amroha, Tehsil Harraiya, District-Basti. On the basis of the order dated 4.9.1976, the name of the petitioner was recorded in revenue records. C.H. Form 45 has been annexed along with the writ petition as Annexure No. 1. Petitioner remained in possession of the plot in dispute on the basis of the order dated 4.9.1976. Notification under Section 52 of U.P.C.H. Act took place on 8.2.1978 in respect to Village in question. Against the order dated 4.9.1976, private-respondent nos. 3 to 5 filed an appeal under Section 11(1) of the U.P.C.H. Act along with the delay condonation application. The appeal was registered as appeal No. 512 on 26.4.2017. Petitioner filed his objection dated 18.12.2017 in aforementioned appeal No. 512 stating specifically that Village has been denotified under Section 52 of the U.P.C.H. Act on 8.2.1978. Therefore the appeal is liable to be rejected on the ground of limitation, the ground has also been taken in the objection that respondent nos. 3 to 5 have no locus to file an appeal against the order dated 4.9.1976. Settlement Officer Consolidation vide order dated 19.9.2019 allowed the delay condonation application vide order dated 19.9.2019 and fixed the appeal for disposal on merit. Against the order dated 19.9.2019, petitioner filed a revision under Section 48 of the U.P.C.H. Act which was dismissed vide order dated 12.10.2021 on the ground of maintainability. Against the order dated 12.10.2021, petitioner filed a restoration application which was also dismissed on 21.12.2021. Hence this writ petition.

3. Counsel for the petitioner submitted that appeal filed under Section 11(1) of the U.P.C.H. Act along with application under Section 5 of Limitation Act after 41 years on behalf of respondent nos. 3,4 and 5 who has no locus to file the application has been illegally entertained by Settlement Officer Consolidation. He further submitted that delay of 41 years has been arbitrarily condoned by the Settlement Officer Consolidation. He further submitted that Village has also been denotified long back, as such, the appeal filed by respondent nos. 3 to 5 under Section 11(1) of the U.P.C.H. Act was not maintainable before the Consolidation Court. He further submitted that respondent nos. 3 to 5 have no locus to file the appeal against the order dated 4.9.1976 but the Settlement Officer Consolidation has illegally granted benefit of Section 5 of Limitation Act in filing appeal which was delayed by 41 years. He further submitted that Revisional Court has dismissed the revision as well as the restoration application in arbitrary manner on the ground that revision is no maintainable against the order passed condoning the delay in filing the appeal. He submitted that impugned orders be set aside as the filing of appeal after 41 years by the respondent nos. 3,4 and 5 is a abuse of process of law.

4. On the other hand, Mr. Ashutosh Pandey appearing for respondent nos. 3,4 and 5 submitted that respondent nos. 3,4 and 5 are residents of Village Maravat and Village Maravat is within the Gram Panchayat Gobhiya. He further submitted that petitioner Vijay Narayan was posted as Lekhpal in the year 1975-1976 and he misused his position. He further submitted that the order dated 4.9.1976 is the fraudulent act of the petitioner, Vijay Narayan. He further submitted that no lease

was executed by the Land Management Committee in respect to the plot in dispute in favour of the petitioner, Vijay Narayan and land in dispute was a bachat land of the Gaon Sabha accordingly, the appeal under Section 11(1) of the U.P.C.H. Act was rightly filed against the order of Assistant Consolidation Officer dated 4.9.1976 along with the prayer for condonation of delay. He further submitted that by the impugned order only delay in filing the appeal has been condoned, as such, no interference is required against the impugned order passed by Appellate Court condoning the delay in filing the appeal. He further submitted that appeal will be decided on merit in accordance with law and petitioner can appear before the Appellate Court for decision of appeal under Section 11(1) of the U.P.C.H. Act filed by the respondent nos. 3,4 and 5. He further submitted that Revisional Court has rightly decided the revision in accordance with law by placing the certified copy of the orders of Revisional Court dated 4.11.2020, 7.9.2011 and 14.9.2021 in order to demonstrate that proper opportunity of hearing was afforded to the parties before deciding the revision under Section 48 of the U.P.C.H. Act by the petitioner. Counsel for the respondent nos. 3 to 5 placed reliance upon the judgment of this Court reported in **2014 (125) RD 333 Dodram vs. Collector Peelibheet, 2006 Volume 1 AWC 205 Tripal Singh s/o Sone Lal Vs. State of U.P. and Others, 2014 (124) RD 2019 Ram Jiavan and Additional Commissioner Vindhyachal Mandal Mirzapur and Others** in order to demonstrate that matter should be decided on merit rather on technical grounds.

5. I have considered the arguments advanced by Counsel for the parties and perused the records.

6. There is no dispute about the fact that Assistant Consolidation Officer in case No. 425 passed an order dated 4.9.1976 under Section 12 of the U.P.C.H. Act in respect to the plot in dispute. There is also no dispute about the fact that respondent nos. 3 to 5 filed an appeal No. 512 under Section 11(1) of the U.P.C.H. Act on 26.4.2017 along with the delay condonation application. There is also no dispute about the fact that Settlement Officer Consolidation has condoned the delay in filing the aforementioned appeal vide order dated 19.9.2019 and fixed the appeal for disposal on merit. There is also no dispute about the fact that revision under Section 48 of the U.P.C.H. Act filed by petitioner as well as the restoration application filed in revisions have been dismissed by the Deputy Director Consolidation.

7. In order to appreciate the controversy, the perusal of Section 11 of the U.P.C.H. Act will be relevant which is as under:-

"(1) Any party to the proceedings under Section 9-A, aggrieved by an order of the Assistant Consolidation Officer or the Consolidation Officer under that section, may, within 21 days of the date of the order, file an appeal before the Settlement Officer, Consolidation, who shall after affording opportunity of being heard to the parties concerned, give his decision thereon which, except as otherwise provided by or under this Act, shall be final and not be questioned in any Court of law.

(2) The Settlement Officer, Consolidation, hearing an appeal under subsection (1) shall be deemed to be a Court of competent jurisdiction, anything to the contrary contained in any law for the time being in force notwithstanding."

8. The perusal of Section 11 of the U.P.C.H. Act reveals that appeal can be filed by any party to the proceeding under Section 9-A of U.P.C.H. Act can file appeal under Section 11 of the U.P.C.H. Act.

9. This Court in the case reported in **(2003) 94 RD 79 Smt. Sukhjinder Jeet Kaur and others Vs. Deputy Director of Consolidation, Rampur and Others** has considered the scope of Section 11 of U.P.C.H. Act and has held that only party to the proceeding can file appeal under Section 11 of U.P.C.H. Act. Paragraph Nos. 9,10,11 and 12 of the judgement are relevant which are as under:-

"9. So far as the question of maintainability of the appeals filed by the State Government is concerned, as admitted by learned standing counsel, the State Government was not a party to the proceedings before the Assistant Consolidation Officer. It, therefore, had no right to file the appeals in view of the amended provisions of Section 11(1) of the Act, which reads as under:

?11. Appeals.?(1) Any party to the proceedings under Section 9A, aggrieved by an order of the Assistant Consolidation Officer or the Consolidation Officer under that section, may, within 21 days of the order, file an appeal before the Settlement Officer, Consolidation, who shall after affording opportunity of being heard to the parties, concerned, give his decision thereon which, except as otherwise provided by or under this Act, shall be final and not be questioned in any court of law.?

10. The aforesaid statutory provision came up for interpretation before this Court in Writ Petition No. 36233 of 1991, Gaon Sabha through its Pradhan v. Deputy Director of Consolidation, Basti, decided on 3.12.2002. This Court after referring to the provisions of Section 11, held as under:

?A reading of the aforesaid statutory provision reveals that an appeal can be filed only by a party to the proceedings. It is well settled in law that right of appeal, revision or review are the statutory rights. They are conferred by the statutes and unless conferred, they can not be availed of by any person and no authority can entertain an appeal, revision or review unless the said authority is authorized by the statute to entertain the same. The Deputy Director of Consolidation was, thus, right in holding that the aforesaid petitioners were not the

party to the proceedings and they had no right to file an appeal. The appeal filed by them was legally not maintainable.?

11. Further, Section 47 of the Act provides as under:

?47. Appeals, etc., to be allowed by Act.?No appeal and no application for revision shall lie from any order passed under the provisions of this Act except as provided by or under this Act.?

12. The aforesaid section clearly provides that no appeal and no application for revision shall lie from any order passed under the Act except as provided by or under the Act. Thus, all the appeals filed by the State Government, in which the State Government, admittedly, was not a party to the proceedings before the Assistant Consolidation Officer, after six

years against the order passed by the Assistant Consolidation Officer, the Settlement Officer, Consolidation acted illegally and in excess of his jurisdiction in entertaining the said appeals. Further, having refused to grant any relief to the State Government, there was no justification for the Settlement Officer, Consolidation to grant relief in favour of the petitioners in the connected case. He could at the best remand the case to the Assistant Consolidation Officer for referring the matter to the Consolidation Officer for decision. The order passed by the Settlement Officer, Consolidation dated 12.1.2001 is, thus, illegal and liable to be quashed. Learned counsel for the petitioners in the leading case attempted to say that the order passed by the Settlement Officer, Consolidation which was in favour of his clients, was valid and lawful. He referred to and relied upon the decision in the case of Palakdhari v. Deputy Director of Consolidation, Basti, 1992 (1) AWC 228 : 1992 RD 111. In the said decision, question of maintainability of an appeal under Section 11 of the Act by a person who was not a party to the proceeding was neither raised nor considered by the Court. Therefore, no advantage can be claimed by learned counsel for the petitioners on the basis of the said case. What was decided by the Court in the said case was to the effect that the petitioner, who was a member of the Gaon Sabha could file an objection on behalf of the Gaon Sabha. It may be noted that Section 11 of the Act was amended by the U.P. Act No. VIII of 1963. Before amendment, the words used were ?any person aggrieved by the order of the Assistant Consolidation Officer under Section 9 or the Consolidation Officer under Section 10?, but after the amendment, the words ?person aggrieved? have been deleted and in the place the words ?any party to the proceedings under Section 9A aggrieved by an order of the Assistant Consolidation Officer or Consolidation Officer under that section? have been substituted. In view of the provisions of Section 11 of the Act, referred to above, the appeals filed by the State Government were legally not maintainable. The Settlement Officer, Consolidation as well as the Deputy Director of Consolidation have acted illegally and in excess of their jurisdiction in entertaining the appeals and revisions filed by the State Government, as the State Government was not a party to the said proceedings before the Assistant Consolidation Officer and in allowing the same. Impugned orders passed by the authorities below are, thus, wholly illegal and without jurisdiction."

10. The order passed by the Settlement Officer Consolidation dated 19.9.2019 will be relevant for perusal which is as follows:-

"मैंने पक्षों की ओर से तर्क कों सुना तथा पत्रावली को अवलोकन किया। प्रस्तुत अपील अनन्त कुमार आदि के द्वारा विजय नरायन आदि को पक्षकार बनाते हुए सहायक चकबन्दी अधिकारी के आदेश दिनांक ***04.9.76*** के विरुद्ध दिनांक ***26.4.17*** के शपथ पत्र के साथ प्रस्तुत किया गया। पत्रावली के अवलोकन से प्रथम दृष्टया यह विदित होता है कि प्रकरण ग्राम समाज से सम्बन्धित है, जिसका परिक्षण करने के उपरान्तज निर्णय किया जाना विधि विधि संगत होगा। ऐसी स्तिथि में पोषणीयता एवं मियाद के बिन्दु पर अपील निरस्त किया जाना उचित नहीं है।

आदेश

अतः उपरोक्त विवेचना के आधार पर आदेश हुआ कि प्रस्तुत अपील पोषणीय है तथा अपील में प्रस्तुत शपथ पत्र विश्वास करते दफा-5 मियाद कानून का लाभ प्रदान किया जाता है। पत्रावली वास्ते गुण-दोष पर बहस हेतु दिनांक ***29.9.19*** को पेश हो।

ह० अपठनीय
19.09.19

दिनांक ***19.9.19 (***अनिल कुमार**)**

बंदोबस्त अधिकारी चकबन्दी,
बस्ती।"

11. The perusal of the order passed by the Settlement Officer Consolidation dated 19.9.2019 reveals that delay in filing the appeal under Section 11(1) of the U.P.C.H. Act has been condoned and the appeal has also held to be maintainable.

12. This Court in the case reported in 1982 ALJ76 Sita Ram Versus Deputy Director of Consolidation and others has held that an objection under Section 9-A(2) of the U.P.C.H. Act cannot be filed by private person as procedure has been prescribed under Para-128 of Gaon Sabha Manual for conducting or initiating proceeding in respect of Gaon Sabha property. Paragraph Nos. 21 and 22 of the judgement are relevant which are as under:-

"21. The Gaon Sabha is a body corporate and the Land Management Committee is an executive body of the Gaon Sabha charged with the functions to supervise and protect the property vested in the Gaon Sabha and it has to function in the manner sanctioned under law. The provisions contained in Para 128 of the Gaon Sabha Manual and Rule 110A of the U.P. Zamindari Abolition and Land Reforms Rules prescribed the manner in which the litigation is to be conducted by and on behalf of the Gaon Sabha. These provisions, which are mandatory, would govern the litigation to be conducted on behalf of the Gaon Sabha in all proceedings under the provisions of the U.P. Consolidation of Holdings Act.

22. Thus, in view of the above I am of the opinion that the objection filed by opposite party No.3 Sheo Prasad cannot be treated to be a valid objection on behalf of the Gaon Sabha under Section 9-A(2) of the U.P. Consolidation of Holdings Act, on the ground that he was himself an interested person under Section 9-A(2) of the Act, as admittedly the Land Management Committee of the Gaon Sabha had not passed any resolution taking decision to file objection, appeal and revision nor opposite party No. 3 was authorized to file those on behalf of the Gaon Sabha. It is also not disputed that the action of opposite party No.3, in filing objections, appeal and revision on behalf of the Gaon Sabha, was not ratified by the Land Management Committee in its meetings. Thus, the objections, appeal and revision filed by opposite party No.3 Sheo Prasad on behalf of the Gaon Sabha were wholly incompetent and opposite party Nos. 1 and 2 acted illegally and without jurisdiction in passing the impugned orders."

13. In view of ratio of law laid down in **Smt. Sukhinder Jeet Kaur (Supra)** as well as in **Sita Ram (Supra)**, the appeal under Section 11 of U.P.C.H. Act filed by contesting respondents cannot be entertained as contesting respondents were not parties to the proceeding before Consolidation Officer nor contesting respondents have title in respect to dispute plot rather their stand is that they are protecting the State/ Gaon Sabha property, as such, there was no question of condonation of delay in filing the appeal and fixing the same for decision on merit. The continuance of the appellate proceeding at the instance of contesting respondents on the ground that by impugned order only delay in filing appeal has been condoned and rest matter will be decided later on will be abuse of process of

law. In the case of **Sita Ram (Supra)**, it has been held that Gaon Sabha litigation initiated/ conducted in violation of Para-128 of Gaon Sabha Manual is illegal.

14. It is also relevant that appeal under Section 11(1) of U.P.C.H. Act has been filed by contesting respondents on 26.4.2017 against the order of Assistant Consolidation Officer dated 4.9.1976 and Village has been denotified under Section 52 of U.P.C.H. Act on 8.2.1978, as such, entertaining the appeal after 41 years will be abuse of process of law.

15. Case laws cited by learned counsel for the contesting respondent no.3 are not applicable in the dispute arising out of U.P.C.H. Act where procedure has been provided for filing objection / appeal / revision at proper stage by person authorized to initiate the proceeding.

16. Considering the entire facts and circumstances as well as ratio of law laid down in **Smt. Sukhjinder Jeet Kaur (Supra) and Sita Ram (Supra)** the impugned order dated 19.9.2019 passed by Settlement Officer Consolidation as well orders dated 21.12.2021 and 12.10.2021 passed by the Deputy Director Consolidation are liable to be set aside and are hereby set aside. The writ petition stands allowed. No order as to cost.

(2023) 6 ILRA 905
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ C No. 4368 of 2022

M/S AL Haq Food Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Salil Kumar Srivastava, Abhinav Singh, Lalta Prasad Misra, Rahul Kapoor, Rahul Srivastava, Shobhit Mohan Shukla, Vinod Kumar

Counsel for the Respondents:
C.S.C., A.S.G.I., Ashok Kumar Verma

A. Civil Law – The Water (Prevention & Control of Pollution) Act, 1974 - Sections 25/26 - The Air (Prevention & Control of Pollution) Act, 1981 - Sections 21/22 - impugned order- consent to operate slaughterhouse refused by UPPCB- - NOC given to petitioner by District Magistrate- the slaughterhouse not operation- meanwhile GO dated 07.07.2017 containing 24-point compendium came in vogue-compliance mandatory in light of the directions given by the Supreme Court.

B. Preliminary objection-maintainability of writ petition- alternative remedy available-Section 28 of the Water Act- Section 31 of the Air Act- objection rejected-existence of alternative remedy is not an absolute bar-writ petition held to be maintainable. (Paras 15, 16 and 17)

HELD:
Having heard the learned Counsels on the issue of preliminary hearing, this Court is of the view that the existence of alternative remedy is not an absolute bar, is a legal proposition, which does not require any detailed discussion. It is settled law that while a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution of India, if an effective and efficacious alternative remedy is available and the existence of an alternate remedy does not by itself per se bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been

crystallized by the Hon'ble Apex Court in Whirpool Corporation Vs Registrar of Trademarks, Mumbai : (1998) 8 SCC 1 and Harbanslal Sahni Vs Indian Oil Corporation Ltd :(2003) 2 SCC 107. In Radha Krishan Industries Vs St. of Himachal Pradesh & Ors (supra), wherein the Hon'ble Apex Court has summarized the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy. (Para 15)

Therefore, the test that is to be applied for the determination of a question of law is whether the rights of the parties before the Court can be determined without reference to the factual scenario. In this case, as has been argued, refusal to grant 'consent to operate' by means of the impugned orders dated 11.07.2020 is violative of right to occupation, trade and business as guaranteed under Article 19 (g) of the Constitution of India, particularly the background of the fact that the petitioner has a right to run the business in respect of which the permission to establish the unit was accorded by U.P. Pollution Control Board by means of letter dated 04.01.2017. Apparently the issues raised by the petitioner are questions of law which can be decided upon a comprehensive reading of various provisions of Water Act, 1974, Air Act, 1981 and other provisions of the Act as well as various Government Orders and legal propositions on the issue to grant of 'consent to operate' the modern slaughterhouse. Thus, we are of the considered opinion that the questions raised by the petitioner can be adjudicated without delving upon any factual dispute. Thus, we proceed to hold the instant petition maintainable under Article 226 of the Constitution of India. (Para 17)

C. Analysis of the impugned order-Board is bestowed with three different powers-power to grant the 'consent to operate', power to renew the said consent, power to revoke the said consent prior to the ned of term for which the consent is given-petitioner had established slaughterhouse but it was not operational-compliance of terms and conditions of GO dated 07.07.2017 mandatory-no such NOC or revalidation of earlier NOC sought by the petitioner-no error in impugned order- writ petition dismissed. (Paras 29, 30, 31, 32, 34, 36, 37, 38, 39, 40 and 41)

HELD:

A bare perusal of the aforesaid provisions clearly reveals that the Board is bestowed with three different powers, namely, the power to grant the 'consent to operate', the power to renew the said consent and the power to revoke the said consent prior to the end of the term for which the consent order is given. Subclause (3) of Section 21 imposes a legal duty that in case an application for consent is filed under sub-section (1), then the Board shall inquire and follow such procedure as may be prescribed. (Para 32)

It is, indeed, a settled principle of law that if a procedure has been prescribed under a statute, the appropriate authority is legally bound to adhere to the said procedure. (Para 34)

This Court finds that although it is not the case of the U.P. Pollution Control Board that it has made any attempt to either prohibit slaughtering or vending of animal food, however they have taken a consistent stand that they are empowered under both the Acts i.e. Water Act and Air Act to regulate this business and vending for ensuring lawful methods to be adopted and to prevent unlawful methods for carrying of such trade and business in order to protect the environment in the light of the decision of the Apex Court dated 17.02.2017 rendered in Common Cause Vs U.O.I. (supra), Laxmi Narayan Modi Vs U.O.I. (supra) as well as Government Order dated 07.07.2017 issued in compliance of the aforesaid decisions of the Apex Court and the order dated 03.05.2023 passed by the National Green Tribunal in Original Application No. 879 of 2022 : Gauri Maulekhi Vs U.O.I. & ors.. There is also no dispute that such trade and business can be regulated including by licensing provisions. There is also no dispute that such trade and business has been permitted by the appropriate regulations under the relevant laws and the Rules and Regulations. Thus in the absence of any such plea on behalf of the U.P. Pollution Control Board to impose prohibition of such trade and business which also is not directly reflected in the Government Order dated 07.07.2017, there cannot be any assumption or presumption of such prohibition or else that would violate constitutional rights and the fundamental rights guaranteed under the Constitution of India. (Para 36)

Apparently, the order dated 21.05.2015 issued by the District Magistrate, Unnao while granting NOC to the petitioner to establish the modernized slaughterhouse plant clearly mentioned in condition no.68 that it will be mandatory for the petitioner to follow the direction issued in future and condition no. 69 categorically St.s about the consequential effect of deemed cancellation of the said NOC, in case of any irregularity or violation of any of the conditions. The order dated 04.01.2017 issued by the U.P. Pollution Control Board clearly mentioned that conditions enumerated in the NOC given by the District Magistrate, Unnao by the aforesaid order dated 21.05.2015 shall be complied with in letter and spirit. Meaning thereby the petitioner is obliged to follow all the directions for continuation of the NOC granted by the District Magistrate, Unnao in future. However, the issue does not rest here as the Government Order dated 07.07.2017 specifically mentions about superssession of the Government Order dated 26.11.2014 and accordingly directs all the slaughterhouse units to comply with 24 point compendium as mentioned in para-3 of the aforesaid Government Order dated 07.07.2017 for consent to operate/ establishment of the slaughterhouse. Thus, since the earlier NOC dated 21.05.2015 was issued in view of the existing Government Order dated 26.11.2014, which as per the Government Order dated 07.07.2017 stands superseded, it was mandatory for all the slaughterhouse units that in order to seek 'consent to operate', the 24 point compendium as mentioned in para-3 of the aforesaid Government Order dated 07.07.2017 be followed. Thus, apparently, there are two aspects of the matter; firstly NOC ought to have been taken as per the Government Order dated 07.07.2017 to establish the unit; and secondly on establishment of unit, the unit ought to have applied 'consent to operate' as per the Government Order dated 07.07.2017. (Para 39)

In the instant case, NOC of the District Magistrate, Unnao was granted before issuance of the Government Order dated 07.07.2017. Although the petitioner had come to establish the modernized slaughterhouse unit, however, the same was not operational and as such it was mandatory for the petitioner to comply with all the terms of the Government Order dated 07.07.2017 including NOC for 'consent to operate' from the District Magistrate, Unnao, St. Level Committee and U.P. Pollution Control Board. (Para 40)

It is an admitted fact that the petitioner has not taken NOC from the District Magistrate, Unnao nor has obtained a re-validation of the said NOC in order to comply with the provisions of Government Order dated 07.07.2017, which are mandatory in nature having been issued pursuant to the dictum of the Apex Court in Common Cause Vs U.O.I. & ors. (supra) and Laxmi Narain Modi Vs U.O.I. (supra), for running the modernized slaughterhouse. Therefore, the U.P. Pollution Control Board has rightly refused to grant 'consent to operate' by means of the impugned orders. (Para 41)

Petition dismissed. (E-14)

List of Cases cited:

1. Hon'ble Apex Court in Writ Petition (C) No.330 of 2001 (Common Cause Vs U.O.I. & Ors.), Writ Petition No. 44 of 2004, Contempt Petition No. 124 of 2015 and connected Writ Petition (C) No. 309 of 2003 (Laxmi Narain Modi Vs U.O.I. & ors.) on 17.02.2017

2. Radha Krishan Industries Vs St. of Himachal Pradesh & ors., (2021) 6 SCC 771

3. Rajendra Prasad Upadhyay Vs St. of U.P. & ors. (Special Appeal No. 73 of 2012, decided on 19.03.2012)

4. M/s Magadh Sugar & Energy Ltd. Vs The St. of Bihar & ors. (Civil Appeal No.5728 of 2021 decided on 24.09.2021)

5. Piscesia Sarvonik Jv LLP through Designated Partner DLF Corporate Park Haryana Vs St. of U.P. & ors. (Criminal Misc. Writ Petition No. 1008 of 2003, decided on 15.02.2023)

6. Whirpool Corporation Vs Registrar of Trademarks, Mumbai : (1998) 8 SCC 1

7. Harbanslal Sahni Vs Indian Oil Corporation Ltd :(2003) 2 SCC 107

8. Meenakshi Mills Ltd. Vs Commissioner of Income Tax : AIR 1957 SC 49

9. St. of Madhya Pradesh & ors. Vs Tikamdas : (1975) 2 SCC 100

10. Chairman Railway Board & ors. Vs C.R. Rangadhamaiah & ors. : (1976) 6 SCC 623

11. J.S. Yadav Vs St. of U.P. : (2011) 6 SCC 570

12. Canara Bank & anr. Vs M. Mahesh Kumar : (2015) 7 SCC 412

13. Bharat Sanchar Nigam Ltd. Vs Tata Communication Ltd. : (2022) SCC On-Line SC 1280

14. n DSR Steel (Private) Limited Vs St. of Raj. & ors. : (2012) 6 SCC 782 and Bussa Overseas

15. Properties Pvt. Ltd.& anr. Vs U.O.I. : (2016) 4 SCC 696

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Dr. L.P. Mishra and Shri Abhinav Singh, learned Counsel representing the petitioners, Shri S.C. Mishra, learned Senior Advocate, assisted by Shri Ashok Kumar Verma, learned Counsel representing the U.P. Pollution Control Board and learned State Counsel for the State-respondents.

(2) The petitioner-M/s Al-Haq Foods Pvt. Ltd., which is a Private Limited Company registered under the provision of the Companies Act, has sought to invoke the extra-ordinary writ jurisdiction of this Court under Article 226 of the Constitution of India to challenge two orders dated 11.07.2020 passed on the same day by the Chief Environmental Officer, Circle-5, U.P. Pollution Control Board, Lucknow, whereby the 'consent to operate' slaughterhouse (integrated meat shop) of the petitioner was refused (i) under Section 25/26 of the Water (Prevention & Control of Pollution) Act, 1974 (hereinafter referred to as **"Water Act, 1974"**); and (ii) under Section 21/22 of the Air (Prevention & Control of Pollution) Act, 1981 (hereinafter referred to as **"Air Act, 1981"**) as amended and by both the impugned orders, the petitioner has been also directed to comply with the mandatory provisions of Water Act, 1974 and Air Act, 1981.

Though the petitioner had also sought a direction for declaring the provisions of Section 11-A of the Water Act, 1974 as ultra vires to the Constitution as well as to the provisions of the Water Act, 1974, however, during the course of arguments, learned Counsel representing the petitioner has given up the said challenge.

FACTUAL MATRIX

(3) Shorn off unnecessary details, the case of the petitioner as narrated in the pleadings available on record and having gathered from the arguments of the respective parties is that sometimes in the year 2014, the petitioner, M/s Al Haq Foods Pvt. Ltd., applied for 'No Objection Certificate' (hereinafter referred to as **'NOC'**) for establishment of modern integrated slaughterhouse at U.P.S.I.D.C. Industrial Area, Unnao. The District Magistrate, Unnao, vide order dated 21.05.2015, in consultation with all district stakeholder departments, granted NOC to the petitioner's unit for establishment of modern integrated slaughterhouse with 69 conditions enumerated in the said order dated 21.05.2015 itself, however, the period of expiry has not been prescribed in the aforesaid order dated 21.05.2015. Further, condition no. 68 of the aforesaid order dated 21.05.2015 stipulates that it will also

be mandatory to follow the instructions given in future, whereas condition no. 69 stipulates that NOC will automatically be deemed to be cancelled for any kind of irregularity or violation of any of the conditions.

(4) Thereafter, vide office memorandum dated 21.10.2016, the State Level Committee, which has been constituted for implementation of various aspects related to operation of modern integrated slaughterhouse, by the State Government, had issued NOC to the petitioner's unit with 12 conditions. Condition No. 11 stipulates that before starting operation of the project, no-objection will have to be obtained from the Uttar Pradesh Pollution Control Board within three months. It was also stated in the aforesaid office memorandum dated 21.10.2016 that after NOC given by the State Level Committee, the concerned firm will submit an application in accordance with rules to the Member Secretary, U.P. Pollution Control Board, Lucknow, who, in turn after issuing NOC within three months for the operation of the scheme to the concerned firm, shall make available the compliance report to the State Level Committee.

(5) Pursuant to the aforesaid office memorandum dated 21.10.2016, the petitioner's unit had moved an application for granting NOC to the Member Secretary, U.P. Pollution control Board, Lucknow, which was apparently received in the office of U.P. Pollution Control Board on 21.11.2016. After that the Member Secretary, U.P. Pollution Control Board, Lucknow accorded NOC to the petitioner for establishing the slaughterhouse with certain conditions vide order dated 04.01.2017. The relevant portion of the order dated 04.01.2017 is extracted hereinbelow :-

"महोदय,

कृपया उपरोक्त विषयक अपने अनापत्ति प्रमाण हेतु आवेदन पत्र दिनांक 21.11.16 (प्राप्त) का संदर्भ लें। उद्योग को पर्यावरणीय प्रदूषण के दृष्टिकोण से निम्नलिखित विशिष्ट शर्तों एवं सामान्य शर्तों (संलग्नकं) के समुचित अनुपालन के साथ सशर्त अनापत्ति प्रमाण पत्र स्वीकृत किया जाता है।

अनापत्ति प्रमाण पत्र निम्नलिखित विशिष्ट विवरणों के लिए ही निर्गत किया जा रहा है।

(क) स्थलः	प्लाट नं०-एफ- 13, 14, 29, 30, 44, 45, 46 एवम् एच- 72, 73 औ० क्षेत्र, साईट- 2, उन्नाव।
(ख) उत्पादनः (ग) सहं उत्पाद	फोजेन मीट- 50 टन/दिन, एम०बी०एम०- 20 टन/दिन, टैलो- 10 टन/दिन
(घ) मुख्य कच्चे मालः	300 नग भैंस व भैसा प्रतिदिन
(ड़) औद्योगिक उत्प्रवाह की मात्राः	385 किलो लीटर प्रतिदिन
(च) प्रयुक्त ईधनः	डीजल डी०जी० सेट हेतु लकड़ी- 2 टन/दिन राइस हस्क- 2 टन/दिन

उपर्युक्त विषय वस्तु में से किसी भी प्रकार से परिवर्तन करने पर पुनः अनापत्ति प्रमाण-पत्र प्राप्त करना आवश्यक होगा

1. इकाई का संचालन तब तक प्रारम्भ नहीं किया जाये जब तक कि वह राज्य बोर्ड से जल एवं वायु अधिनियमों के अन्तर्गत सहमति प्राप्त न कर ले। जल एवं वायु सहमति प्राप्त करने हेतु इकाई में संचालन प्रारम्भ करने ककी तिथि से कम से कम 02 माह पहले निर्धारित सहमति आवेदन पत्रों को संचालन पूर्व प्रथम आवेदन का उल्लेख करते हुये इस कार्यालय में अवश्य जमा कर दिया जाये।

2. उद्योग को राज्य स्तरीय समिति द्वारा निर्गत अनापत्ति प्रमाण पत्र की शर्तों का पूर्णतया अनुपालन किया जाये।

3. उद्योग में उत्प्रवाह शुद्धिकरण संयंत्र हेतु दिये गये प्रस्ताव के अनुसार ई०टी०पी० की स्थापना कर शून्य उत्प्रवाह व्यवस्था मेन्टेन रखी जाये।

4. उद्योग में दिये गये प्रस्ताव के अनुसार उचित क्षमता का रेण्डरिंग प्लांट स्थापित किया जाये।

5. उद्योग में दुर्गन्ध के नियंत्रण हेतु उचित क्षमता के बायो फिल्टर की स्थापना की जाये।

6. उद्योग में दिये गये प्रस्ताव के अनुसार गोबर गैस प्लांट की स्थापना की जाये।

7. उद्योग में दिये गये प्रस्ताव के अनुसार वायु प्रदूषण नियंत्रण की व्यवस्था की जाये।

8. उद्योग द्वारा 6 टी०पी०एच० क्षमता के ब्वायलर पर वायु प्रदूषण नियंत्रण व्यवस्था दिये गये प्रस्ताव के अनुरूप स्थापित किया जाय तथा प्रस्तावित डी.जी सेटों पर ध्वनि/वायु प्रदूषण नियंत्रण व्यवस्था नानकों के अनुरूप स्थापित किया जाये।

9. ठोस अपशिष्ट (हैजार्डस वेस्ट) का निस्तारण टी०एस०डी०एफ० में किया जाये।

10. उद्योग परिसर में सघन वृक्षों का रोपण किया जाये।

11. पर्यावरण (संरक्षण) अधिनियम, 1986 के प्राविधानों का अनुपालन किया जाये।

12. प्रक्रिया से जनित वेस्ट का समुचित निस्तारण किया जाये एवं इससे सम्बन्धित रिकार्ड भी रखा जाये।

13. उद्योग परिसर में वर्षा जल संचयन हेतु रूफ टाप रेन वाटर हार्वेस्टिंग व्यवस्था स्थापित की जाये।

14. भू गर्भ जल दोहन हेतु सम्बन्धित विभाग से अनापत्ति प्रमाण पत्र प्राप्त करना अनिवार्य होगा।

15. उद्योग से जनित घरेलू उत्प्रवाह का शुद्धिकरण उचित क्षमता के सेप्टिक टैंक/सोक पिट के माध्यम से किया जाये।

16. जिलाधिकारी उन्नाव द्वारा दिनांक- 21.5.15 को निर्गत अनापत्ति प्रमाण पत्र की शर्तों का पूर्णतया अनुपालन किया जाये।

17. उद्योग से किसी भी प्रकार का उत्प्रवाह परिसर से बाहर निस्तारित न किया जाये।

उपरोक्त शर्तों का अनुपालन न किये जाने की दशा में उद्योग द्वारा प्रेषित बैंक गारन्टी संख्या 36791LG000117, RS. 10,00,000/- बोर्ड के पक्ष में जब्त की जा सकती है।

कृपया ध्यान दें कि उपर्युक्त लिखित विशिष्ट शर्तों एवं सामान्य शर्तों का प्रभावी एवं संतोषजनक अनुपालन न करने पर बोर्ड द्वारा निर्गत अनापत्ति प्रमाण पत्र निरस्त कर दिया जाएगा। बोर्ड का अधिकार सुरक्षित है कि अनापत्ति की शर्तों में संशोधन किया जाय अथवा निरस्त कर दिया जाय। उपर्युक्त विशिष्ट एवं सामान्य शर्तों के सम्बन्ध में उद्योग द्वारा इस कार्यालय में दिनांक 31.02.2017 तक प्रथम अनुपालन आख्या अवश्य प्रेषित की जाए। अनुपालन आख्या नियमित प्रेषित की जाए अन्यथा अनापत्ति प्रमाण पत्र निरस्त भी किया जा सकता है।

भवदीय

सदस्य सचिव"

(6) A bare perusal of the aforesaid order dated 04.01.2017 reveals that conditions enumerated in the NOC given by the District Magistrate, Unnao vide order dated 21.05.2015 shall be complied with in letter and spirit; the period of aforesaid consent/NOC to establish the slaughterhouse was two months; the petitioner ought to submit first compliance by 31.02.2017; and further progress report was to be submitted from time to time.

(7) It would be pertinent to mention that in the interregnum, in compliance of the directions issued by the Hon'ble Apex Court in Writ Petition (C) No.330 of 2001 ***(Common Cause Vs. Union of India & Ors.)***, Writ Petition No. 44 of 2004, Contempt Petition No. 124 of 2015 and connected Writ Petition (C) No. 309 of 2003 ***(Laxmi Narain Modi Vs. Union of India and Ors.)*** on 17.02.2017, the State Government had issued the Government Order dated 07.07.2017 containing 24 point compendium regarding various compliances.

(8) Apparently, after lapse of more than two years i.e. on 12.06.2019, the petitioner, after creation of all requisite paraphernalia and after establishing the industry, applied for grant of 'consent to operate' (CTO) under Sections 25 (1) (b) and 26 of the Water Act, 1974 and under Section 21 read with section 22 of the Air Act, 1981, which was rejected by means of order dated 06.11.2019 *inter alia* on the ground that the petitioner had not yet submitted the required clarification/ information regarding the compliance of 24 points compendium as per Government Order dated 07.07.2017. This order dated 06.11.2019 had attained finality as it was never assailed by the petitioner. However, on 06.06.2020, the petitioner again applied

to the Uttar Pradesh Pollution Control Board for 'consent to operate' under Section 25 (1) (b) and Section 26 of the Water Act, 1974 and Sections 21 read with Section 22 of the Air Act, 1981, which again came to be rejected vide impugned orders dated 11.07.2020, stating that it is required from the Project Proponent to submit the re-validated NOCs from different departments as well as from the State Level Committee according to Government Order dated 07.07.2017.

(9) The impugned orders record that the petitioner had not submitted compliance of different points raised in previous CTO rejection letter dated 06.11.2019. In respect of compliance of 24 points compendium, although the impugned orders record that the petitioner had submitted NOC of CVO dated 06.5.2020, NOC from ARTO dated 14.05.2020 and application submitted for NOC from Food Safety and Standards Authority, dated 19.05.2020, however it also records that the petitioner had not submitted re-validated NOCs from District Magistrate, Unnao and State Level Committee set up for considering grant of NOC for establishing slaughterhouse units.

(10) It is these orders dated 11.07.2020, which are under challenge in the instant writ petition.

MAINTAINABILITY OF THE WRIT PETITION

(11) Learned Senior Counsel representing the U.P. Pollution Control Board has raised a preliminary objection regarding maintainability of the writ petition and has contended that the instant petition under Article 226 of the Constitution of India is not maintainable in view of the availability of an alternative statutory remedy of appeal against the order of refusal of consent before the National Green Tribunal under Section 28 of Water Act, 1974 and Section 31 of the Air Act.

(12) The learned Counsel representing the petitioner, on the other hand, has made objection to the aforesaid submission of the learned Senior Counsel representing the U.P. Pollution Control Board and vehemently argued that the instant writ petition is maintainable. His submission is that alternative remedy is not an absolute bar, rather it is a self-imposed restriction to be exercised on the well settled principle that an exercise suffering from want of jurisdiction, vice of violation of principle of natural justice or in violation of fundamental right or statutory right, can be a subject matter of challenge in a writ petition under Article 226 of the Constitution of India can be entertained. According to the learned Counsel, in the instant case, the impugned orders have been passed without undertaking any exercise of inspection etc. as contemplated under Section 25 (3) of the Water Act, 1974 read with Rule 5 of the U.P. Water (consent of discharge of sewage and trade effluents) Rules, 1981 and Section 21 (3) of the Air Act, 1981 read with Rule 28 of the U.P. Air (Prevention and Control of Pollution) Rules, 1983. Therefore, it is the submission of the learned Counsel that the impugned orders cannot be termed to have been passed under Section 25 (2) (b) of the Water Act, 1974 and under Section 21 (4) of the Air Act, 1981 as has been camouflaged by the impugned orders. He further argued that the principle of natural justice was not followed by the statutory authorities before passing of the impugned orders and as such the same are in violation of the fundamental rights granted to the

petitioner under Article 19 (1) (c) and Article 14 of the Constitution of India as no opportunity of hearing was afforded to the petitioner before undertaking the impugned exercise. Hence the instant writ petition was maintainable before this Court.

(13) To strengthen his submission, he has placed reliance upon the judgments of the Apex Court in **Radha Krishan Industries Vs. State of Himachal Pradesh and others :** (2021) 6 SCC 771, **M/s Magadh Sugar & Energy Ltd. Vs. The State of Bihar & others** (Civil Appeal No.5728 of 2021 decided on 24.09.2021) and the judgment of this Court in **Rajendra Prasad Upadhyay Vs. State of U.P. and others** (Special Appeal No. 73 of 2012, decided on 19.03.2012) and **Piscesia Sarvonik Jv LLP through Designated Partner DLF Corporate Park Haryana Vs. State of U.P. and others** (Criminal Misc. Writ Petition No. 1008 of 2003, decided on 15.02.2023).

(14) Both the parties have been heard at considerable length on the preliminary issue as to whether the petitioner be relegated to avail the remedy to file an appeal under Section 28 of the Water Act and Section 31 of the Air Act before the National Green Tribunal or in the presence of such remedy, whether the instant writ petition is maintainable or not.

(15) Having heard the learned Counsels on the issue of preliminary hearing, this Court is of the view that the existence of alternative remedy is not an absolute bar, is a legal proposition, which does not require any detailed discussion. It is settled law that while a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution of India, if an effective and efficacious alternative remedy is available and the existence of an alternate remedy does not by itself per se bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallized by the Hon'ble Apex Court in **Whirpool Corporation v. Registrar of Trademarks, Mumbai** : (1998) 8 SCC 1 and **Harbanslal Sahni v. Indian Oil Corporation Ltd :**(2003) 2 SCC 107. In **Radha Krishan Industries v. State of Himachal Pradesh & Ors (supra)**, wherein the Hon'ble Apex Court has summarized the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy. The Apex Court has observed as under :-

"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."

(emphasis supplied)

(16) No doubt, the Hon'ble Apex Court has reserved the residual power of the High Court to entertain writ petition in case of enforcement of fundamental rights, however, the Hon'ble Apex Court has also held that in case where there are disputed questions of fact, the High Court would ordinarily refrain from exercising its writ jurisdiction. At this juncture, it would be apt to mention that a three judge Bench of the Apex Court in Sree **Meenakshi Mills Ltd. v Commissioner of Income Tax** : AIR 1957 SC 49 succinctly explained the tests for the identification of questions of fact, questions of law and mixed questions of law and facts. The Apex Court observed that :-

"9. ……To take an illustration, let us suppose that in a suit on a promissory note the defence taken is one of denial of execution. The court finds that the disputed signature is unlike the admitted signatures of the defendant. It also finds that the attesting witnesses who speak to execution were not, in fact, present at the time of the alleged execution. On a consideration of these facts, the court comes to the conclusion that the promissory note is not genuine, Here, there are certain facts which are ascertained, and on these facts, a certain conclusion is reached which is also one of fact.

10. In between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The questions that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained. To take an example, the question is whether the defendant has acquired title to the suit property by adverse possession. It is found on the facts that the land is a vacant site that the defendant is the owner of the adjacent. residential house and that he has been drying grains and cloth and throwing rubbish on the plot. The further question that has to be determined is whether the above facts are sufficient to constitute adverse possession in law. Is the user continuous or fugitive? Is it as of right or permissive in character? Thus, for deciding whether the defendant has acquired title by adverse possession the court has firstly to find on an appreciation of the evidence what the facts are. So far, it is a question of fact. It has then to apply the principles of law regarding acquisition of title by adverse possession, and decide whether on the facts established by the evidence, the

requirements of law are satisfied. That is a question of law."

(17) Therefore, the test that is to be applied for the determination of a question of law is whether the rights of the parties before the Court can be determined without reference to the factual scenario. In this case, as has been argued, refusal to grant 'consent to operate' by means of the impugned orders dated 11.07.2020 is violative of right to occupation, trade and business as guaranteed under Article 19 (g) of the Constitution of India, particularly the background of the fact that the petitioner has a right to run the business in respect of which the permission to establish the unit was accorded by U.P. Pollution Control Board by means of letter dated 04.01.2017. Apparently the issues raised by the petitioner are questions of law which can be decided upon a comprehensive reading of various provisions of Water Act, 1974, Air Act, 1981 and other provisions of the Act as well as various Government Orders and legal propositions on the issue to grant of 'consent to operate' the modern slaughterhouse. Thus, we are of the considered opinion that the questions raised by the petitioner can be adjudicated without delving upon any factual dispute. Thus, we proceed to hold the instant petition maintainable under Article 226 of the Constitution of India.

(18) For the reasons aforesaid, we are persuaded to entertain the instant writ petition while rejecting objection regarding maintainability of the writ petition raised by the learned Senior Counsel representing the U.P. Pollution Control and the learned Counsel representing the State.

SUBMISSIONS OF THE PARTIES ON MERIT OF THE CASE

(19) Challenging the impugned orders by which 'consent to operate' under Section 25/26 of the Water Act, 1974 and 21/22 of Air Act, 1981 has been refused, learned Counsel for the petitioner has contended that Government Order dated 07.07.2017 was issued in furtherance of judgment and order dated 17.02.2017 passed by the Apex Court in Writ Petition (C) No. 330 of 2021 *(Common Cause A Regd. Society Vs. Union of India and others)*, requiring the Central Government to issue directions in furtherance of recommendation made by the Committee appointed by the Apex Court. The said Government Order dated 07.07.2017 supersedes some of the provisions of Government Order dated 26.11.2014, which stood irrelevant in view of 24 points compendium.

(20) Learned Counsel for the petitioner has submitted that the applicability of the compendium enumerated in the Government Order dated 07.07.2017 is to be categorized mainly under the three heads viz. (i) pre-slaughter; (ii) during slaughter; and (iii) post slaughter. All the conditions as stipulated in the compendium pertaining to (i) pre-slaughter as mentioned above, have already been complied with by the petitioner, however, condition pertaining to aforesaid (ii) during slaughter and (iii) post-slaughter will be complied with only after the unit of the petitioner is permitted to be made functional and operational after grant of 'consent to operate' by the State Pollution Board. He argued that the Government Order dated 07.07.2017 does not provide the steps to be taken for pre-establishing consent or pre-operational or post-establishing consent during the operation of the Government Order dated 26.11.2014. He submits that the petitioner's unit has already been established prior to 2017 and

certain permission can be obtained only while operating the unit. Thus, the Government Order dated 07.07.2017 does not operate retrospectively, particularly as it provides for modernizing of already operational industries and also for establishing new industries on the basis of latest livestock census.

(21) Learned Counsel for the petitioner has further submitted that 24 points compendium enumerated in the Government Order dated 07.07.2017 relates to various statutory prescriptions, most of which relate to the operational stage of meat industry. According to the learned Counsel, some of the statutory prescriptions as contained in some of the statutes also relate to establishment stage which are the same as provided as conditions of consent for establishment dated 04.01.2017 given by the U.P. Pollution Control Board to the petitioner. Thus, Government Order dated 07.07.2017 does not require that the NOC issued earlier by the District Magistrate, Unnao or by the State Level Committee would require any re-validation. In any case, the learned Counsel submits that the NOC granted by the District Magistrate or the State Level Committee having no expiry period mentioned therein, the issuance of the impugned orders are wholly arbitrary and illegal.

(22) Placing reliance upon the judgments of the Apex Court in **State of Madhya Pradesh and others Vs. Tikamdas** : (1975) 2 SCC 100, **Chairman Railway Board and others Vs. C.R. Rangadhamaiah and others** : (1976) 6 SCC 623, **J.S. Yadav Vs. State of U.P. :** (2011) 6 SCC 570, **Canara Bank and another Vs. M. Mahesh Kumar** : (2015) 7 SCC 412, **Bharat Sanchar Nigam Ltd. Vs. Tata Communication Ltd. :** (2022) SCC On-Line SC 1280, learned Counsel for the petitioner has submitted that a Government Order otherwise also cannot have any retrospective operation nor can it override any statutory prescriptions. It also cannot divest a person of any already vested or accrued right, more particularly in the case in hand, wherein more than Rs. 200 Crore have been already invested by the petitioner in establishing the meat industry in furtherance of NOC/consent for its establishment having been granted by the State functionaries.

(23) Learned Counsel for the petitioner, thus, has submitted that it is not the case of the respondents that the petitioner's industry is lacking any requirement for establishment of meat industry as per conditions imposed vide consent for establishment, dated 04.01.2017. He submits that the adherence to all other statutory conditions as mentioned in the statutes comprising 24 points compendium are to be checked and verified only after the industry comes into operation. In this backdrops, his submission is that the impugned orders are wholly arbitrary, illegal and unconstitutional.

(24) The learned Counsel for the petitioner addressing to the plea of the respondents that the petitioner has not challenged the order dated 30.07.2020 rejecting the request of reviewing the impugned order dated 11.07.2020, has placed reliance upon the judgment of the Apex Court in **DSR Steel (Private) Limited Vs. State of Rajasthan and others** : (2012) 6 SCC 782 and **Bussa Overseas and Properties Private Limited and another Vs. Union of India** : (2016) 4 SCC 696 and has argued that the order dated 30.07.2020 need not to be challenged

as doctrine of merger does not stand attracted in a situation where prayer for review has been refused.

(25) So far as prayer being made on behalf of the U.P. Pollution Control Board for deferring of the hearing the writ petition in view of the order dated 03.05.2023 passed by National Green Tribunal in O.A. No. 879 of 2012 (IA No. 38 of 2022) is concerned, learned Counsel for the petitioner has submitted that the order dated 03.05.2023 passed by the National Green Tribunal, Principal Bench, New Delhi in O.A. No. 879 of 2022 *(Gauri Maulekhi Vs. Union of India and others)* does not provide that an already established meat industry shall not be allowed to operate. His submission is that environmental concerns in regard to the meat industry stand regulated under the Water Act, 1974 and the Air Act 1981 and as and when the Environmental Protection Notification 2006 framed under the Environmental Protection Act, 1986 would proceed to include a meat industry, the relevant norms would have to be adhered to by all the industries including the petitioner. Thus, the application for deferment of hearing is misconceived.

(26) Learned Senior Counsel representing the U.P. Pollution Control Board has vehemently opposed the aforesaid arguments advanced by the learned Counsel for the petitioner and has argued that in the Government Order dated 07.07.2017 itself, it has been mentioned that Government Order dated 26.11.2014 has been superseded, therefore, all NOCs granted pursuant to the Government Order dated 26.11.2014 stood superseded. He argued that in para-3 of the Government Order dated 07.07.2017, various statutes from point no. 1 to 24 have been referred. While disposing of the application of the petitioner for 'consent to operate' as regards point nos. 13 to 20 and 24 which relates to U.P. Pollution Control Board, it has been mentioned that the compliance verification of these points will be possible only during the operation of the industry. The petitioner has not submitted the clarification/information in the compliance of 24 points compendium.

(27) Learned Senior Counsel has drawn our attention to para-3 of the Government Order dated 07.07.2017 and has argued that so far as the earlier Government Order dated 26.11.2014 is concerned, it has become irrelevant as several provisions in view of the Government Order dated 07.07.2017 have become irrelevant/redundant. He argued that a bare perusal of the points no. 1 to 12 of the Government Order dated 07.07.2017, it is apparent that various enactments referred in the compendium have been amended and certain important provisions for its compliance have been inserted. Furthermore in sub-para (4) of para-4 of the Government Order dated 07.07.2017, it has been mentioned that for establishment of slaughter house, the data collected by the Committee constituted under the aforesaid paras relating to livestock will be relevant and if the District Level Committee finds the justification of establishment of Slaughterhouse, it will be placed before the District Level Committee whose recommendations will be placed before the State Level Committee which will take the decision with regard to establishment of Slaughterhouse.

ANALYSIS

(28) Having heard learned Counsel for the parties and having traversed the

aforesaid facts and the provisions that have been placed before us as well as the decisions and directions of the Apex Court, there is no dispute to the fact that pursuant to the NOC having been granted by the District Magistrate vide order dated 21.05.2015 and thereafter by the State Level Committee vide order dated 21.10.2016 and also by the U.P. Pollution Control Board vide order dated 04.01.2017, the petitioner has established modern slaughterhouse plant and has applied for 'consent to operate' the plant, which has been refused by means of the impugned orders dated 11.07.2020 *inter alia* on the grounds that the petitioner has not submitted re-validated NOCs from District Magistrate, Unnao, State Level Committee related for slaughterhouse unit.

(29) Water Act, 1974 is a comprehensive legislation that regulates agencies responsible for checking on water pollution and ambit of Pollution Control Boards both at the level of Centre and States. The Water Act, 1974 was adopted by the Indian parliament with the aim of prevention and control of water pollution in India. Section 25 of the Act, 1974 states that prior consent of the State Board under Section 25 of the Act, 1974 is necessary to set up any industry, plant or process which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land or bring into use any new or altered outlets for the discharge of sewage or begin to make any new discharge of sewage. Section 25 of the Water Act, 1974 further states that every State Board is liable to maintain a register containing particulars or conditions imposed under the section related to any outlet, or to any effluent, from any land or premises which must be open to inspection by the state board. Section 25 of the Water Act, 1974 is extracted hereinbelow :-

"25. Restrictions on new outlets and new discharges.—

(1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board,—

(a) establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as discharge of sewage); or

(b) bring into use any new or altered outlet for the discharge of sewage; or

(c) begin to make any new discharge of sewage: Provided that a person in the process of taking any steps to establish any industry, operation or process immediately before the commencement of the Water (Prevention and Control of Pollution) Amendment Act, 1988, for which no consent was necessary prior to such commencement, may continue to do so for a period of three months from such commencement or, if he has made an application for such consent, within the said period of three months, till the disposal of such application.

(2) An application for consent of the State Board under sub-section (1) shall be made in such form, contain such particulars and shall be accompanied by such fees as may be prescribed.]

(3) The State Board may make such inquiry as it may deem fit in respect of the application for consent referred to in sub-section (1) and in making any such inquiry shall follow such procedure as may be prescribed. 2[(4) The State Board may—

(a) grant its consent referred to in sub-section (1), subject to such conditions as it may impose, being—

(i) in cases referred to in clauses (a) and (b) of sub-section (1) of section 25, conditions as to the point of discharge of sewage or as to the use of that outlet or any other outlet for discharge of sewage;

(ii) in the case of a new discharge, conditions as to the nature and composition, temperature, volume or rate of discharge of the effluent from the land or premises from which the discharge or new discharge is to be made; and

(iii) that the consent will be valid only for such period as may be specified in the order, and any such conditions imposed shall be binding on any person establishing or taking any steps to establish any industry, operation or process, or treatment and disposal system of extension or addition thereto, or using the new or altered outlet, or discharging the effluent from the land or premises aforesaid; or

(b) refuse such consent for reasons to be recorded in writing.

(5) Where, without the consent of the State Board, any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, is established, or any steps for such establishment have been taken or a new or altered outlet is brought into use for the discharge of sewage or a new discharge of sewage is made, the State Board may serve on the person who has established or taken steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, or using the outlet, or making the discharge, as the case may be, a notice imposing any such conditions as it might have imposed on an application for its consent in respect of such establishment, such outlet or discharge.

(6) Every State Board shall maintain a register containing particulars of the conditions imposed under this section and so much of the register as relates to any outlet, or to any effluent, from any land or premises shall be open to inspection at all reasonable hours by any person interested in, or affected by such outlet, land or premises, as the case may be, or by any person authorised by him in this behalf and the conditions so contained in such register shall be conclusive proof that the consent was granted subject to such conditions.]

(7) The consent referred to in sub-section (1) shall, unless given or refused earlier, be deemed to have been given unconditionally on the expiry of a period of four months of the making of an application in this behalf complete in all respects to the State Board.

(8) For the purposes of this section and sections 27 and 30,—

(a) the expression "new or altered outlet" means any outlet which is wholly or partly constructed on or after the commencement of this Act or which (whether so constructed or not) is substantially altered after such commencement;

(b) the expression "new discharge" means a discharge which is not, as respects the nature and composition, temperature, volume, and rate of discharge of the effluent substantially a continuation of a discharge made within the preceding twelve months (whether by the same or a different outlet), so however that a discharge which is in other respects a continuation of previous discharge made as aforesaid shall not be deemed to be a new discharge by reason of any reduction of the temperature or volume or rate of discharge of the effluent as compared with the previous discharge."

(30) Section 26 of the Water Act is the provision regarding existing discharge of

sewage or trade effluent and the same is reproduced as under :-

"Where immediately before the commencement of this Act any person was discharging any sewage or trade effluent into a stream or well or sewer or on land, the provisions of section 25 shall, so far as may be, apply in relation to such person as they apply in relation to the person referred to in that section subject to the modification that the application for consent to be made under sub-section (2) of that section 2 shall be made on or before such date as may be specified by the State Government by notification in this behalf in the Official Gazette."

(31) Section 21 of the Air Act, 1974 prevents a person from establishing or operating any industrial plant in the air pollution control area without the previous consent of the Board. Sub-clause (4) of Section 21 of the Air Act, 1974 empowers the Board to either grant or to refuse to grant the consent by passing an appropriate order. The proviso to the sub-clause (4) of Section 21of the Air Act, 1974 also empowers the Board to cancel a consent before the expiry of the period for which it had been granted in case the conditions for grant of consent are not fulfilled. Section 21 of the Air Act, 1974 is reproduced as under :-

"21. Restrictions on use of certain industrial plants.

(1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, establish or operate any industrial plant in an air pollution control area :

Provided that a person operating any industrial plant in any air pollution control area immediately before the commencement of section 9 of the Air (Prevention and Control of Pollution) Amendment Act, 1987 (47 of 1987), for which no consent was necessary prior to such commencement, may continue to do so for a period of three months from such commencement or, if he has made an application for such consent within the said period of three months, till the disposal of such application.

(2) An application for consent of the State Board under sub-section (1) shall be accompanied by such fees as may be prescribed and shall be made in the prescribed form and shall contain the particulars of the industrial plant and such other particulars as may be prescribed :

Provided that where any person, immediately before the declaration of any area as an air pollution control area, operates in such area any industrial plant, such person shall make the application under this sub-section within such period (being not less than three months from the date of such declaration) as may be prescribed and where such person makes such application, he shall be deemed to be operating such industrial plant with the consent of the State Board until the consent applied for has been refused, (3) The State Board may make such inquiry as it may deem fit in respect of the application for consent referred to in sub-section (1) and in making any such inquiry, shall follow such procedure as may be prescribed.

(4) Within a period of four months after the receipt of the application for consent referred to in sub-section (1), the State Board shall, by order in writing, and for reasons to be recorded in the order, grant the consent applied for subject to such conditions and for such period as may be specified in the order, or refuse such consent.

Provided that it shall be open to the State Board to cancel such consent before the expiry of the period for which it is granted or refuse further consent after such expiry if the conditions subject to which such consent has been granted are not fulfilled:

Provided further that before cancelling a consent or refusing a further consent under the first provision, a reasonable opportunity of being heard shall be given to the person concerned.

(5) Every person to whom consent has been granted by the State Board under sub-section (4), shall comply with the following conditions, namely -

(i) the control equipment of such specifications as the State Board may approve in this behalf shall be installed and operated in the premises where the industry is carried on or proposed to be carried on;

(ii) the existing control equipment, if any, shall be altered or replaced in accordance with the directions of the State Board;

(iii)the control equipment referred to in clause (i) or clause (ii) shall be kept at all times in good running condition;

(iv) chimney, wherever necessary, of such specifications as the State Board may approve in this behalf shall be erected or re-erected in such premises;

(v) such other conditions as the State Board, may specify in this behalf; and

(vi) the conditions referred to in clauses (i), (ii) and (iv) shall be complied within such period as the State Board may specify in this behalf :

Provided that in the case of a person operating any industrial plant in an air pollution control area immediately before the date of declaration of such area as an air pollution control area, the period so specified shall not be less than six months :

Provided further that-

(a) after the installation of any control equipment in accordance with the specifications under clause (i), or

(b) after the alteration or replacement of any control equipment in accordance with the directions of the State Board under clause (ii), or

(c) after the erection or re-erection of any chimney under clause (iv), no control equipment or chimney shall be altered or replaced or, as the case may be, erected or re-created except with the previous approval of the State Board.

(6) If due to any technological improvement or otherwise the State Board is of opinion that all or any of the conditions referred in to sub-section (5) require or requires variation (including the change of any control equipment, either in whole or in part), the State Board shall, after giving the person to whom consent has been granted an opportunity of being heard, vary all or any of such conditions and thereupon such person shall be bound to comply with the conditions as so varied.

(7) Where a person to whom consent has been granted by the State Board under sub-section (4) transfers his interest in the industry to any other person, such consent shall be deemed to have been granted to such other person and he shall be bound to comply with all the conditions subject to which it was granted as if the consent was granted to him originally."

(32) A bare perusal of the aforesaid provisions clearly reveals that the Board is bestowed with three different powers, namely, the power to grant the 'consent to operate', the power to renew the said consent and the power to revoke the said consent prior to the end of the term for

which the consent order is given. Sub-clause (3) of Section 21 imposes a legal duty that in case an application for consent is filed under sub-section (1), then the Board shall inquire and follow such procedure as may be prescribed.

(33) Section 21 (4) of the Act empowers the Board to either grant the consent to operate or to refuse such consent. However, while exercising either of the two powers, the Board is required to record its reasons for granting, for imposing the conditions, or for refusing to grant the consent. The first proviso to Section 21(4) further empowers the Board to revoke the consent to operate in case the conditions subject to which such a consent had been granted, are not fulfilled. According to second proviso, before cancelling a consent or refusing a further consent (renewal of consent) a reasonable opportunity of being heard has to be given to the person concerned. Section 21 (5) of the Act lays down the conditions which need to be complied with by the operating unit.

(34) It is, indeed, a settled principle of law that if a procedure has been prescribed under a statute, the appropriate authority is legally bound to adhere to the said procedure.

(35) The stand of the petitioner is that once the petitioner has already been granted NOCs for establishing the modern slaughterhouse and in pursuance of that the petitioner has established the modern slaughterhouse, therefore, after establishment of the unit, the refusal to grant 'consent to operate' by asking the petitioner to seek re-validation of the NOCs from District Magistrate and the State Level Committee related for slaughterhouse units, by means of the impugned orders under the garb of Government Order dated 07.07.2017, is arbitrary and illegal.

(36) This Court finds that although it is not the case of the U.P. Pollution Control Board that it has made any attempt to either prohibit slaughtering or vending of animal food, however they have taken a consistent stand that they are empowered under both the Acts i.e. Water Act and Air Act to regulate this business and vending for ensuring lawful methods to be adopted and to prevent unlawful methods for carrying of such trade and business in order to protect the environment in the light of the decision of the Apex Court dated 17.02.2017 rendered in **Common Cause Vs. Union of India (supra), Laxmi Narayan Modi Vs. Union of India (supra)** as well as Government Order dated 07.07.2017 issued in compliance of the aforesaid decisions of the Apex Court and the order dated 03.05.2023 passed by the National Green Tribunal in Original Application No. 879 of 2022 : *Gauri Maulekhi Vs. Union of India and others*. There is also no dispute that such trade and business can be regulated including by licensing provisions. There is also no dispute that such trade and business has been permitted by the appropriate regulations under the relevant laws and the Rules and Regulations. Thus in the absence of any such plea on behalf of the U.P. Pollution Control Board to impose prohibition of such trade and business which also is not directly reflected in the Government Order dated 07.07.2017, there cannot be any assumption or presumption of such prohibition or else that would violate constitutional rights and the fundamental rights guaranteed under the Constitution of India.

(37) At this juncture, it would be apt to mention that the Government Order dated

07.07.2017 deals with the 'consent to operate' the modern slaughterhouse. The Government Order dated 07.07.2017 is reproduced as under :-

संख्या-3710/नौ-8-2017-2सी.एस/12टी.सी.

प्रेषक,

कुमार कमलेश,
प्रमुख सचिव,
उत्तर प्रदेश।

सेवा में,

1. समस्त मण्डलायुक्त, उत्तर प्रदेश।
2. निदेशक, नगरीय निकाय, उत्तर प्रदेश, लखनऊ।d
3. समस्त जिलाधिकारी, उत्तर प्रदेश।
4. समस्त नगर आयुक्त, नगर निगम, उत्तर प्रदेश।
5. समस्त अधिशासी अधिकारी, नगरपालिका परिषद/ नगर पंचायत,

उत्तर प्रदेश।

नगर विकास अनुभाग-8

लखनऊः दिनांक 07 जुलाई, 2017

विषयः मा० सर्वोच्च न्यायालय द्वारा रिट याचिका (सिविल) संख्या- 330/2001काम काज बनाम भारत संघ, रिट याचिका संख्या- 44/2004, अवमानना याचिका संख्या-124/2015 के साथ संलग्न रिट याचिका संख्या- 309/2003 लक्ष्मी नारायण मोदी बनाम यूनियन ऑफ इण्डिया व अन्य में पारित आदेश दिनांक 17.02.2017 के अनुपालन में पशुवधशालाओं के संचालन के सम्बन्ध में अद्यतन दिशा-निर्देश।

महोदय,

मा० सर्वोच्च न्यायालय में पशुवधशालाओं से सम्बन्धित विभिन्न बिन्दुओं के सम्बन्ध में दायर रिट याचिक – (सिविल) 309/2003, लक्ष्मीनारायण मोदी बनाम यूनियन आफ इण्डिया के सम्बन्ध में मा० सर्वोच्च न्यायालय द्वारा समय-समय पर पारित किये गये आदेशों के अनुपालन में सचिव, भारत सरकार, पर्यावरण एवं वन मंत्रालय के अर्द्ध शा० पत्र संख्या- 7/4/2011-ए. डब्लू. डी. दिनांक 02.07.2012 में दिये गये दिशा-निर्देशों के अनुक्रम में उत्तर प्रदेश के अन्तर्गत राज्य सरकार द्वारा पशुवधशालाओं के संचालन से सम्बन्धित विषयों के क्रियान्वयन हेतु शासन के कार्यालय ज्ञाप संख्या- 1838/नौ- 8-2012-2सी.एस./2012 दिनांक 11 सितंबर, 2012 द्वारा "राज्य स्तरीय समिति" का गठन किया गया है, जिसमें प्रमुख सचिव/सचिव, पशुधन, गृह, चिकित्सा एवं स्वास्थ्य, पर्यावरण, पंचायतीराज, श्रम विभाग तथा पुलिस महानिदेशक, उत्तर प्रदेश आदि को समिति में सदस्य के रूप में नामित किया गया है। पशुवधशालाओं के संचालन हेतु गठित "राज्य स्तरीय समिति" को सौपे गये दायित्वों के अंतर्गत प्रदेश में स्थित पुरानी पशुवधशालाओं का आधुनिकीकरण तथा आधुनिक पशुवधशालाओं की स्थापना किये जाने की योजना शासनादेश संख्या-2394/नौ-8-2014-03पी(बजट)/2014 दिनांक 26.11.2014लागू की गयी थी।

2. मा० सर्वोच्च न्यायालय द्वारा रिट याचिका (सिविल) संख्या-330/2001 कामन काज बनाम भारत संघ, रिट याचिका संख्या- 44/2004, अवमानना याचिका 124/2015 के साथ संलग्न रिट याचिका संख्या- सिविल 309/2003, लक्ष्मीनारायण मोदी बनाम यूनियन आफ इण्डिया एवं अन्य में पशुवधाशालाओं से सम्बन्धित रिट याचिकाओं पर सुनवाई करते हुए दिनांक 17.02.2017 को पारित निर्णय (Judgement) के सुसंगत अंश निम्नवत हैः-

"Pursuant to our orders dated 26.09.2016 and 28.10.2016, a compendium of the Indian Standards has been prepared along with all relevant material in consultation with all the stake-holders. The Union of India is directed to print the compendium in sufficient numbers and circulate it to all the State Governments and Union Territories for compliance. The Union of India will comply with our orders within six weeks from today. In the event there is non-compliance with the Indian Standards, other rules and regulations, the petitioners are entitled to approach the concerned district collector or the judicial authorities, as the case may be in a given specific instance."

3. मा० उच्चतम न्यायालय द्वारा केन्द्र सरकार/ राज्य सरकार के विभिन्न विभागों द्वारा compendium में विभिन्न अधिनियमों, नियमों, दिशा-निर्देशों के अनुसार पशुवधशालाओं की स्थापना/ मीटशॉप का संचालन किये जाने हेतु निम्न प्राविधान प्रसारित किये गये हैंः-

S.N.	STATUS/STANDARD/GUIDELINE
1	Prevention of Cruelty to Animals Act, 1960 (relevant Sections: 3(p.3), 9(b) (p.6), Section 9 (e) (p.6), 11 (p.7,8) and 38(P.15,16)
2	Transport of Animals Rules, 1978(as amended in 2001 and 2009)
3	Prevention of cruelty to Animals (Transport of Animals of Foot) Rules 2000
4	Prevention of Cruelty to Animals (Slaughter House) Rules 2001
5	Performa for Ante and Post Mortem Fitness Certificates to be issued by the veterinary Doctor after examining the animals before and after slaughter of animals as per Rule 4(3) of the Prevention of Cruelty to Animals (Slaughter House) Rules, 2001 [Relevant documents: Letter from AWBI to Director/Commissioner, Municipal Administration of all States and Union Territories, dated 17.10.2016 (p.49); Letter from AWBI to CEO Food Safety & Standards Authority, dated 17.10.2016(p.50) Letter from FSSAI to All Central Licensing Authorities and Commisioners of food safety of all States/UT's (p.51)
6	Draft Prevention Of Cruelty to Animals (Regulation of livestock market) Rules 2016
7	Central Motor Vehicles (Eleventh Amendment) Rules, 2015[Relevant Rules: Rule 125 E(p.62)
8	Central Motor Vehicles (13th Amendment) Rules, 2016 [Relevant Rules: Rule 125 E(p.71)
9	Food Safety and Standards Act 2006 [Relevant Sections-Section 92 (p.118,119)]
10	Food Safety and Standards Act 2006 [Relevant Sections-Section 92 (p.118,119)]
11	Food Safety and Standards (Food Products Standards and Food Additives) Regulations 2011 [Relevant regulations- Regulation 2.5 (p. 265)]
12	Agriculture and Processed Food Product Export Development Authority (Amendment) Act, 2009 [Relevant Sections-section 4 (p.344) and section 12 (p.349)]
13	Environment Protection Act 1986 [Relevant Section-6 & 25(p.356)
14	The Environment (Protection) Rules, 1986 [Relevant Rules- Effluent Discharge Standards. S. No. 509(p.357)
15	(Revised Draft) Effluent Discharge Standards for Slaughter House to be notified by the MoEF [Relevant Rules- Effluent Discharge Standards. S.No. 50 (p. 360)
16	The water (Preservation and Control of Pollution) Act, 1974 [Relevant Section 24(p.373, 374) , 25 (p.374), 26 (p.375), 27 (p.375,376),28 (p.376)& 33B(p. 378)]
17	The Water (Preservation and Control of Pollution) Act, 1975[Relevant Rules: Form XIII(p.410)]
18	The Air (Prevention and Control of Pollution) Act 1981, [Relevant Section- 21 (p.441), 21A (p.443),23 (p.443), 24 (p.443,444), 31A (p.446),31B (p.446), 37 (p.448), 40(p.448,449), & 41(p.449)]
19	The Municipal Solid Wastes (Management & Handling) Rules 2000 [Relevant Rules-7 (p.456), Schedule II-S.No.1 (iii)(p.458), 4(p.459), 5.(p.459,460),6(p.460), Form II Clause 6 (ii) (p.472)]
20	The National Green Tribunal Act 2010 [Relevant sections 14(p.482),16(p.483)]
21	IS 8895:2015 Handling Storage and Transport of Slaughter house by- produce Guidelines(First revision)
22	IS 1982:2015 Ante Mortem and post mortem inspection of meat animals- Code of practice (second reivison)
23	IS 4393:2016 Basic Requirement of an Abattoir(second revision)
24	[Revised] Standards for Discharge of Effluents from slaughter houses, Meat Processing Units and Sea Food Industry.

मा० सर्वोच्च न्यायालय द्वारा उपर्युक्त मामले में पारित अन्तिम निर्णय दिनांक 17.02.2017 का परिशीलन किये जाने पर यह पाया गया कि प्रदेश में पुरानी पशुवधशालाओं का आधुनिकीकरण तथा आधुनिक पशुवधशालाओं की स्थापना किये जाने से सम्बन्धित शासनादेश संख्या-2394/नौ-8-2014-03पी(बजट)/2014 दिनांक 26.1.2014 में उल्लिखित कई प्राविधान वर्तमान आदेश के परिप्रेक्ष्य में अप्रांसगिक हो गये है, जिसके दृष्टिगत पशुवधशालाओं की स्थापना/संचालन किये जाने हेतु संशोधित दिशा निर्देश जारी किये जाने की आवश्यकता है।

4. मा० सर्वोच्च न्यायालय द्वारा रिट याचिका (सिविल) संख्या-330/2001 कामन काज बनाम भारत संघ, रिट याचिक संख्या-44/2004, अवमानना याचिका संख्या-124/2015 के साथ संलग्न रिट याचिका संख्या- 309/2003 लक्ष्मी नारायण मोदी बनाम यूनियन ऑफ इण्डिया व अन्य में पारित आदेश दिनांक17.02.2017 के अनुपालन में पशुवधाशालाओं के संचालन के सम्बन्ध में श्री राज्यपाल शासनादेश संख्या-

2394/नौ-8-2014-03पी(बजट)/2014 दिनांक 26.11.2014 को अवकमित करते हुए निम्नवत अद्यतन दिशा-निर्देश निर्गत करते हैः-

(1) The Food safety and Standards Act, 2006 की धारा-89 में दी गयी व्यवस्था- The Provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect of virtue of any law other than this Act. समस्त प्रचलित अधिनियमों पर ओवरराइडिंग इफेक्ट रखती है। ऐसी स्थिति में किसी भी कारोबारी को लाइसेन्स निर्गत करने का दायित्व The Food Safety and Standards Act, 2006 की धारा-89 के अन्तर्गत खाद्य सुरक्षा एवं औषधि प्रशासन विभाग का है, जो The Food safety and Standard (Licencing and Registration of Food Businesses) Regulation, 2011 के 2.1.2 (1)(5) के शेड्यूल-IV के अन्तर्गत हाइजीन एवं सैनेटरी आवश्यकताओं को दृष्टिगत रखते हुए लोकल अथारिटी से अनापत्ति प्रमाण पत्र प्राप्त करते हुए लाइसेन्स/पंजीकरण निर्गत किये जाने की व्यवस्था है।

(2) The Food safety and Standards Act. 2006 एवं The Food Safety and Standard (Licensing and Registration of Food Businesses) Regulation, 2011 के 2.1.2 (1)(5) के शेड्यूल-IV के अन्तर्गत हाइजीन एवं सैनेटरी आवश्यकताओं को दृष्टिगत रखते हुए लोकल अथारिटी से अनापत्ति प्रमाण पत्र प्राप्त कर खाद्य सुरक्षा एवं औषधि प्रशासन विभाग के संबंधित अधिकारी द्वारा लाइसेन्स/पंजीकरण निर्गत किये जाने की कार्यवाही की जायेगी।

(3) The Food safety and Standards Act. 2006 के दिनांक 05.08.2011 से प्रभावी हो जाने के फलस्वरूप उ०प्र० नगर निगम अधिनियम, 1959 एवं नगर पालिका अधिनियम, 1916 में खाद्य लाइसेन्स दिये जाने सम्बन्धी प्राविधान निष्प्रभावी हो गये हैं।

(4) अद्यतन पशुधन गणना को आधार में लेते हुए सम्बन्धित लोकल एथारिटी यदि पशुवधशाला की स्थापना का औचित्य पाती है, तो डी०पी०आर मा० उच्चतम न्यायालय के निर्देशों व सुसंगत अधिनियमों/नियमों/आदेशों के अधीन तैयार करायेगी। सम्बन्धित लोकल एथारिटी जनपद के जिलाधिकारी के समक्ष डी०पी०आर० सहित आवेदन-पत्र प्रस्तुत करेगी, जिसे जिलाधिकारी की अध्यक्षता में गठित समिति, जिसमें सदस्य के रूप में सम्बन्धित जनपद के वरिष्ठ पुलिस अधीक्षक/ पुलिस अधीक्षक, मुख्य पशु चिकित्साधिकारी, सम्बन्धित स्थानीय निकाय के नगर आयुक्त/अधिशाषी अधिकारी /अपर मुख्य अधिकारी एवं उत्तर प्रदेश प्रदूषण नियंत्रण बोर्ड के क्षेत्रीय अधिकारी होंगे, मा० सर्वोच्च न्यायालय द्वारा पारित निर्णय में उल्लिखित अधिनियमों/नियमों को दृष्टिगत रखते हुए परीक्षण करेगी यदि सम्बन्धित लोकल एथारिटी द्वारा मा० सर्वोच्च न्यायालय के निर्णय में वर्णित दिशा-निर्देशों के अनुसार डी०पी०आर० तैयार की गयी हो, और अद्यतन पशुधन गणना के अनुसार वहाँ पर पशुवधशाला की स्थापना का औचित्य पाया जाता है, तो जिला स्तरीय समिति द्वारा अपनी स्पष्ट संस्तुति सहित प्रस्ताव प्रमुख सचिव, नगर विकास विभाग की अध्यक्षता में गठित राज्य स्तरीय समिति के विचारार्थ प्रस्तुत किया जाय। राज्य स्तरीय समिति द्वारा प्रस्ताव प्राप्त होने पर 03माह के अन्दर परियोजना की स्वीकृति दिये जाने पर विचार कर यथोचित निर्णय लेगी।

(5) अतः इस सम्बन्ध में मुझे यह कहने का निर्देश हुआ कि उपर्युक्त संशोधित दिशा निर्देशों के अनुसार अग्रिम कार्यवाही करने का कष्ट करें।

भवदीय

(कुमार कमलेश)

प्रमुख सचिव

संख्या3710(1)/नौ-8-17, तद् दिनांक

प्रतिलिपि निम्नलिखित की सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।

1- अपर मुख्य सचिव/ प्रमुख सचिव/ सचिव, पंचायतीराज/ गृह/पर्यावरण/पशुधन/चिकित्सा एवं स्वास्थ्य विभाग/ खाद्य सुरक्षा एवं औषधि/ प्रशासन विभाग/श्रम/ परिवहन, उत्तर प्रदेश शासन, लखनऊ।

2- पुलिस महानिदेशक, उत्तर प्रदेश।

3- समस्त वरिष्ठ पुलिस अधीक्षक,/पुलिस अधीक्षक, उत्तर प्रदेश।

4- सदस्य सचिव, उत्तर प्रदेश, प्रदूषण एवं नियंत्रण बोर्ड, लखनऊ।

5- समस्त अनुभाग, नगर विकास विभाग।

6- कम्प्यूटर सेल, नगर विकास विभाग।

7- गार्ड फाइल।

आज्ञा से

(शैलेन्द्र कुमार सिंह)

विशेष सचिव।"

(38) A bare perusal of the aforesaid Government Order dated 07.07.2017 reveals that it is mandatory for all the slaughterhouse units to comply with the 24 compendium as mentioned in para-3 of the aforesaid Government Order dated 07.07.2017 for consent to operate/establishment of the modern slaughterhouse. We also notice that clause 4 (3) of the Government Order dated 07.07.2017 clearly observes that after enforcement of the Food Safety and Standards Act, 2006 w.e.f. 05.08.2011, the provisions relating to grant of license available under Uttar Pradesh Nagar Palika Adhiniyam, 1916 and Uttar Pradesh Municipal Corporation Act, 1959 have become redundant.

(39) Apparently, the order dated 21.05.2015 issued by the District Magistrate, Unnao while granting NOC to the petitioner to establish the modernized slaughterhouse plant clearly mentioned in condition no.68 that it will be mandatory for the petitioner to follow the direction issued in future and condition no. 69 categorically states about the consequential effect of deemed cancellation of the said NOC, in case of any irregularity or violation of any of the conditions. The order dated 04.01.2017 issued by the U.P. Pollution Control Board clearly mentioned that conditions enumerated in the NOC given by the District Magistrate, Unnao by the aforesaid order dated 21.05.2015 shall be complied with in letter and spirit. Meaning thereby the petitioner is obliged to follow all the directions for continuation of the NOC granted by the District Magistrate, Unnao in future. However, the issue does not rest here as the Government Order dated 07.07.2017 specifically mentions about superssession of the Government Order dated 26.11.2014 and accordingly directs all the slaughterhouse units to comply with 24 point compendium as mentioned in para-3 of the aforesaid Government Order dated 07.07.2017 for consent to operate/ establishment of the slaughterhouse. Thus, since the earlier NOC dated 21.05.2015 was issued in view of the existing Government Order dated 26.11.2014, which as per the Government Order dated 07.07.2017 stands superseded, it was mandatory for all the slaughterhouse units that in order to seek 'consent to operate', the 24 point compendium as mentioned in para-3 of the aforesaid Government Order dated 07.07.2017 be followed. Thus, apparently, there are two aspects of the matter; firstly NOC ought to have been taken as per the Government Order dated 07.07.2017 to establish the unit; and secondly on establishment of unit, the unit ought to have applied 'consent to operate' as per the Government Order dated 07.07.2017.

(40) In the instant case, NOC of the District Magistrate, Unnao was granted before issuance of the Government Order dated 07.07.2017. Although the petitioner had come to establish the modernized slaughterhouse unit, however, the same was not operational and as such it was mandatory for the petitioner to comply with all the terms of the Government Order dated 07.07.2017 including NOC for 'consent to operate' from the District Magistrate, Unnao, State Level Committee and U.P. Pollution Control Board.

(41) It is an admitted fact that the petitioner has not taken NOC from the District Magistrate, Unnao nor has obtained a re-validation of the said NOC in order to comply with the provisions of Government Order dated 07.07.2017, which are mandatory in nature having been issued

pursuant to the dictum of the Apex Court in **Common Cause vs. Union of India and others (supra) and Laxmi Narain Modi Vs. Union of India (supra)**, for running the modernized slaughterhouse. Therefore, the U.P. Pollution Control Board has rightly refused to grant 'consent to operate' by means of the impugned orders.

CONCLUSION

(42) For the aforesaid reason, we are of the view that there is no error in the impugned orders which may warrant any interference under Article 226 of the Constitution of India by this Court.

(43) The writ petition is, accordingly, **dismissed.**

(44) Needless to mention that while refusing to grant 'consent to operate' by means of the impugned orders, liberty was granted by the Chief Environmental Officer to the petitioner to comply with the mandatory provisions of law. That being the position, we hope and trust that in case the petitioner complies with the mandatory provisions of law and applies afresh for 'consent to operate' complying with the provision of Government Order dated 07.07.2017, the authorities concerned shall consider the claim of the petitioner in accordance with law expeditiously.

(2023) 6 ILRA 926
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.06.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ C No. 4913 of 2023

Sandeep & Ors. ...Petitioners

Versus

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

Counsel for the Petitioners:
Vipin Kumar Mishra

Counsel for the Respondents:
C.S.C.

Civil Law – the Land Revenue Act,1901 - Section 210/211 -impugned order-order passed in appeal - appeal filed against the order passed under Section 34 of the Land Revenue Act-mutation proceedings are summary in nature-question of title not decided-impugned orders not amenable to writ jurisdiction- exception circumstances wherein writ court can entertain writ petition arising out of mutation proceedings-*Hadisul Nisha* reiterated—impugned order not *ex parte* in nature-hence appeal not barred under Section 201 of the Land Revenue Act-impugned orders neither decide title of the parties-nor they are without jurisdiction-writ petition against remand order not to be entertained ordinarily-Petition dismissed. (Paras 11, 14, 15,17, 18 and 19)

HELD:
A perusal of the mutation order dated 12.07.2001 indicates that it was decided on the basis of a compromise between Hari Shyam and the opposite party no. 5, when the application was lying dismissed in default. It merely records that on the basis of material available on record, it would be proper to enter the plaintiff's name in respect of the property in question. Nothing has been St.d in the order regarding title of the parties. While setting aside the aforesaid order, the appellant authority has merely remanded the matter for being decided afresh on its merit after giving an opportunity of hearing to the opposite party no. 5 and the appellate authority has also not recorded any finding or satisfaction about title of the parties. The revisional authority has refused to interfere against the appellate order holding that it was merely an order of remand and the parties will have the opportunity to present their case. The revisional authority has also not recorded any finding which may affect the title of the parties.

Therefore, I am unable to accept the submissions made by the learned counsel for the parties that the title has been decided in the present case while deciding the mutation application. (Para 11)

It is not the case of the petitioner that the authorities deciding the mutation application, the appeal and the revision did not have jurisdiction to do so or that any other exceptional circumstance exists in the present case which may warrant interference by this Court in exercise of its extraordinary Writ jurisdiction. (Para 15)

In view of the aforesaid discussion, I am of the view that the orders under challenge do not decide title of the parties and the orders are not without jurisdiction. (Para 18)

There is one more reason for declining to entertain the Writ Petition and that by means of the order under challenge, the appellate authority has merely remanded the matter for being decided afresh after giving an opportunity of hearing to the opposite party no. 5. It is settled law that a Writ Petition against a remand order should not be entertained unless there are compelling reasons warranting exercise of extraordinary Writ jurisdiction of this Court. No compelling reasons have been are shown in the present case as to why the remand order passed by the opposite party no. 3 and affirmed by respondent No. 2 should be interfered in extraordinary jurisdiction under Article 226 of the Constitution of India. (Para 19)

Petition dismissed. (E-14)

List of Cases cited:

1. Lal Bachan Vs Board of Revenue, UP, 2002 (93) RD 6

2. Hadisul Nisha Vs Additional Commissioner (Judicial) Faizabad & ors. 2021 (6) ADJ 176

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

1. Sri Vipin Kumar Mishra, learned counsel for the petitioners and Sri Uttam Kumar Srivastava, the learned Standing Counsel.

2. By means of the instant writ petition, the petitioner has challenged the validity of the orders dated 03.10.2006 passed by the Sub Divisional Officer, Kadipur in an appeal filed under Section 210/211 of the Land Revenue Act against an order dated 12.07.2001 passed by the Naib Tehsildar, Dostpur, Sultanpur in Case No. 724, under Section 34 of the Land Revenue Act.

3. The brief facts of the case are that the recorded tenure holder Kamal Nayan had executed a Will in favour of the opposite party no. 5 and thereafter the opposite party no. 5 had executed a sale deed in favour of Chhote Lal - the predecessor-in-interest of the petitioners. Chhote Lal and the opposite party no. 5 both filed separate application for mutation, which were clubbed together. One Hari Shyam, brother of Opposite party no. 5 had filed objections against the application disputing the Will and claiming ownership in respect of half share on the basis of succession.

4. The application filed by Chhote Lal was dismissed in default on 18.06.2001. He filed an application for restoration on the same date, but the same was allowed on 09.07.2001. Although the application remained dismissed for default between 18.06.2001 and 09.07.2001, a compromise purportedly signed by Hari Shyam and Chhote Lal was filed on 27.06.2001, statements of Chhote Lal and an attesting witness of the Will were recorded on the same day.

5. The order dated 18.06.2001 was recalled on 09.07.2001 and on 12.07.2001,

the Nayab Tahsildar passed an order allowing mutation in terms of the compromise between Hari Shyam and Chhote Lal. The compromise was filed and statements were recorded while the application was lying dismissed for default.

6. The opposite party no. 5 Ram Shyam filed an Appeal against the order dated 12.07.2001, stating that he did not get any notice of the application for restoration and the order has been obtained in furtherance of a conspiracy between the witnesses.

7. The Sub-Divisional Officer allowed the appeal by means of an order dated 03.10.2006, whereby he set aside the order dated 12.07.2001 and remanded the matter for being decided afresh after giving an opportunity of hearing to the opposite party no. 5.

8. Chhote Lal challenged the appellate order by filing the revision before the Additional Commissioner (Judicial), which has been dismissed by means of an order dated 18.05.2023 on the ground that while allowing the appeal, the matter has been remanded to the Naib Tehsildar for passing a fresh order on merits of the case. As the parties will have an opportunity to present their case, there is no need for interference in the remand order.

9. The learned Standing Counsel has raised a preliminary objection against maintainability of the Writ petition on the ground that mutation proceedings are summary in nature and the question of title is not decided in mutation proceedings. Therefore, the aforesaid order is not amenable to writ jurisdiction of this Court.

10. Replying to the aforesaid submission, the learned counsel for the petitioner has submitted that title has been decided in the name of mutation in the present case.

11. A perusal of the mutation order dated 12.07.2001 indicates that it was decided on the basis of a compromise between Hari Shyam and the opposite party no. 5, when the application was lying dismissed in default. It merely records that on the basis of material available on record, it would be proper to enter the plaintiff's name in respect of the property in question. Nothing has been stated in the order regarding title of the parties. While setting aside the aforesaid order, the appellant authority has merely remanded the matter for being decided afresh on its merit after giving an opportunity of hearing to the opposite party no. 5 and the appellate authority has also not recorded any finding or satisfaction about title of the parties. The revisional authority has refused to interfere against the appellate order holding that it was merely an order of remand and the parties will have the opportunity to present their case. The revisional authority has also not recorded any finding which may affect the title of the parties. Therefore, I am unable to accept the submissions made by the learned counsel for the parties that the title has been decided in the present case while deciding the mutation application.

12. The learned counsel for the petitioner has relied upon a decision of this Court in the case of ***Lal Bachan v. Board of Revenue, UP, 2002 (93) RD 6*** wherein this Hon'ble Court held as follows:

22. ***The cases in which writ petition can also be entertained arising out of the mutation proceedings may be cases in which an authority not having jurisdiction has passed an order or***

interfered with an order passed in the proceedings. The writ petition challenging an order passed without jurisdiction can be entertained by the Court despite availability of an alternative remedy. However, in that case also, the Court will interfere only when it appears that substantial injustice has been suffered by a party. *In view of the above discussion, it is held that the writ petition arising out of the mutatiion proceedings under Section 34 U.P. Land Revenue Act cannot be entertained by this Court subject to only exception as laid down by the Division Bench in Jaipal's case supra). The writ petition may also be entertained where authority passing the order had no jurisdiction.*

23. The third question which arises in the writ petition is as to whether in view of the facts of the present case, the present writ petition can be entertained. From the facts of the case as stated in the writ petition, it is clear that the writ petitioner is claiming his right on the basis of succession on death of Smt. Chandra Dei. The respondent No. 6 is claiming on the basis of sale-deed from the said Smt. Chandra Dei. The dispute was squarely covered by Section 34 of the Act and was simple cause of mutation as contemplated in Section 34 of the Act. The orders passed in mutation proceedings are only summary in nature which does not entitle the petitioner to invoke the jurisdiction of this Court under Article 226 of the Constitution. In view of what has been said above, the present writ petition cannot be entertained. It is however, observed that the ***impugned order passed in mutation proceedings being in summery proceedings, will not come in the way of the petitioner in seeking adjudication of his title before the competent court. The orders passed in the mutation proceedings are always subject to decision by competent court entitled to adjudicate the title"***

(Emphasis supplied).

13. The learned counsel for the petitioners has placed before this Court another judgment dated 29.11.2019 rendered by co-ordinate Bench of this Court in Writ Petition No. 32853 (M/S) of 2019, wherein the earlier decision in ***Lal Bachan v. Board of Revenue*** has been followed and it has been held that *'the writ petition, challenging the orders passed in mutation proceedings are not usually entertained as the remedy of getting the title adjudicated in Regular Suit is available to the parties.'*

14. The exceptional circumstances, in which this Court can entertain a Writ Petition arising out of mutation proceedings have been succinctly stated by a co-ordinate Bench of this Court in **Hadisul Nisha vs. Additional Commissioner (Judicial) Faizabad and Ors.** 2021 (6) ADJ 176 as follows: -

"19. ...The exceptions that have been carved out being very few, for example:

(i) If the order is without jurisdiction;

(ii) If the rights and title of the parties have already been decided by the competent Court, and that has been varied by the mutation Courts;

(iii) If the mutation has been directed not on the basis of possession or simply on the basis of some title deed, but after entering into a debate of entitlement to succeed the property, touching into the merits of the rival claims;

(iv) If rights have been created which are against statutory provisions of any Statute, and the entry itself confers a

title on the petitioner by virtue of the provisions of the U.P. Zamindari Abolition and Land Reforms Act;

(v) Where the orders impugned in the writ petition have been passed on the basis of fraud or misrepresentation of facts, or by fabricating the documents by anyone of the litigants.

(vi) Where the Courts have not considered the matter on merits for example the Courts have passed orders on restoration applications etc."

15. It is not the case of the petitioner that the authorities deciding the mutation application, the appeal and the revision did not have jurisdiction to do so or that any other exceptional circumstance exists in the present case which may warrant interference by this Court in exercise of its extraordinary Writ jurisdiction.

16. The learned counsel for the petitioner has submitted that Section 201 of the U.P. Land Revenue Act provides that no appeal shall lie from an order passed under Section 200 ex-parte or in default. He has submitted that while deciding the appeal, the learned Additional Commissioner has recorded that the mutation application was dismissed in default on 18.06.2001. Chhote Lal had filed an application for restoration which was allowed on 09.07.2001. The statements of attesting witness of the will had been recorded after dismissal of the application in default and before it was restored. After restoration of the case, no notice of the restoration was sent to the opposite party no.5. The admission of claim filed by the opposite party no. 5 appears to be suspicious and the opposite party no. 5 has not put his signatures on the order sheet. For the aforesaid reasons, the appellate authority found that the order passed by the Naib Tehsildar was not in accordance with the law.

17. The order dated 12.07.2021 does not state that it was an ex-parte order and, therefore, an appeal against the aforesaid order is not barred by the provisions of Section 201 of the Land Revenue Act. It cannot be accepted that the Sub Divisional Officer had no jurisdiction to entertain and decide the appeal against an order passed on the basis of a compromise, which was not signed by all the parties and which was filed while the suit was lying dismissed for default. The aforesaid narration made by the appellate authority in the appeal regarding the order dated 12.07.2021 passed by the Naib Tehsildar would not make the order ex-parte so as to create a bar filing of appeal against the aforesaid order under Section 201 of the Land Revenue Act.

18. In view of the aforesaid discussion, I am of the view that the orders under challenge do not decide title of the parties and the orders are not without jurisdiction.

19. There is one more reason for declining to entertain the Writ Petition and that by means of the order under challenge, the appellate authority has merely remanded the matter for being decided afresh after giving an opportunity of hearing to the opposite party no. 5. It is settled law that a Writ Petition against a remand order should not be entertained unless there are compelling reasons warranting exercise of extraordinary Writ jurisdiction of this Court. No compelling reasons have been are shown in the present case as to why the remand order passed by the opposite party no. 3 and affirmed by respondent No. 2 should be interfered in extraordinary jurisdiction under Article 226 of the Constitution of India.

20. Therefore, the writ petition filed by the petitioner against the orders passed

in mutation proceedings is ***dismissed*** at the admission stage without making any observation which may affect the merits of the case.

21. The dismissal of the writ petition will not affect the right of the petitioners to seek redressal of his grievance in accordance with law.

(2023) 6 ILRA 931
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Matter under Article 227 No. 3671 of 2022
with
Writ-C No. 14043 of 2023

Md Sameer Rao ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
In Person, Sri Hritudhwaj Pratap Sahi

Counsel for the Respondents:
C.S.C., Sri Gaurav Mahajan, Sri Rajesh Tripathi

A. Civil Law- impugned order- Regional Secretary, Madhyamik Shiksha Parishad, Regional Office, Bareilly, U.P.- rejected the application of the petitioner for change of his name in the High School and Intermediate certificates.

B. Fundamental right to a name-right to keep a name of choice or change the name according to personal preference-Article 19(1)(a) of the Constitution--comes within the ambit of right to life-guaranteed under Article 21 of the Constitution of India-restrictions on the fundamental right to a name- not an absolute right-subject to various reasonable restrictions. (Paras 23,26, 27 and 32)

HELD:
The intimacy of human life and a person's name is undeniable. The right to keep a name of choice or change the name according to personal preference comes within the mighty sweep of the right to life guaranteed under Article 21 of the Constitution of India. (Para 23)

Bhatia, J. in Rashmi Srivastava Vs St. of U.P. & anr. reaffirmed the right to change the name as a facet of the fundamental right guaranteed under Article 19(1)(a) of the Constitution of India. (Para 27)

Clearly the importance of a name is an universal human value and a cherished right across jurisdictions. Commonality of human values and consensus of judicial authorities often becomes the basis of universal human rights. (Para 32)

C. Impugned order-Regulation 7 of Chapter III of the Uttar Pradesh Intermediate Education Act, 1921-correction of clerical errors in the name or the other particulars of a candidate-Regulation 40 of Chapter XII of the Uttar Pradesh Intermediate Education Act, 1921- application seeking change of name recorded in High School or Intermediate certificates issued by the Board-application made after 7 years and 5 months-petitioner's claim rejected on ground of delay and bar of limitation-for the purpose of change of name-students appearing in different Boards-comprise one class-Regulation 40(ग)-fails the test of reasonable restriction under Article 19(1)(a) and Article 21-Doctrine of 'reading down' invoked-. (Paras 38, 39, 40, 43, 48, 49, 51, 52, 53, 54, 55 and 59)

HELD:

For the purpose of change of name, the students appearing in different Boards across the country comprise one class. The CBSE bye-laws do not contain any restrictions as are imposed in the Regulations of the U.P. Intermediate Education Act, 1921, discussed above. The students who appear in the UP Board are treated deferentially and discriminated against the candidates who

appear in the CBSE Board, as regards their right to change of name. This constitutes violation of right to equality under Article 14 of the Constitution of India. (Para 52)

The restrictions contained in Regulation 40 (ग) are disproportionate and in nature of prohibitions and fail the test of reasonable restrictions on fundamental rights under Article 19(1)(a) and Article 21 and Article 14 of the Constitution of India. The restrictions in Regulation 40 (ग) are arbitrary and infringe the fundamental right to choose and change own's name vested by virtue of Article 19(1)(a), Article 21 and Article 14 of the Constitution of India. (Para 53)

Situation of unconstitutionality can be saved by invoking the doctrine of 'reading down'. (Para 54)

Writ petition allowed. (E-14)

List of Cases cited:

1. Sumpurnanand Vs St. of U.P. & ors., 2018 (11) ADJ 550

2. Olga Tellis Vs Bombay Municipal Corpn, 1985 (3) SCC 545

3. Munn Vs Illinois; 1877 (94) US 113

4. Kashish Gupta Vs Central Board of Secondary Education & ors., 2020 SCC OnLine Ker 1590

5. Rayaan Chawla Vs University of Delhi & anr., 2020 SCC OnLine Del 1413

6. Jigya Yadav Vs CBSE, 2021 (7) SCC 535

7. Rashmi Srivastava Vs St. of U.P. & anr., 2022 (9) ADJ 696

8. Coeriel and Aurik Vs The Netherlands, Communication No. 453/1991

9. Raihman Vs Latvia, Communication No. 1621/2007

10. Standesamt Stadt Niebüll, 2006 EUEJ C-96/04A

11. K. S. Puttaswamy Vs U.O.I., 2017 (10) SCC 1

12. Jeeja Ghosh Vs U.O.I., 2016 (7) SCC 761

13. Madhyamam Broadcasting Limited Vs U.O.I., Civil Appeal No. 8129, 8130 and 8131 of 2022; April 05, 2023 MANU/SC/0333/2023

14. Subramanian Swamy Vs Raju, 2014 (8) SCC 390

15. DTC Vs Mazdoor Congress, 1991 Supp (1) SCC 600

(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	Facts
III	Submissions of learned counsels
IV	Concept of names and constitutional perspectives: A. Fundamental Right to a name B. Restrictions on the fundamental right to a name
V	Impugned order and statutory provisions : Analysis
VI	Conclusions and Directions

2. Both writ petitions arise out of same issue and are being decided by a common judgement.

I. Introduction:

3. By the impugned order dated 24.12.2020 the Regional Secretary, Madhyamik Shiksha Parishad, Regional Office, Bareilly, U.P. has rejected the application of the petitioner for change of his name in the High School and Intermediate certificates.

II. Facts:

4. Brief facts are these. Name of the petitioner was recorded as "Shahnawaz" in the Board of High School Examination certificate, and the Intermediate Examination certificate by the Madhyamik Shiksha Parishad issued in 2013 and 2015 respectively.

5. The petitioner publicly disclosed the change of his name by causing the following notification to be published in the Gazette of India bearing Gazette No. 39 New Delhi, Saturday, September 26 — October 2, 2020 (Asvina 4, 1942) Part-IV, Page 1091:

" I hitherto known as SHAHNAWAZ son of MAUVEEN HUSAIN, residing at village Mehloli, Pot Jalalpur Khs, Tehsil Bilari, Disst. Moradabad, Uttar Pradesh-244411, have changed my name and shall hereafter be known as MD. SAMEER RAO.

It is certified that I have complied with other legal requirements in this connection.

SHAHNAWAZ

[Signature (in existing old name)]"

6. A similar notification was also published in a local daily newspaper "Hindustan" having wide circulation in the area.

7. The petitioner made an application for change of his name from "Shahnawaz" to "Md Sameer Rao" to the respondent Board in the year 2020. The said application was declined by the impugned order.

III. Submissions of learned counsels

8. The petitioner was present in Court and expressed his inability to engage a counsel due to paucity of funds. A request was made by the Court to the members of the Bar at large to represent the petitioner pro bono. Shri Hritudhwaj Pratap Sahi, learned counsel volunteered to represent the petitioner and assist the Court in high traditions of the legal profession. Shri Rajesh Tripathi, learned counsel for the Union of India is present.

9. Shri Hritudhwaj Pratap Sahi, learned counsel for the petitioner/amicus curiae submitted as under:

(A). The rejection of the name change application by the respondent authorities is arbitrary and contrary to the statutory provisions holding the field.

(B). The right to keep name is relatable to fundamental rights of a citizen guaranteed under Articles 19(1)(a) and 21 of the Constitution of India.

(C). The relevant Regulations have to be interpreted in light of the holdings of the constitutional courts to uphold the fundamental rights of the petitioner. The offending provisions of Regulation 40 (π) are liable to be read down.

(D). The authority erred in law by rejecting the application on the grounds of limitation by invoking Regulation 7 framed under the Intermediate Education Act,

1921, which is inapplicable to applications for change of name.

10. (I). Shri I. P. Srivastava, learned Additional Chief Standing Counsel submits that the change of name is not an absolute right and subject to various restrictions imposed by law. The application for change of name was rightly rejected since it was barred by limitation.

(II). Citation of wrong provision will not void the impugned order since power is vested in the authority by virtue of Regulation 40 of the U.P. Intermediate Education Act, 1921.

(III). The claim of the petitioner for change of name is in the teeth of the said provision. The proposed name falls in the prohibited category since it discloses the religion of the applicant.

(IV). Regulation 40 (ग) are not liable to be read down and are reasonable restrictions on fundamental rights.

IV. Concept of names and constitutional perspectives:

A. Fundamental Right to a name

11. The most ancient stirrings of human thought evidenced in the Rigveda exalted keeping of names as a primal act of human life1:

"….प्रारम्भिक दशा में पदार्थो के नाम रखे गए है। यह ज्ञान का पहला चरण है"

12. Western scholars opine that usage of name became prevalent in the earliest specimens of humankind which are kindred with our own. "The primitive human speech was probably a very scanty collection of names, and may have been eked out with gestures and signs.2" The first recorded evidences of human thought and transactions discovered in the remnants of the ancient Mesopotamian civilization contain references to the name of a person3.

13. "These are the names of the sons of Israel who went down into Egypt….as Reuben and Simeon they descended [into Egypt] and as Reuben and Simeon they went out". — Shemot 1:1 (Exodus)

This passage from Torah's Shemot shows the importance of names in ancient Jewish customs.

14. "What is a name….?4 asked a forlorn Juliet. But name was all. The lovers met their tragic fate only because Romeo took the name of his ancestors. General MacArthur's mother cautioned him of how honour was a facet of name and urged him to "remember the world will be quick with its blame if shadow or shame ever darken your name". Nearer home the bard Maithli Saran Gupt invoked the power of name as a summon and spur to action "...जग में रह कर कुछ नाम करोए कुछ काम करोए कुछ काम करो5..."

15. Virtues of name are celebrated in verse and prose, in spiritual literature and secular texts. The importance of an individual's name is experienced in all aspects of life including social interfaces and commercial transactions. Power and glory of the human name transcends time and is not fenced by boundaries.

16. The invention of the "name" played a significant role in the development of human societies, and even changed the course of human evolution. The idea of giving a name to each individual added to human skills to adapt to the needs of social

living, and enhanced the capacity of humankind to survive and progress as a species. The human name is an inalienable part of an individual's life, and an indispensable tool for the human race to enter into social groups and thrive as a race. Name imparts a unique identity to each human being. Every person finds fulfillment of life in their6 name.

17. Tradition and sources of human names are many and varied. Naming traditions are derived from the cultural deposit, historic memories, value systems, inspiring personalities, religious beliefs of a society and things that bring joy. Names are chosen to cherish the human life that newly comes into being. Similarly change of name too has its roots in ancient customs of various societies. Sannyasa order and the priestly class in different religious persuasions make it imperative for the seeker to drop the birth name symbolizing renouncement of past associations, and take a new name manifesting the quest for a higher cause.

18. The inextricable connection between an individual's name and the person's life inevitably becomes a subject matter of constitutional law discourse.

19. The discussion will be taken forward with assistance of authorities in point.

20. This Court in **Sumpurnanand vs. State of U.P. and others**7 while examining the scope of Article 21 of the Constitution of India in light of various landmarks in constitutional law observed:

"29. The simple words of Article 21 of the Constitution of India, had profound significance in development of constitutional law in India.

30. The resolve to create the Constitution was the collective will of the people of India. The promise of the Constitution is to every individual citizen of India. Part III of the Constitution is anchored in the individual and revolves around the individual citizens. The simple word "life" in Article 21 of the Constitution of India presented a complex jurisprudential problem to the Courts. The simple word "life" did not disguise for long the profound intent of the constitution framers. The approach of the Courts to the provision in the Constitution progressed from tentative to visionary, the interpretation of provision advanced from literal to prophetic.

31. What was the meaning of life for the people of India on the morrow of our independence? If life meant physical existence and mere survival, Indian people had shown remarkable resilience to live through the vicissitudes of history. The people of India have lived in servitude, survived famines, lived in an iniquitous social order often dominated by prejudice, penury and illiteracy. Trackless centuries are filled with the record of survival of the people of India. Surely life of the Indian people could not remain the same after the dawn of independence of India. Surely the meaning of life for the people of India had to change after the advent of the Republic of India. The founding fathers, had the audacity to dream of transforming the meaning of life for the people of India. The Courts in India had the vision and the courage to make the dreams a reality. Life had to embrace all the attributes which made life meaningful and all the pursuits which made life worth living.

32. The probe into the purpose of life has traditionally been the province of the

philosophers. The framers of the constitution, brought the word "life" in the ambit of the constitution. Constitutional law put the meaning of life in the domain of the Courts. "Life" is very much the concern of the Courts. The search for the meaning of life is the business of the Courts. Indeed, the discovery of the meaning of life is central to realizing the fundamental rights guaranteed under the Constitution.

34. The Courts in India, knew early on that understanding the significance of life was the key to providing the security of justice. While interpreting Article 21 of the Constitution of India, the Hon'ble Supreme Court, embraced life in all its breadth and profundity and eschewed a narrow interpretation."

21. A defining moment came in the constitutional history when the Supreme Court liberated life from the fetters of physical existence and found that the sweep of the right to life conferred by Article 21 of the Constitution of India is wide and far-reaching. **Olga Tellis v. Bombay Municipal Corpn**8 endorsed the holding in **Munn v. Illinois**9 that life was "something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed".

22. Article 21 was set on a career of constantly expanding boundaries and the ambit of life was progressively enlarged.

23. The intimacy of human life and a person's name is undeniable. The right to keep a name of choice or change the name according to personal preference comes within the mighty sweep of the right to life guaranteed under Article 21 of the Constitution of India.

24. Kerala High Court in **Kashish Gupta Vs. Central Board of Secondary Education and others**10, brought the right to a name within the scope of Article 19(1)(a) and Article 21 of the Constitution of India by holding:

"8. Name is something very personal to an individual. Name is an expression of one's individuality, one's identity and one's uniqueness. Name is the manner in which an individual expresses himself to the world at large. It is the foundation on which he moves around in a civil society. In a democracy, free expression of one's name in the manner he prefers is a facet of individual right. In Our Country, to have a name and to express the same in the manner he wishes, is certainly a part of right to freedom of speech and expression under Article 19 (1) (a) as well as a part of the right to liberty under Article 21 of the Constitution of India. State or its instrumentalities cannot stand in the way of use of any name preferred by an individual or for any change of name into one of his choice except to the extent prescribed under Article 19(2) or by a law which is just, fair and reasonable. Subject to the limited grounds of control and regulation of fraudulent or criminal activities or other valid causes, a bonafide claim for change of name in the records maintained by the Authorities ought to be allowed without hesitation."

25. Similarly Delhi High Court in **Rayaan Chawla Vs. University of Delhi and another**11 set its face against adopting a technical approach to the issue of change of name and expounded the law as under:

"14. Hence, the aforesaid judgment has clearly stated that to have a name and to express the same in the manner he

wishes, is a part of the right to freedom of speech and expression under Article 19(1)(a)as well as right to liberty under Article 21of the Constitution of India. It cannot be denied that the right to change a name is a protected right and the petitioner would normally be not denied the said right on technical issues."

26. The Supreme Court in **Jigya Yadav Vs. CBSE**12, held that "name is an intrinsic element of identity". The nexus of name and identity, and the freedom to express one's identity in the manner of one's preference was thus expounded in **Jigya Yadav (Supra):**

"125.Identity, therefore, is an amalgam of various internal and external including acquired characteristics of an individual and name can be regarded as one of the foremost indicators of identity. And therefore, an individual must be in complete control of her name and law must enable her to retain as well as to exercise such control freely "for all times". Such control would inevitably include the aspiration of an individual to be recognised by a different name for a just cause. Article 19(1)(a) of the Constitution provides for a guaranteed right to freedom of speech and expression. In light ofNavtej Singh Johar[Navtej Singh Joharv.Union of India, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] , this freedom would include the freedom to lawfully express one's identity in the manner of their liking. In other words, expression of identity is a protected element of freedom of expression under the Constitution.

126.Having recognised the existence of this right, the essential question pertains to the rights that flow due to the change of name. The question becomes vital because identity, as stated above, is a combination of diverse set of elements.Navtej Singh Johar[Navtej Singh Joharv.Union of India, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] dealt with "natural identity" and here we are dealing with name, which can only be perceived as an "acquired identity". Therefore, the precise scope of right and extent of restrictions could only be determined upon deeper examination.

127.To begin with, it is important to explain what we understand by this right to change of name as a constituent element of freedom of expression of identity. Any change in identity of an individual has to go through multiple steps and it cannot be regarded as complete without proper fulfilment of those steps. An individual may self-identify oneself with any title or epithet at any point of time. But the change of identity would not be regarded as formally or legally complete until and unless the State and its agencies take note thereof in their records. Afterall, in social sphere, an individual is not only recognised by how an individual identifies oneself but also by how his/her official records identify him/her. For, in every public transaction of an individual, official records introduce the person by his/her name and other relevant particulars."

27. Bhatia, J. in **Rashmi Srivastava Vs. State of U.P. and another**13 reaffirmed the right to change the name as a facet of the fundamental right guaranteed under Article 19(1)(a) of the Constitution of India.

28. The United Nations Human Rights Committee in **Coeriel and Aurik v. The Netherlands**14 acknowledged that name is an indispensable component of a person's identity and it falls within the realm of right to privacy by holding thus:

"10.2….The Committee is of the view that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name……The question arises whether the refusal of the authorities to recognize a change of surname is also beyond the threshold of permissible interference within the meaning of article 17.

10.5. In the present case, the authors' request for recognition of the change of their first names to Hindu names in order to pursue their religious studies had been granted in 1986. The State party based its refusal of the request also to change their surnames on the grounds that the authors had not shown that the changes sought were essential to pursue their studies, that the names had religious connotations and that they were not 'Dutch sounding'. The Committee finds the grounds for so limiting the authors' rights under article 17 not to be reasonable. In the circumstances of the instant case the refusal of the authors' request was therefore arbitrary within the meaning of article 17, paragraph 1, of the Covenant."

29. A similar view was taken by the United Nations Human Rights Committee in **Raihman v. Latvia**15, and by the Court of Justice of the European Community in **Standesamt Stadt Niebüll1**6.

30. International jurisprudence has increasingly recognized "the growing importance of human rights in international law, of the obligation to recognize and respect individual identity, as well as the generality of certain human rights standards such as the prohibition of discrimination, the right to private life, and the right to a name17"

31. Various international instruments18i also vest the right to a name in every person.

32. Clearly the importance of a name is an universal human value and a cherished right across jurisdictions. Commonality of human values and consensus of judicial authorities often becomes the basis of universal human rights.

IV. B. Restrictions on the fundamental right to a name

33. The fundamental right to keep or change a name is vested in every citizen by virtue of Article 19(1)(a) and Article 21 of the Constitution of India. But it is not an absolute right and is subject to various reasonable restrictions as may be prescribed by law.

34. The limitations or restrictions imposed by law on fundamental rights have to be fair, just and reasonable. Reference can be profitably made to the following holdings of the Supreme Court in **K. S. Puttaswamy Vs. Union of India**19:

24…..The jurisprudential foundation which held the field sixty three years ago in M P Sharma and fifty five years ago in Kharak Singh has given way to what is now a settled position in constitutional law. Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights under Article 19 does not denude Article 21 of its expansive ambit. Secondly, **the validity of**

a law which infringes the fundamental rights has to be tested not with reference to the object of state action but on the basis of its effect on the guarantees of freedom. Thirdly, the requirement of Article 14 that state action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III

(emphasis supplied)

260. The impact of the decision inCooper[Rustom Cavasjee Cooperv.Union of India, (1970) 1 SCC 248] is to establish a link between the fundamental rights guaranteed by Part III of the Constitution. The immediate consequence of the decision is that a law which restricts the personal liberties contained in Article 19 must meet the test of permissible restrictions contemplated by clauses (2) to (6) in relation to the fundamental freedom which is infringed. Moreover, since the fundamental rights are interrelated, Article 21 is no longer to be construed as a residue of rights which are not specifically enumerated in Article 19. **Both sets of rights overlap and hence a law which affects one of the personal freedoms under Article 19 would, in addition to the requirement of meeting the permissible restrictions contemplated in clauses (2) to (6), have to meet the parameters of a valid "procedure established by law" under Article 21 where it impacts on life or personal liberty. The law would be assessed not with reference to its object but on the basis of its effect and impact on the fundamental rights.** Coupled with the breakdown of the theory that the fundamental rights are watertight compartments, the post-Maneka[Maneka Gandhiv.Union of India, (1978) 1 SCC 248] jurisprudence infused the test of fairness and reasonableness in determining whether the "procedure established by law" passes muster under Article 21. At a substantive level, the constitutional values underlying each article in the Chapter on Fundamental Rights animate the meaning of the others. This development of the law has followed a natural evolution. The basis of this development after all is that every aspect of the diverse guarantees of fundamental rights deals with human beings. Every element together with others contributes in the composition of the human personality. In the very nature of things, no element can be read in a manner disjunctive from the composite whole. The close relationship between each of the fundamental rights has led to the recognition of constitutional entitlements and interests. Some of them may straddle more than one, and on occasion several, fundamental rights. Yet others may reflect the core value upon which the fundamental rights are founded. (emphasis supplied)

"294…….The inter-relationship between the guarantee against arbitrariness and the protection of life and personal liberty operates in a multi-faceted plane. First, it ensures that the procedure for deprivation must be fair, just and reasonable. Second, Article 14 impacts both the procedure and the expression "law". A law within the meaning of Article 21 must be consistent with the norms of fairness which originate in Article 14. As a matter of principle, once Article 14 has a connect with Article 21, norms of fairness and reasonableness would apply not only to the procedure but to the law as well. (emphasis supplied)

35. Scope of reasonableness of restrictions on fundamental rights was further elaborated in **Puttaswamy (supra)** as follows:

"310…Three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. **The first requirement that there must be a law in existence** to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. **Second, the requirement of a need, in terms of a legitimate state aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action**. The pursuit of a legitimate state aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not re-appreciate or second guess the value judgment of the legislature but is for deciding **whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional** to the object and needs sought to be fulfilled by the law. **Proportionality is an essential facet of the guarantee against arbitrary state action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law.** Hence, the three-fold requirement for a valid law arises out of the mutual inter-dependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms." (emphasis supplied)

36. Tests of reasonableness on restrictions stated in **Jeeja Ghosh Vs. Union of India**20 will be applicable to the facts of this case:

"The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; **third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right."**

(emphasis supplied)

37. The position of law in respect of limits on fundamental rights was also clarified in **Madhyamam Broadcasting Limited vs. Union of India**21:

"48. Rights are not absolute in a constitutional democracy. The jurisprudence that has emanated from this Court is that rights can be limited but such a limitation must be justified on the ground of reasonableness. Though, only Article 19 of the constitution expressly prescribes that the limitation must be reasonable, after the judgments of this Court in RC Cooper(supra) and Maneka Gandhi (supra) it is conclusive that the thread of reasonableness runs through the entire chapter on fundamental rights guiding the

exercise of procedural and substantive limitations. That leaves us to answer the question of the standard used to assess the 'reasonableness' of the limitation. The text of the Constitution does not prescribe a standard of review. Much ink has flowed from this Court in laying down the varying standards to test reasonability: rationality, Wednesbury unreasonableness, proportionality, and strict scrutiny.

49. Reasonableness is a normative concept that is identified by an evaluation of the relevant considerations and balancing them in accordance with their weight. It is value oriented and not purpose oriented. That is why the courts have been more than open in identifying that the action is unreasonable rather than identifying if the action is reasonable. This is also why the courts while assessing the reasonableness of limitations on fundamental rights have adopted a higher standard of scrutiny in the form of proportionality. The link between reasonableness and proportionality and the necessity of using the proportionality standard to test the limitation on fundamental rights has been captured by Justice Jackson in the course of the Canadian Supreme Court's judgment in R v. Oakes:

"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be "of" sufficient importance to warrant overriding a constitutionally protected right or freedom...Second … the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test." (emphasis supplied)

50 The proportionality analysis assesses both the object and the means utilised, which are pertinent requirements while testing an infringement of fundamental rights. This Court has held that the proportionality standard can be used to assess the validity of administrative action infringing upon fundamental freedoms. However, the courts have till date used the proportionality standard to only test the infringement of a substantive right such as the right to privacy protected under Article 21, and the freedoms protected under Article19."

V. Impugned order and statutory provisions : Analysis

38. The impugned order dated 24.12.2020 references Regulation 7 of Chapter III of the Uttar Pradesh Intermediate Education Act, 1921, while invalidating the claim of the petitioner on the ground of delay and bar of limitation.

39. Regulation 7 of Chapter III of the Uttar Pradesh Intermediate Education Act, 1921 pertains to correction of clerical errors in the name or the other particulars of a candidate entered in the High School or Intermediate certificates issued by the Board. The aforesaid provision is clearly not applicable in cases of change of name. However, it is trite that citing a wrong provision shall not vitiate the order if the authority is possessed of powers to pass such orders.

40. Application seeking change of name recorded in the High School or Intermediate certificates issued by the Board are regulated by Regulation 40 of Chapter XII of the Uttar Pradesh Intermediate Education Act, 1921 and

relevant parts thereof are extracted hereinunder for ease of reference:

"40. प्रमाण पत्र में नाम परिवर्तन परिषद् सफल उम्मीदवारों द्वारा विहित प्रक्रियानुसार आवेदन पत्र देने तथा इस अध्याय के विनियम 22 ;13द्ध में निर्धारित शुल्क देने पर प्रमाण पत्र में निम्नांकित प्रतिबन्धों के अधीन नाम परिवर्तन कर सकती है..

(क) आवेदन पत्र उचित सारणी द्वारा दिया जायेगा तथा जिस वर्ष में परीक्षा हुई थीण् उसकी 31 मार्च से तीन वर्ष के भीतर परिषद के सचिव के कार्यालय में पहुँचजाना चाहिए। आवेदक को एक टिकट लगे हुए कागज पर शपथ.पत्र देना होगाए जो प्रथम श्रेणी के मजिस्ट्रेट अथवा नोटरी द्वारा यथाविधि प्रमाणित होना चाहिएण् जिसमें नाम में परिवर्तन के वैध कारण दिये होंगे तथा जो एक राजपत्रित अधिकारी द्वारा यथा विधि प्रमाणित होगा और परीक्षार्थी जहाँ वह निवास करता हैए वहाँ के स्थानीय दैनिक पत्र की तीन विभिन्न तिथियों के संस्करणों में अपने नाम के परिवर्तन को विज्ञापित करेगाए इससे पूर्व कि उसे परिवर्तित नाम का नया प्रमाण.पत्र प्राप्त हो । सम्बन्धित तिथियों के समाचार पत्रों की प्रतियाँ आवेदन पत्र के साथ संलग्न करना अनिवार्य है।

(ख) परिषद् द्वारा नाम परिवर्तन के आवेदन.पत्र निम्नलिखित को छोड़कर अन्य किन्हीं कारणों से स्वीकार नहीं किये जायेंगे।

नाम में भद्दापन हो अथवा नाम से अपशब्द की ध्वनि निकलती हो अथवा नाम असम्मान प्रतीत होता हो अथवा अन्य ऐसी स्थिति होने पर।

(ग) परीक्षार्थियों द्वारा नाम के पहले या बाद में उपनाम जोड़ने धर्म अथवा जाति सूचक शब्दों के जोड़ने अथवा सम्मानजनक शब्द या उपाधि जोड़ने जैसे किसी भी प्रकार के आवेदन पत्रों को स्वीकार्य नहीं किया जायेगा। इसी प्रकार धर्म अथवा जाति परिवर्तन के आधार पर अथवा विवाहित छात्र / छात्राओं के नाम में भी विवाह के फलस्वरूप नाम परिवर्तित हो जाने पर परिषद द्वारा नाम में परिवर्तन नहीं किया जायेगा।"

41. The provisions have to be interpreted in a permissive manner to realize the fundamental rights of the petitioner. The scope of the provision cannot be constricted by a pedantic construction which will undermine the fundamental rights.

42. Regulation 40 (क) contemplates that an application for change of name has to be filed within three years from 31st of March of the year when the candidate appeared in the examination. Admittedly in this case, the application was made 7 years and 5 months after the petitioner sat for the High School and Intermediate examinations respectively.

43. A similar limitation of three years provided in the CBSE bye-laws relating to name change was questioned in **Jigya Yadav (supra)** and was found wanting in reasonableness. A narrow approach or a rigid construction of the limitation period in Regulation 40 (ग) will inroad upon the fundamental rights of the petitioner vested by Article 19(1)(a) and Article 21 of the Constitution of India. The said limitation of three years in Regulation 40 (ग) cannot be held to be mandatory and can be relaxed in the facts and circumstances of a case.

44. In the facts and circumstances of this case, the delay was liable to be condoned.

45. In this wake, rejection of the application for change of name on the ground of delay is arbitrary and transgresses the fundamental rights of the petitioner vested by virtue of Article 19(1)(a) and Article 21 of the Constitution of India.

46. The next question is whether the application is in the teeth of restrictions as regards change of name contained in the Regulation 40 of Chapter XII of the Uttar Pradesh Intermediate Education Act, 1921 as quoted above.

47. Regulation 40(ख) and 40 (ग) respectively contain the reasons for which the application can be accepted, and the causes on which the same can be declined.

48. Under Regulation 40(ख), the application for change of name shall be entertained only if the name is gross or sounds offensive, or appears to be derogatory and the like situations. The provision has to be read on the construction canon of "ejusdem generis". The three categories for change of name which have been described cannot be read in isolation. When a general phrase follows a list of specific instances, the general phrase will be interpreted to include items of the same class or in the likeness of those already listed.

49. The deduction from a reading of the provision is that a name which lowers a person's self esteem may be dropped. Alternatively any name that enhances a person's self worth may be adopted.

50. Regulation 40 (ग) provides that applications seeking to adopt nick names, names disclosing a person's religion or caste or use of honorific word or a title will not be accepted. Similarly name change application pursuant to religious conversion or change of caste or change of name after marriage are not liable to be entertained.

51. It is noteworthy that law does not prevent giving the said names at birth. The names given at christening can also be taken later in life. If the former are not prohibited it stands to reason that the latter cannot be proscribed. At times change of name pursuant to change of caste or religion is part of rituals which precede the same. Prohibitions of this nature infringe the fundamental right to profess and practice a religion of one's choice guaranteed under Article 25 of the Constitution of India. Likewise the bar on name change after marriage will interfere in the fundamental right of a person to express one's identity. [Also See **Jigya Yadav (supra)]**.

52. For the purpose of change of name, the students appearing in different Boards across the country comprise one class. The CBSE bye-laws do not contain any restrictions as are imposed in the Regulations of the U.P. Intermediate Education Act, 1921, discussed above. The students who appear in the UP Board are treated deferentially and discriminated against the candidates who appear in the CBSE Board, as regards their right to change of name. This constitutes violation of right to equality under Article 14 of the Constitution of India.

53. The restrictions contained in Regulation 40 (ग) are disproportionate and in nature of prohibitions and fail the test of reasonable restrictions on fundamental rights under Article 19(1)(a) and Article 21 and Article 14 of the Constitution of India. The restrictions in Regulation 40 (ग) are arbitrary and infringe the fundamental right to choose and change own's name vested by virtue of Article 19(1)(a), Article 21 and Article 14 of the Constitution of India.

54. Situation of unconstitutionality can be saved by invoking the doctrine of 'reading down'. The concept of 'reading down' was reiterated by the Supreme Court in ***Subramanian Swamy v. Raju***22 holding:

"61.Reading down the provisions of a statute cannot be resorted to when the

meaning thereof is plain and unambiguous and the legislative intent is clear. The fundamental principle of the "reading down" doctrine can be summarised as follows. Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality."

(Also see : DTC Vs. Mazdoor Congress23)

55. Regulation 40 (ग) is accordingly read down.

56. Clearly the petitioner's new name gives him a higher sense of self worth, and is within the scope Regulation 40(ख).

VI. Conclusions and Directions:

57. The authorities arbitrarily rejected the application for change of name and misdirected themselves in law. The action of the authorities violates the fundamental rights of the petitioner guaranteed under Article 19(1)(a), Article 21 and Article 14 of the Constitution of India and is in the teeth of relevant regulations under the Uttar Pradesh Intermediate Education Act, 1921.

58. The impugned order dated 24.12.2020 the Regional Secretary, Madhyamik Shiksha Parishad, Regional Office, Bareilly, U.P. is liable to be set aside and is set aside.

59. A writ in the nature of mandamus is issued commanding the respondents to allow the application of the petitioner to change his name from "Shahnawaz" to "Md Sameer Rao" and accordingly issue fresh High School and Intermediate certificates incorporating the said change.

60. The petitioner is directed to surrender all his public documents of identity like Aadhar card, Ration card, Driving Licence, Passport, Voter I.D. card, etc. to the competent authorities. The authorities shall register the change of name, dispose off or destroy the earlier identity documents as per law, and issue fresh documents consistent with his changed name in accordance with law. The petitioner has already surrendered his earlier PAN card and the I.T. Department has issued a new one.

61. Before parting some observations. Changes in name made in the High School or Intermediate education certificates issued by the educational Boards have to be simultaneously incorporated in all documents of identity issued by various authorities like Aadhar card, PAN card, Ration card, Driving Licence, Passport, Voter I.D. card, etc. Further earlier documents have to be surrendered to the authorities for destruction or any other appropriate disposal.

62. Congruency in all identity related documents is an essential requirement of public interest and national security. In case a person is allowed to carry identification documents with separate names it would lead to confusion in identity and possibility of mischief. The State has to proactively prevent any such possibility of mischief or misuse.

63. Some of the documents are issued by authorities of the Government of India like PAN card and Passport. Hence there has to be full coordination between the State authorities and the authorities of the Government of India.

64. Secretary, Ministry of Home, Government of India and the Chief Secretary, Government of Uttar Pradesh, Lucknow, shall create appropriate legal and administrative frameworks to ensure that both Governments work in concert to achieve the end of making identity related identity documents consistent and removing anomalies therein.

65. The writ petition is allowed.

66. A copy of this order be placed before the Chief Secretary, Government of Uttar Pradesh, Lucknow and before the Secretary, Ministry of Home, Government of India by the respective counsels for the State and the Union.

(2023) 6 ILRA 945
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Crl. Misc. Writ Petition No. 3831 of 2023

Vinod Kumar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bipin Kumar Tripathi, Sri Anurag Pathak, Sri Harshit Pathak, Sri Shubham

Counsel for the Respondents:
G.A.

Criminal Law –Writ petition- U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Rule 16 of U.P. Gangster and Anti-Social Activities (Prevention) Rules, 2021- Section 3(i) - quashing of the FIR lodged of envisages quick forwarding action-gang chart recommended and forwarded for approval-no unnecessary delay-deduction that rules have not been complied-cannot be made-objective of rules-punish gangsters-establish effective machinery to prevent anti-social activities- allegations in FIR disclose commission of cognizable offence- Petition dismissed.

HELD:
Where the gang-chart is recommended and forwarded for approval without unnecessary delay, it cannot be deduced that the provisions of the U.P. Gangsters and Anti-Social Activities (Prevention) Rules, 2021 have not been complied.

The main purpose for implementing the said Rules is to provide transparent procedure to punish the Gangsters and to establish an efficient machinery to prevent anti-social activities.

In view of the aforesaid facts and circumstances, the allegations in the FIR disclose a commission of cognizable offence.

No interference is required. The writ petition is, therefore, dismissed.

Petition dismissed. (E-14)

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri Anurag Pathak, learned counsel for the petitioner, learned A.G.A. for the State and perused the record.

2. The instant writ petition seeks quashing of the FIR dated 23.02.2023 giving rise to Case Crime No.94 of 2023, under Section 3(i) of U.P. Gangsters and

Anti Social Activities (Prevention) Act, 1986, Police Station-Ramgarh Tal, District-Gorakhpur.

3. The submission of learned counsel for the petitioner is that the petitioner has been falsely implicated due to political influence. It has further been argued that there is non-compliance of certain provisions of U.P. Gangsters and Anti Social Activities (Prevention) Rules, 2021. The due procedure for approval of the gang chart has not been followed. No proper scrutiny has been made before recommending and forwarding the Gang Chart. Apart from the aforesaid contention, it has been submitted that the joint meeting did not take place.

4. Per contra, learned A.G.A. for the State has refuted the aforesaid submissions on the ground that the petitioner is an active member of the gang and has been roped on the basis of charge sheet prepared in two base cases:-

(i) Case Crime No. 606 of 2022, under Sections 147, 323, 504, 506, 427, 455, 307 IPC, Police Station Ramgarh Tal, District Gorakhpur, vide charge sheet dated 04.01.2023.

(ii) Case Crime No.621 of 2022, under Sections 193, 420, 120-B IPC, Police Station Ramgarh Tal, District Gorakhpur, vide charge sheet dated 06.01.2023.

5. It has been emphasized that Rule 16 of the U.P. Gangsters and Anti Social Activities (Prevention) Rules, 2021 in its general application provides for taking quick forwarding action by the Police Officers while recommending and forwarding the gang-chart. Apart from above, it is relevant to quote Rule 16(3) of the aforesaid Rules, which reads as follows:-

"Rule 16.....

(3):- Resolution of the Commissioner of Police/District Magistrate:- When the gang-chart is sent to the Commissioner of Police/District Magistrate along with all the Forms, all the facts will also be thoroughly perused by the Commissioner of Police/District Magistrate and when he is satisfied that the basis of action exists in the case, then he will approve the gang-chart stating therein that: "I duly perused the gang-chart and attached Forms in the light of the evidence attached with the gang-chart satisfactory grounds exist for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. The gang chart is approved accordingly."

It is noteworthy that the words written above are only illustrative. There is no compulsion to write the same verbatim but it is necessary that the meaning of approval should be the same as the recommendations written above, and it should also be clear from the note of approval marked."

6. Thus, from the perusal of the gang-chart dated 20.02.2023, it is apparent that the recommending Police Officers as well as concerned District Magistrate were unanimous. Their implied concurrence as clear from the fact that they had recommended and forwarded the gang chart for approval on the very same date itself as a quick forwarding action. Besides, there is no basis for the submission of counsel for petitioner that no joint meeting was in fact held at the time approval was accorded to the gang-chart. Merely because the approving authority has approved the gang-chart subsequently, it cannot be assumed that no joint meeting took place,

specially when the bald statement made in the petition stands denied by learned A.G.A., on the basis of instructions received by him.

7. The petitioner being an active member of the gang has indulged in several anti social activities. Thus, non-compliance of the provisions of the U.P. Gangsters and Anti Social Activities (Prevention) Rules, 2021, as contended by counsel for the petitioner, has no basis.

8. Where the gang-chart is recommended and forwarded for approval without unnecessary delay, it cannot be deduced that the provisions of the U.P. Gangsters and Anti Social Activities (Prevention) Rules, 2021 have not been complied.

9. The main purpose for implementing the said Rules is to provide transparent procedure to punish the Gangsters and to establish an efficient machinery to prevent anti social activities.

10. In view of the aforesaid facts and circumstances, the allegations in the FIR disclose a commission of cognizable offence.

11. No interference is required. The writ petition is, therefore, ***dismissed***.

(2023) 6 ILRA 947
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Crl. Misc. Writ Petition No. 18302 of 2022

Dilip Kumar Singh @ Deepu Singh ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Arvind Kumar Upadhyay

Counsel for the Respondents:
G.A., Dharmveer Singh

Criminal Law –Indian Penal Code, 1860 - Sections 419, 420, 467, 468, 471 & 409 - Writ petition- quashing of the FIR lodged under - civil litigation already sub-judice before the Provident Fund Commissioner, Varanasi- criminal prosecution cannot be thwarted merely because civil proceedings are also maintainable- criminal prosecution can still proceed against the petitioner-Petition dismissed.

HELD:
Considering the aforesaid facts, it cannot be denied that there is no express bar to the simultaneous continuance of a criminal proceeding as well as civil proceedings. Citing the decision rendered by Hon'ble Supreme Court in (1999) 8 SCC 686 (Trisuns Chemical Industry Vs Rajesh Agarwal & ors.). It has been held that criminal prosecution cannot be thwarted merely because civil proceedings are also maintainable. Merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. Thus, even if the civil proceedings are subjudice before the Provident Fund Commissioner, Varanasi, the criminal prosecution can still proceed against the petitioner.

Petition dismissed. (E-14)

List of Cases cited:

Trisuns Chemical Industry Vs Rajesh Agarwal & ors., (1999) 8 SCC 686

(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 instant writ petition seeks quashing of the FIR dated 17.11.2022 giving rise to FIR No. 513 of 2022, under Sections 419, 420, 467, 468, 471, 409 IPC, Police Station- Kotwali Mau, District-Mau.

3. The main contention of learned counsel for the petitioner is that petitioner is the proprietor of M/s Singh Construction, Nizamuddinpura, Mau and was awarded work order as a contractor from theNagar Palika Parishad, Maunath Bhanjan, Mau for the purposes of cleaning 14 wards including Urban Poor settlements and slum areas from the period 01.04.2017 to 31.03.2018 for which about 275 Safai Karmcharis were employed.

4. It has further been contended that the petitioner has been falsely implicated with the mala fide intention. Adding to the above, it has been contended that the civil litigation is already sub-judice before the Provident Fund Commissioner, Varanasi.

5. *Per contra*, learned AGA for the State has opposed the aforesaid submissions and has stated that the petitioner has not deposited the provident fund amount of Safai Karmcharis and has produced fake copies of challans/receipts, resulting in embezzlement of EPF amount of Rs. 285 employees.

6. Considering the aforesaid facts, it cannot be denied that there is no express bar to the simultaneous continuance of a criminal proceeding as well as civil proceedings. Citing the decision rendered by ***Hon'ble Supreme Court in (1999) 8 SCC 686 (Trisuns Chemical Industry Vs. Rajesh Agarwal & Others)***. It has been held that criminal prosecution cannot be thwarted merely because civil proceedings are also maintainable. Merely because an act has a civil profile is not sufficient to denude it of its criminal outfit.

7. Thus, even if the civil proceedings are subjudice before the Provident Fund Commissioner, Varanasi, the criminal prosecution can still proceed against the petitioner.

8. Having considered the submissions advanced by learned counsel for the parties and from the perusal of records, it is apparent that the allegations in the FIR do constitute ingredients of a cognizable offence.

9. No interference is required.

10. The writ petition is, therefore, dismissed.

(2023) 6 ILRA 948
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2023

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS BUDHWAR, J.

Special Appeal No. 234 of 2023

Vinod Kumar & Anr. ...Appellants
Versus
Sri Veer Bahadur Yadav & Anr. ...Respondents

Counsel for the Appellants:
Sri Shashi Kant

Counsel for the Respondents:

Civil Law – The Contempt of Courts Act, 1926 - The Contempt of Courts Act, 1971- Sections 12 & 19-maintainability of special appeal-against the order of single

judge declining to initiate contempt proceedings-historical evolution of law of contempt- -The Contempt of Courts (Amendment) Act, 1937-The Contempt of Courts Act, 1952-Sanyal Committee submitted its report on 28.02.1963-Contempt of Courts Bill, 1963-the Contempt of Courts Act, 1971- Sections 12 and 19-appeal- Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952- Special Appeal against the order of single judge-various judicial pronouncements- intra-court special appeal-against single judge order declining to initiate contempt proceedings-not maintainable-special appeal dismissed. (Paras 12, 15, 25, 26 and 33)

HELD:

A perusal of Section 19 of the Contempt of Courts Act of 1971 reveals that under sub-section (1) of Section 19 of 1971 Act, an appeal shall lie as of right from any order or decision of a High Court in the exercise of its jurisdiction to punish for contempt where the order or decision is that of a single judge, to a Bench of not less than two Judges of the Court and where the order or decision is that of a Bench to the Supreme Court. (Para 12)

Chapter VIII Rule 5 of the Rules of the Court provides that an appeal shall lie to the Court from a judgment not being a judgment passed in exercise of appellate jurisdiction in respect of a decree or order made by the Court subject to the superintendence of the Court and not being an order made in exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award of a Tribunal, Court or Statutory Arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or any Central Act with respect to any of the matters enumerated in the St. List or the Concurrent List in the 7th Schedule of the Constitution or of a Government, any officer or authority made or purported to be made in exercise or purported exercise of appellate or revisional jurisdiction under such Act of one Judge. (Para 15)

The proposition of law so culled out in the above noted decision clearly spells out that no appeal is maintainable against dropping of contempt proceedings against the contemnor under Section 19 of the Contempt of Courts Act, 1971, as the remedy lies under Article 136 of the Constitution of India before the Hon'ble Supreme Court. (Para 25)

So far as the issue with regard to maintainability of a Special Appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules is concerned, an appeal is maintainable only on those contingencies wherein the Contempt jurisdiction has been exercised while touching the merit of the controvercy or dispute between the parties for the purposes of implementation of the judgment or order and the same has been held to be deemed to have been issued in exercise of power conferred by Article 226 of the Constitution. (Para 26)

As noticed above, the Hon'ble Apex Court and this Court has consistently held that an intra-court appeal is not maintainable against the order of the learned Single Judge exercising contempt jurisdiction in a contingency, when the contempt proceedings are not being initiated. The reliance placed upon the judgment in the case of Durga Nagpal (supra) is misconceived and misplaced as in the said case, the Hon'ble Judges while exercising appellate jurisdiction were confronted with the situation where the contempt court reviewed its own order after entertaining miscellaneous application for modification of the final judgment. The Division Bench opined that when accused are discharged and proceedings are closed, miscellaneous application for modification is not maintainable. In the said perspective, the Special Appeal was held to be maintainable. Since the present case originates from a judgment and order of the contempt court declining to exercise contempt jurisdiction, thus, the said judgment is of no aid to the appellants. (Para 33)

Appeal dismissed. (E-14)

List of Cases cited:

1. Durga Nagpal Vs Committee of Management, Patronage Institute of Management Studies, reported in 2013 (7) ADJ 223

2. Baradakant Mishra Vs Justice Gatikrushna Misra reported in (1975) 3 SCC 535

3. Bombay High Court held in Narendrabhai Sarabhai Hatheesing Vs Chinubhai Manibhai Seth ILR 60 Bom 894

4. D.N. Taneja Vs Bhajan Lal reported in 1988 (3) SCC 26

5. St. of Maharashtra Vs Mahboob S. Allibhoy & anr. reported in (1996) 4 SCC 411

6. Sujitendra Nath Singh Roy Vs St. of West Bengal & ors. reported in (2015) 12 SCC 514

7. A.P. Verma Vs U.P. Laboratory Technicians Association & ors., in C.M. Contempt Appeal No. 102 of 1997, reported in Manu/UP/0553/1998

8. Maheshwari Prasad Mishra Vs Smt. Achala Khanna reported in (2006) 64 ALR 627 (All)

9. Mrs. Manju Sree Robinson Vs Mrs. Chirkumarithva Yadav ACJ (J.D.) reported in (2014) 86 ACC 181

10. Sheo Charan Vs Nawal & ors., 1997(3) A.W.C. 1909

11. Hemendra Swaroop Bhatnagar Vs Sri P.S. Gosain reported in 2007 (1) AWC 1045

12. Ashwani Kumar Vs Mahendra Pratap Singh in Special Appeal No. 400 of 2021

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This intra-court appeal is against the judgment and order dated 17.03.2023 passed by the learned Single Judge exercising contempt jurisdiction in Contempt Application (Civil) No.1894 of 2023, by which the learned Single Judge upon finding that the opposite party has not committed contempt, has declined to initiate proceedings for contempt.

2. The case of the writ petitioner before the Contempt Court was that on 07.09.2022 in Public Interest Litigation (PIL) No. 1686 of 2022 (Vinod Kumar Gupta and others vs. State of U.P. and 3 others), liberty was accorded to the appellant-petitioner to approach the appropriate forum under Section 67 of the U.P. Revenue Code, 2006 for removal of encroachments on the public land, however, despite the fact that the appellant-writ petitioner represented his cause before the competent authority on 21.09.2022, 01.10.2022 and 15.02.2023, no action was taken at the level of the opposite parties, which occasioned the appellant-writ petitioner to institute contempt petition alleging disobedience of the orders of the Writ-Court.

3. Submission is that a clear cut case of contempt is made out against the opposite parties, but the learned Single Judge has erred in law in decling to exercise its jurisdiction vested under Section 12 of the Contempt of Courts Act, 1971.

4. The appellant-writ petitioner has relied upon the judgment in the case of ***Durga Nagpal Vs. Committee of Management, Patronage Institute of Management Studies***, reported in ***2013 (7) ADJ 223,*** so as to contend that the present intra-court appeal against the order of learned Single Judge declining to initiate contempt proceedings, is maintainable.

5. Before delving into the issue regarding the maintainability of the present proceedings at the behest of the appellant, this Court finds appropriate to give a brief outline of the statutory enactments governing law of contempt.

6. Historically, Pre-Independence, **the Contempt of Courts Act, 1926 (Act No.**

XII of 1926), was notified on 8.3.1926 by the Governor General of the Council. The Contempt of Courts Act, 1926 is extracted in extenso:

"The Contempt of Courts Act, 1926
ACT NO. XII OF 1926
[8th March, 1926]

An Act to define and limit the powers of certain Courts in punishing contempts of Courts.

WHEREAS doubts have arisen as to the powers of a High Court of Judicature to punish contempts of subordinate Courts:

And whereas it is expedient to resolve these doubts and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of Courts. It is hereby enacted as follows:

1. (1) This Act may be called the Contempt of Courts Act, 1926.

(2) It shall extend to the whole of British India.

(3) It shall come into force on such date as the Governor General in Council may, by notification in the Gazette of India, appoint.

2. (1) Subject to the provisions of sub-section (3), the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of courts sub-ordinate to them as they have and exercise in respect of contempts of themselves.

(2) Subject to the provisions of sub-section (3), a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of itself as a High Court referred to in sub-section (1).

(3) No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.

3. Save as otherwise expressly provided by any law for the time being in force, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine, which may extend to two thousand rupees, or with both:

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court."

7. Thereafter the Governor General on 10.3.1937 amended the Contempt of Courts Act, 1926 by virtue of Act No. XII of 1937 being **the Contempt of Courts (Amendment) Act, 1937**. For the convenience of this Court, the same is quoted hereinbelow:

"The Contempt of Courts
(Amendment) Act, 1937*
ACT NO. XII OF 1937

An Act to amend the Contempt of Courts Act, 1926, for a certain purpose. WHEREAS it is expedient to amend the Contempt of Courts Act, 1926, for the purpose hereinafter appearing; it is hereby enacted as follows:

1. Short title. This Act may be called the Contempt of Courts Amendment Act, 1937.

2. Amendment of preamble to Act XII of 1926. In the preamble to the Contempt of Courts Act, 1926 (hereinafter referred to as the said Act), the word "subordinate" shall be omitted.

3. Amendment of section 3, Act XII of 1926. To section 3 of the said Act the following proviso shall be added, namely:

"Provided further that notwithstanding anything elsewhere contained in any law no High Court shall impose a sentence in excess of that specified in this section for any contempt either in respect of itself or of a Court subordinate to it."

8. Post Independence, another Act by the name and the nomenclature of the Contempt of Courts Act, 1952 (Act No. XXXII), 1952 was notified which received the assent of President on 14.3.1952. The same reads as under: -

"The Contempt of Courts Act, 1952*
ACT NO. XXXII OF 1952

An Act to define and limit the powers of certain Courts in punishing Contempts of Courts:

1. Short title and extent. (i) This Act may be called the Contempt of Courts Act, 1952.

(ii) It extends to the whole of India except the State of Jammu and Kashmir. 2. Definition. In this Act, "High Court" means the High Court for a State and includes the Court of the Judicial Commissioner in a Union Territory.

3. Power of High Court to punish contempts of subordinate courts. (i) Subject to the provisions of sub-section (ii) every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to it as it has and exercise in respect of contempts of itself.

(ii) No High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (Act XLV of 1860).

4. Limit of punishment for contempt of court. Save as otherwise expressly provided by any law for the time being in force, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both:

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court:

Provided further that notwithstanding anything elsewhere contained in any law for the time being in force, no High Court shall impose a sentence in excess of that specified in this section for any contempt either in respect of itself or of a court subordinate to it.

**Received the assent of the President on 14th March 1952*

5. Power of High Court to try offences committed or offenders found outside jurisdiction. A High Court shall have jurisdiction to inquire into or try a contempt of itself or of any court subordinate to it whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction and whether the person alleged to be guilty of the contempt is within or outside such limits.

6. Repeal and Savings. (i) The Contempt of Courts Act, 1926 (XII of 1926), and the enactment specified in the Schedule are hereby repealed.

(ii) Section 6 of the General Clauses Act, 1897 (X of 1897), shall apply to the repeal of any of the laws specified in the Schedule as it applies to the repeal of the Contempt of Courts Act, 1926 (XII of 1926).

The Schedule

[Repealed]."

9. As there was certain areas, which were not covered under Contempt of Courts Act, 1952, thus a Sanyal Committee was constituted which in turn submitted its report on 28.2.1963 proposing certain amendments and additions in the Contempt of Courts Act. The Sanyal Committee under Chapter XI for the very first time recommended introduction of a provision of "right of appeal". For the convenience, Chapter XI and XII in extenso are quoted hereinunder:

"Chapter XI
Right of Appeal

1. The feature of the law of contempt which has given rise to considerable criticism relates to the non-appealability as of right of a sentence passed for criminal contempt. It is urged that much of the criticism against the large powers of the court to punish contemners will disappear if a right of appeal is provided. In an earlier Chapter, we have pointed out how Judges, like other human beings, are not infallible and inasmuch as any sentence of imprisonment for contempt involves a fundamental question of a personal liberty, it is only proper that there should be provision for appeal as a matter of course. As the Shawcross Committee observed: "..... in every system of law of any civilized State there is always a right of appeal against sentence of imprisonment." There is no justification whatsoever for making any exception to this universally recognized principle in the case of sentences for contempt.

2.1 The present state of the law relating to appeal in cases of criminal contempt appears to be more the result of accidents of legal history than a matte of policy. That this is so, is clearly evident from the fact that in these cases of contempt for which specific provision is made in the Indian Penal Code and the Code of Criminal Procedure, a right of appeal is provided for under Section 486 of the Code of Criminal Procedure. In the case of contempt falling within the purview of inherent powers of the High Courts no specific provision has been made in the Letters Patent of the High Courts and the only explanation for this seems to be that no such provision was made in England in regard to the English superior courts. Further, under the provisions of the Letters patent, no appeal is ordinarily permissible where the order of the court is made in the exercise of the criminal jurisdiction. It has also been held that section 411-A of Code of Criminal Procedure does not afford any remedy by way of appeal in contempt cases. 2 The result has been that before the Constitution came into force, an appeal in contempt cases from the decision of a High Court could lie only on special cases to the Judicial Committee. 3 The Constitution did not alter this position very much for the effect of Articles 134 an 136 of the Constitution is merely to substitute the Supreme Court for the Privy Council. In short, there is only a discretionary right of appeal available at present in cases of criminal contempt.

2.2 The discretionary right of appeal in contempt cases so far as it goes has served a very useful purpose both in the direction of setting aside erroneous decisions as also in the direction of bringing about some degree of uniformity and certainty in regard to the principles of law relating to contempt. The Shawcross Committee has referred to eight reported cases in which convictions for criminal contempt were considered by the Judicial Committee of the Privy Council on merits,

those being the only cases of the type which thy could discover. They have pointed out that it is noteworthy that in every case except one (in which the fine was reduced), the appeal was allowed and the conviction quashed. The story of the cases which have come up on appeal before our Supreme Court is not very much different. In a considerable majority of the cases the Supreme Court has found it necessary either to modify or reverse the decision of the High Court. Mention may be made in this connection of the following:

(1) Rizwan-ul-Hasan v State of Uttar Pradesh, 1953 SCR 581

(Judgment of High Court set aside).

(2) Brahma Prakash v State of Uttar Pradesh, 1953 SCR 1169

(Judgment of High Court set aside).

(3) Shareef v Hon'ble Judges of the High Court of Nagpur, (1955) 1 SCR 757

(opportunity given to the High Court to accept the apology by contemners and on failure by the High Court, sentence of fine passed by the High Court set aside).

(4) State of Madhya Pradesh v Revashankar, 1959 SCR 1367

(High Court's interpretation of Section 3(2) of the Contempt of Courts Act, 1952, held erroneous).

(5) S.S. Roy v State of Orissa, AIR 1960 S.C. 190

(Judgment of High Court set aside).

(6) B.K. Kar v Chief Justice and his companion Justices of the Orissa High Court. A.I.R. 1961 S.C. 1367

(Judgment of High Court set aside).

3.1 It may be said that the discretionary right of appeal as it exists at present is adequate as in most of the cases the High Court itself may grant the appropriate certificate under Article 134 in fit cases and where the High Court refuses, the Supreme Court may intervene by granting special leave under Art. 136. There is, no doubt, some force in this argument and it is perhaps for this reason that in one or two of the suggestions received we have been told that it I not necessary to provide for appeals as a matter of right or that the right may be allowed only if the sentence exceeds a certain limit. But considering the uncertain state of the law and the fact that an appeal should be provided as a matter of course in all criminal cases, we are of the opinion that a right of appeal should be available in all cases and we accordingly recommend that against an order of a single judge, punishing for contempt, the appeal should lie, in the High Court to a Bench of Judges and against a similar order of a Bench of Judges of a High Court, the appeal should lie as of right to the Supreme Court.

3.2 The recommendation we have made in regard to allowing appeals in contempt matters as a matter of right will bring our law in line with the developments that have taken place in English law in recent years. We do not mean to suggest that we should give effect in our land to every change which has taken place in England. But there can be no doubt that if in the system from which our law is derived a change has been felt necessary, that would be a strong argument for reviewing the position in our law also with a view to finding out whether a parallel change is necessary or not. The reasons for which English law has been changed may be best stated in the words of the Shawcross Report [10]:

"First, there is the special difficulty of defining the law of contempt. We have indicated in this Report the difficulty of defining the law of contempt in its application to particular instances. Further, where definition is not so difficult (as in the case of reports of proceedings in

chambers) the fact that there is no right of appeals and the divergence of judicial views has sometimes meant that it cannot be said at all with any confidence what the law is; the result in any particular case must then depend on the view which the particular court before whom it comes chooses to take. Thus we consider to be a serious defect but one which can be cured by granting a right of appeal. Secondly, an issue of fact does not usually arise in contempt cases--the question being whether what was done amounted to a contempt or not. Thirdly, the danger to the administration of justice of the conduct complained of has often to be weighed against other matters of public concern such as the liberty of free discussion. Thus the issue of contempt is not only particularly suitable for determination by an appellate court, but it is particularly where an affront to a Judge is charged, the experience of the Privy Council appears to show that the right of appeal does rectify wrong."

It would be clear from what has been stated earlier that these reasons apply with equal force in the case of our system also and it is for these reasons that we have made the recommendation that a provision should be made for appeal as of right in the case of contempt.

3.3 The Shawcross Committee in its Report, adverted to an alleged insuperable difficulty about appeal in the case of a contempt committed in facie the court, namely that if the case were disputed it would involve the committing judge being a witness on appeal and pointed out that such a difficulty arises but rarely and that in the only case in which it arose-Rainy's case-the Privy Council was able to overcome it. Be that as it may, so far as our country is concerned such a situation cannot possibly arise after the decision of the Supreme Court in the recent case of ***B.K. Kar v Chief Justice of Orissa, AIR 1961 SC 1367.*** *In this case the Supreme Court considered the question whether in cases of appeals in contempt cases the Chief Justice and Judges of the High Court which decided the case originally should be made parties. Madholkar J., holding that they ought not to be made parties, observed:*

" ...Where judges of a High Court try a person for contempt and convict him they merely decide a matter and cannot be said to be interested in any way the ultimate result in the sense in which a litigant is interested. The decision of judges given in a contempt matter is like any other decision of those judges that is, in matters which come up before them by way of suit, petition, appeal or reference."

Once this position is established, it follows that the presence of the judges as witnesses is as much uncalled for in appeals in contempt cases as in appeals in other cases decided by them. We may also add that in view of the recommendation, we have made as to procedure in contempt cases, all the material required by an appellate court would be available in writing and there would then be little need for the judges being summoned to appear as witnesses.

4. Purge of contempt. *In this connection we would also like to refer to the rule of practice observed by Court that a person in contempt cannot be heard in prosecution of his appeal until he purges himself of the contempt. 13 This rule, no doubt, I based on sound reasons but in the light of the discussions preceding it would not be difficult to conceive that it may work hardship in many cases. In our opinion, the law should contain suitable provisions for meeting such a contingency. For this purpose, we recommend that both the appellate court and the court from whose*

judgment the appeal is being preferred should have the power to stay execution of the sentence to release the alleged contemner on bail and to hear the appeal or allow it to be heard, notwithstanding the fact the appellant has not purged himself of the contempt.

Chapter XII Conclusion

1. Our main conclusions and recommendations may be summarized as follows:--

(1) Confidence in the administration or justice is essential for the preservation of our liberty and nothing should be done which may tend to undermine that confidence.

(2) At the same time, as the jurisdiction to punish for contempt trenches upon two important fundamental rights, namely the right of personal liberty and freedom of speech and expression-rights which are of the vital importance in any democratic system the law of contempt of court should be viewed mainly from the standpoint of these rights rather than on the basis of its origin or its present position in other countries.

(3) The contempt of Courts Act, 1952, though sound so far as it goes, touches only the fringes of the subject. While its existing provisions should be continued, there is need for widening considerably the scope of the Act.

(4) Under the Constitution, Parliament is competent to legislate on contempt of courts subject only to the limitations that it cannot (i) abrogate, nullify or transfer to some other authority, the power of the superior courts to punish for contempt, (ii) exercise its power so as to stultify the status and dignity of the superior courts, and (iii) impose any unreasonable restrictions on the fundamental right of the citizen to freedom of speech and expression.

(5) Contempt cannot be defined except by enumerating the heads under which it may be classified-heads which can never be exhaustive-and a definition merely incorporating such heads under which criminal contempt or even contempt as a whole is generally classified, would be useless as a definition and is totally unnecessary.

(6) Delimitation of the concept of contempt by the exclusion of any particular head is not possible as none of the recognized heads become obsolete. The assumption once made that contempt by scandalizing has become obsolete has been proved to be erroneous.

(7) Want of knowledge of a pending proceeding, whether civil or criminal, should afford a complete defence to a person accused of contempt.

(8) The rule of contempt in relation to imminent proceedings may be abolished so far as civil cases are concerned. As regards criminal cases, want of knowledge should be a complete defence as in the case of pending proceedings. Further, where in respect of an offence, no arrest has taken place, a presumption should be drawn in favour of the alleged contemner, that proceedings are not imminent.

(9) A case which has reached the stage of execution shall not be deemed to be a pending case for the purpose of the law of contempt.

(10) An innocent distributor of a newspaper or other publication, that is to say, a person who had no reasonable ground for believing that a publication distributed by him contained any offending matter, shall not be guilty of contempt of court.

(11) The burden of establishing any of the defences aforesaid shall be on the alleged contemner.

(12) No contempt proceeding in respect of the publication of the text or a fair and accurate summary of the whole or any part of an order made by a court sitting in chambers or in camera shall not be competent unless the court has expressly prohibited the same in exercise of any power conferred by any enactment for the time being in force.

(13) Cases of contempt in violation of secrecy should be confined within clearly defined limits and secrecy may be enjoined with regard to judicial proceedings only in exceptional cases mentioned in paragraph 51 of Chapter VIII. Contempt proceedings in relation to cases of secrecy should be initiated only when no other punishment is prescribed.

(14) Some of the existing defences open to an alleged contemner may be given express statutory recognition. These are:

(i) that a person shall not be guilty of contempt for publishing a fair and accurate report of a judicial proceeding or any stage thereof;

(ii) that a person shall not be guilty of contempt for publishing any fair comments on the merit of any case which has been heard and finally decided or on the conduct of any judge, if it be for the public good, the question of public good being in each case a question of fact;

(iii) that a person shall not be guilty of contempt in respect of any statement made by him in good faith concerning the presiding officer of any court subordinate to a High Court, say, to the Chief Justice of that High Court.

(15) As a matter of caution, it may be provided that the provisions recommended for inclusion in the Bill shall not be construed as in any way enlarging the scope of contempt as otherwise understood or as affecting any other defence which may be open to an alleged contemner.

(16) The general rule of procedure applicable in contempt cases should be formulated clearly.

(17) In the case of contempts committed in the face of the court, the present summary powers of court have to be continued and a simple procedure consisting of oral appraisal of the charge to the contemner, the giving of an opportunity to him, to make his defence and provisions as to bail and custody, on the lines suggested in paragraph 4 of Chapter X may be adopted.

(18) Applications for transfer of proceedings for contempt committed in the face of the court may be entertained by the judge in whose presence the contempt is committed and if he feels that in the interests of proper administration of justice the application should be allowed, and that it is practicable to do so, he should cause the matter to be placed before the Chief Justice for his directions.

(19) A criminal contempt (other than a contempt committed in the face of the court) should be heard only by a Bench of not less than two judges except in cases where the court consists of one judge, e.g., Court of the Judicial Commissioner. That contempt may be taken cognizance of only on a motion or on a reference made by some other agency. That is to say, in the case of the Supreme Court, the motion may be mad by the Attorney-General or a person authorized by him, and, in case of High Court by the Advocate-General or a person authorized by him. Such motion may be either on the initiative of the Attorney-General or the Advocate General, as the case may be, or at the instance of the court concerned. Where the contempt is that of a subordinate court, action may be taken on a reference made by that court.

(20) The motion or reference should specify the act constituting the contempt

and the law should embody provisions as to service of notice of the proceedings and as to the defence of the person charged on the lines indicated in paragraph 6 of Chapter X.

(21) A provision may be made that no court shall punish anyone for contempt unless the contempt is of such a nature as substantially to interfere with the due course of justice.

(22) The provisions of the Contempt of Courts Act, 1952, as to punishment and apology may be continued but it may be made clear that in cases of civil contempt, where fine is not an adequate punishment, the punishment of simple imprisonment to be awarded should consist of detention in a civil prison for a term not exceeding the prescribed statutory period.

(23) It may also be provided that in cases where the person found guilty of contempt in respect of any undertaking given to a court is a corporation, the punishment may be enforced, with the leave of the court, by the detention in a civil prison of the directors or principal officer of the corporation.

(24) Every order of punishment for contempt shall state the facts consisting the contempt, the defence of the person charged, the substance of the evidence taken, if any, as well as the finding and the punishment awarded.

(25) Provision may be made for an appeal as of right from any order or decision of a High Court in the exercise of its jurisdiction to punish for contempt. The appeal should lie to a Bench of Judges of the High Court where the order or decision is of a single Judge. Where the order or decision is of a Bench the appeal should lie to the Supreme Court.

(26) The rule of practice as to 'purge' of contempt may work hardship in many cases and, therefore, both the appellate court and the court from whose judgment or order an appeal is being preferred should have the power to stay execution of the sentence, to release the alleged contemner on bail and to hear the appeal or allow it to be heard, notwithstanding the fact that the appellant has not purged himself of the contempt.

(27) The Supreme Court may, in the interest of uniformity, be conferred power to make rules to supplement, where necessary, the rules of procedure recommended by us. It may also be provided that the Supreme Court may make rules in relation to High Courts only after consulting the High Courts."

10. Consequently, the Contempt of Court Bill 1963 containing the heading "**A BILL TO DEFINE AND LIMIT THE POWERS OF CERTAIN COURTS IN PUNISHING CONTEMPT OF COURTS AND TO REGULATE THEIR PROCEDURE IN RELATION THERETO**" was placed before the Appropriate Legislature. Paragraphs 19 and 20 of the said Bill are quoted hereinunder:

"19. Appeals. (1) An appeal shall lie as of right from any order or decision of a High Court in the exercise of its jurisdiction to punish for contempt-

(a) where the order or decision is that of single Judge, to a Bench of not less than two Judges of the Court;

(b) where the order or decision is that of a Bench, to the Supreme Court.

(2) Pending any appeal, the appellate Court may order that-

(a) the execution of the punishment or order appealed against be suspended;

(b) if the appellant is in confinement, he be relased on bail, and

(c) the appeal be heard notwithstanding that the appellant ha not purged himself of the contempt.

(3) Where any person aggrieved by any order against which an appeal may be filed satisfies the High Court that he intends to prefer an appeal, the High Court may also exercise all or any of the powers conferred by in sub-section (2).

(4) An appeal under sub-section (1) shall be filed:

a) in the case of an appeal to a Bench of the High Court, within twenty days; and

(b) in the case of an appeal to the Supreme Court, within a period of sixty days;

from the date of the order appealed against.

20. Punishment how to be carried in certain cases. *(1) Notwithstanding anything contained in Section 12, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary, shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period, not exceeding six months, as it may think fit.*

(2) Where the person found guilty of contempt of court in respect of any undertaking given to a Court is a Corporation, the punishment may be enforced with the leave of the Court, by the detention in civil prison of the Directors or principal officers of the Corporation."

11. Eventually the Contempt of Courts Act, 1971 being Act No. 70 of 1971 came to be notified on 24.12.1971. Relevant extract of Section 19 of the Contempt of Courts Act, 1971 is quoted hereinunder:

"19. ***Appeals****. (1) An appeal shall lie as of right from any order or decision of a High Court in the exercise of its jurisdiction to punish for contempt*

(a) where the order or decision is that of a single judge, to a Bench of not less than two Judges of the Court;

(b) where the order or decision is that of a Bench, to the (2) Pending any appeal, the appellate Court may order that

Supreme Court: Provided that where the order or decision is that of the Court of the Judicial Commissioner in any Union territory, such appeal shall lie to the Supreme Court.

(a) the execution of the punishment or order appealed against be suspended;

(b) if the appellant is in confinement, he be released on bail; and (c) the appeal be heard notwithstanding that the appellant has not purged his contempt.

(3) Where any person aggrieved by any order against which an appeal may be filed satisfies the High Court that he intends to prefer an appeal, the High Court may also exercise all or any of the powers conferred by sub-section (2).

(4) An appeal under sub-section (1) shall be filed - (a) in the case of an appeal to a Bench of the High Court, within thirty days; (b) in the case of an appeal to the Supreme Court, within sixty days, from the date of the order appealed against."

12. A perusal of Section 19 of the Contempt of Courts Act of 1971 reveals that under sub-section (1) of Section 19 of 1971 Act, an appeal shall lie as of right from any order or decision of a High Court in the exercise of its jurisdiction to punish for contempt where the order or decision is that of a single judge, to a Bench of not less than two Judges of the Court and where the order or decision is that of a Bench to the Supreme Court.

13. Notably, for the very first time, the provision of preferring of an appeal stood engranted in the Contempt of Courts Act 1971 as prior to it, there was no provision of filing of an appeal.

14. Apart from the same, Chapter VIII Rule 5 of the Rules of the Court deals with Special Appeals and provides as under: -

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

15. Chapter VIII Rule 5 of the Rules of the Court provides that an appeal shall lie to the Court from a judgment not being a judgment passed in exercise of appellate jurisdiction in respect of a decree or order made by the Court subject to the superintendence of the Court and not being an order made in exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award of a Tribunal, Court or Statutory Arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or any Central Act with respect to any of the matters enumerated in the State List or the Concurrent List in the 7th Schedule of the Constitution or of a Govenrment, any officer or authority made or purported to be made in exercise or purported exercise of appellate or revisional jurisdiction under such Act of one Judge.

16. Before proceeding further, this Court is to examine the authoritative pronouncement of Hon'ble Supreme Court and this Court on the said subject.

17. To start with, it would be appropriate to refer to the judgment of Hon'ble Supreme Court in the case of ***Baradakant Mishra vs. Justice Gatikrushna Misra*** **reported in (1975) 3 SCC 535**. In paragraph 5 whereof it is held as under:

"5. Now, while considering this question, we must bear in mind the true nature of the contempt jurisdiction exercised by the High Court and the law in regard to right of appeal which obtained immediately prior to the enactment of the Contempt of Courts Act, 1971. It has always been regarded as well-settled law that as far as criminal contempt is concerned, it is a matter entirely between the Court and the alleged contemner. No one has a statutory or common law right to say that he is entitled as a matter of course

to an order for committal because the alleged contemner is guilty of contempt. All that he can do is to move the Court and draw its attention to the contempt alleged to have been committed and it will then be for the Court, if it so thinks fit, to take action to vindicate its authority and commit the alleged contemner for contempt. It is for the Court in the exercise of its discretion to decide whether or not to initiate a proceeding for contempt. Even if the Court is prima facie satisfied that a contempt has been committed, the Court may yet choose to ignore it and decline to take action. There is no right in any one to compel the Court to initiate a proceeding for contempt even where a prima facie case appears to have been made out. The same position obtains even after a proceeding for contempt is initiated by the Court on a motion made to it for the purpose. The Court may in the exercise of its discretion accept an unconditional apology from the alleged contemner and drop the proceeding for contempt, or, even after the alleged contemner is found guilty, the Court may, having regard to the circumstances, decline to punish him. So far as the contempt jurisdiction is concerned, the only actors in the drama are the Court and the alleged contemner. An outside party comes in only by way of drawing the attention of the Court to the contempt which has been committed: he does not become a part to the proceeding for contempt which may be initiated by the Court. It was for this reason that a Division Bench of the ***Bombay High Court held in Narendrabhai Sarabhai Hatheesing v. Chinubhai Manibhai Seth ILR 60 Bom 894*** *that an order made by the High Court refusing to commit a man for breach of an undertaking given to the Court is not a judgment within the meaning of clause 15 of the letters patent as it does not affect the merits of any question between the parties to the suit. Beaumont, C.J, pointed out: The undertaking is given to the Court; if it is broken, and that fact is brought to the Court's notice, the Court may take such action as it thinks fit. If it comes to the conclusion that the order has been deliberately broken, it will probably commit the defaulter to jail, but the Court is free to adopt such course as it thinks fit.*

Rangnekar, J., also spoke in the same strain when he said:

"Proceedings for contempt are matters entirely between the Court and the person alleged to have been guilty of contempt. No party has any statutory right to say that he is entitled as a matter of course to an order for committal because his opponent is guilty of contempt. All that he can do is to come to the Court and complain that the authority of the Court has been flouted, and if the Court thinks that it was so, then the Court in its discretion takes action to vindicate its authority. It is, therefore, difficult to see how an application for contempt raises any question between the parties, so that any order made on such an application by which the Court in its discretion refuses to take any action against the party alleged to be in the wrong can be said to raise any question between the parties. "

It is, therefore, clear that under the law as it stood prior to the enactment of the Contempt of Courts Act, 1971 no appeal lay at the instance of a party moving the High Court for taking action for contempt, if the High Court in the exercise of its discretion refused to take action on the motion of such party. Even if the High Court took action and initiated a proceeding for contempt and in such proceeding, the alleged contemner, being found guilty, was punished for contempt, the order being one made by the High Court in the exercise of its criminal

jurisdiction, was not appealable under clause 15 of the letters patent, and therefore, no appeal lay against it from a Single Judge to a Division Bench and equally, there was no appeal as of right from a Division Bench to this Court. The result was that in cases of criminal contempt, even a person punished for contempt had no right of appeal and he could impugn the order committing him for contempt only if the High Court granted the appropriate certificate under Article 134 in fit cases or on the refusal of the High Court to do so, this Court intervened by granting special leave under Article 136."

18. In the case of ***D.N. Taneja vs. Bhajan Lal*** reported in **1988 (3) SCC 26,** the Hon'ble Apex Court has held as under:

"8. The right of appeal will be available under sub-section (1) of section 19 only against any decision or order of a High Court passed in the exercise of its jurisdiction to punish for contempt. In this connection, it is pertinent to refer to the provision of Article 215 of the Constitution which provides that every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Article 215 confers on the High Court the power to punish for contempt of itself. In other words, the High Court derives its jurisdiction to punish for contempt from Article 215 of the Constitution. As has been noticed earlier, an appeal will lie under section 19(1) of the Act only when the High Court makes an order or decision in exercise of its jurisdiction to punish for contempt. It is submitted on behalf of the respondent and, in our opinion rightly, that the High Court exercises its jurisdiction or power as conferred on it by Article 215 of the Constitution when it imposes a punishment for contempt. When the High Court does not impose any punishment on the alleged contemnor, the High Court does not exercise its jurisdiction or power to punish for contempt. The jurisdiction of the High Court is to punish. When no punishment is imposed by the High Court, it is difficult to say that the High Court has exercised its jurisdiction or power as conferred on it by Article 215 of the Constitution.

9…

10.…

11. It does not, however, mean that when the High Court erroneously acquits a contemnor guilty of criminal contempt, the petitioner who is interested in maintaining the dignity of the court will not be without any remedy. Even though no appeal is maintainable under section 19(1) of the Act, the petitioner in such a case can move this Court under Article 136 of the Constitution. Therefore, the contention, as advanced on behalf of the appellant, that there would be no remedy against the erroneous or perverse decision of the High Court in not exercising its jurisdiction to punish for contempt, is not correct. But, in such a case there would be no right of appeal under section 19(1), as there is no exercise of jurisdiction or power by the High Court to punish for contempt. The view which we take finds support from a decision of this Court in Paradakanta Mishra v. Mr. Justice Gatikrushna Mishra, [1975] 1 SCR 524.

12. Right of appeal is a creature of the statute and the question whether there is a right of appeal or not will have to be considered on an interpretation of the provision of the statute and not on the ground of porpriety or any other consideration. In this connection, it may be noticed that there was no right of appeal under the Contempt of Courts Act, 1952. It

is for the first time that under section 19(1) of the Act, a right of appeal has been provided for. A contempt is a matter between the court and the alleged contemnor. Any person who moves the machinery of the court for contempt only brings to the notice of the court certain facts constituting contempt of court. After furnishing such information he may still assist the court, but it must always be borne in mind that in a contempt proceeding there are only two parties, namely, the court and the contemnor. It may be one of the reasons which weighed with the Legislature in not conferring any right of appeal on the petitioner for contempt. The aggrieved party under section 19(1) can only be the contemnor who has been punished for contempt of court."

19. The Hon'ble Apex Court in the decision of ***State of Maharashtra vs. Mahboob S. Allibhoy and another*** reported in ***(1996) 4 SCC 411***, in paragraphs 3 has held as under:

"3. The preliminary question which has to be examined as to whether in the facts and circumstances of the case an appeal is maintainable against an order dropping the proceeding for contempt. It is well settled that an appeal is a creature of a statute. Unless a statute provides for an appeal and specifies the order against which an appeal can be filed, no appeal can be filed or entertained as a matter of right or course.

On a plain reading Section 19 provides that an appeal shall lie as of right from any order or decision of the High Court in exercise of its jurisdiction to punish for contempt. In other words, if the High Court passes an order in exercise of its jurisdiction to punish any person for contempt of court, then only an appeal shall be maintainable under subsection (1) of Section 19 of the Act. As sub-section (1) of Section 19 provides that an appeal shall lie as of right from any order, an impression is created that an appeal has been provided under the said sub-section against any order passed by the High Court while exercising the jurisdiction of contempt proceedings. The words 'any order' has to be read with the expression 'decision' used in said sub-section which the High Court passes in exercise of its jurisdiction to punish for contempt. 'Any order' is not independent of the expression 'decision'. They have been put in an alternative form saying 'order' or 'decision'. In either case, it must be in the nature of punishment for contempt. If the expression 'any order' is read independently of the 'decision' then an appeal shall lie under sub-section (1) of Section 19 even against any interlocutory order passed in a proceeding for contempt by the High Court which shall lead to a ridiculous result.

4. It is well known that contempt proceeding is not a dispute between two parties, the proceeding is primarily between the court and the person person who who is alleged to have committed the contempt of court. The informs the court or brings to the notice of the court that anyone has committed the contempt of such court is not in the position of a prosecutor, he is simply assisting the court so that the dignity and the majesty of the court is maintained and upheld. It is for the court, which initiates the proceeding to decide whether the person against whom such proceeding has been initiated should be punished or discharged taking into consideration the facts and circumstances of the particular case.

No appeal is maintainable against an order dropping proceeding for contempt or

refusing to initiate a proceeding for contempt is apparent not only from sub section (1) of Section 19 but also from sub-section (2) of Section 19 which provides that pending any appeal the appellate Court may order that

(a) the execution of the punishment or the order appealed against be suspended;

(b) if the appellant is in confinement, he be released on bail; and

(c) the appeal be heard notwithstanding that the appellant has not purged his contempt.

Sub-section (2) of Section 19 indicates that the reliefs provided under clauses (a) to (c) can be claimed at the instance of the person who has been proceeded against for contempt of court.

5. But even if no appeal is maintainable on behalf of the person at whose instance a proceeding for contempt had been initiated and later dropped or whose petition for initiating contempt proceedings has been dismissed, is not without any remedy. In appropriate cases be can invoke the jurisdiction of this Court under Article 136 of the Constitution and this Court on being satisfied that it was a fit case where proceeding for contempt should have been initiated, can set aside the order passed by the High Court. In suitable cases, this Court has to exercise its jurisdiction under Article 136 of the Constitution in the larger interest of the administration of Justice."

20. Yet the Hon'ble Apex Court, in the decision in ***Midnapore Peoples' Cooperative Bank Ltd.*** (supra), had taken note of the earlier decisions and culled out the principles of law governing the maintainability of appeals under Section 9 of the Contempt of Courts Act. Paragraph 11 whereof is quoted hereinunder:

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

I. An appeal under section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

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

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

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

contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases)."

21. In a decision in the case of ***Sujitendra Nath Singh Roy vs. State of West Bengal and others*** reported in **(2015) 12 SCC 514**, the Hon'ble Apex Court while considering the earlier judgment in paragraph-5 has observed as under: -

"5. There is no caveat to the proposition of law that under Section 19 of the Contempt of Courts Act, 1971 an appeal lies before the Supreme Court only against such order of the High Court which imposes punishment for contempt and no appeal will lie against an interlocutory order or an order dropping or refusing to initiate contempt proceedings. This was clearly laid down in the case of State of Maharashtra v. Mahboob S. Allibhoy (1996) 4 SCC. This view was also followed in several cases including in the case of Midnapore Peoples' Coop. Bank Ltd. v. Chunilal Nanda (2006) 5 SCC 399."

22. This Court in the case of **A.P. Verma vs. U.P. Laboratory Technicians Association and others,** in **C.M. Contempt Appeal No. 102 fo 1997, reported in Manu/UP/0553/1998**, in paragraph 3 has held as under: -

"The same view was taken in Pursottam Dass v. B. S. Dhillan, AIR 1978 SC 1014. In D. N. Taneja v. Bhajan Lal, 1998 SCC (Cri) 546, it was reiterated that the right of appeal is available under sub-section (1) of Section 19 only against any decision or order of a High Court in the exercise of its jurisdiction to punish for contempt."

23. In the case of ***Maheshwari Prasad Mishra vs. Smt. Achala Khanna*** reported in **(2006) 64 ALR 627 (All)**, in paragraph 4, this Court has observed as under:

"On consideration of the matter, we are firmly of the opinion that the instant appeal under Section 19 of the Contempt of Courts Act is not at all maintainable. The Supreme Court has held in the case of State of Maharashtra v. Mahboob S. Allibhoy and Anr. that no appeal is maintainable against an order dropping proceedings for contempt or refusing to initiate a proceeding for contempt. It has also been ruled that even if no appeal is maintainable on behalf of the person at whose instance a proceeding for contempt had been initiated and later dropped or whose petition for initiating contempt proceedings has been dismissed, is not without any remedy. In appropriate cases, he can invoke the jurisdiction of Supreme Court under Article 136 of the Constitution and the Supreme Court on being satisfied that it was a fit case where proceedings for contempt should have been initiated can set aside the orders passed by the High Court."

24. Following above noted judgments, a coordinate Bench of this Court in the case of Mrs. Manju Sree Robinson vs. Mrs. Chirkumarithva Yadav ACJ (J.D.) reported in (2014) 86 ACC 181, has observed as under:

"17. No appeal is maintainable against an order dropping proceeding for contempt or refusing to initiate a proceeding for contempt is apparent not

only from sub section (1) of Section 19 but also from subsection (2) of Section 19 which provides that pending any appeal the appellate Court may order that

(a) the execution of the punishment or the order appealed against be suspended;

(b) if the appellant is in confinement, he be released on bail; and

(c) the appeal be heard notwithstanding that the appellant has not purged his contempt."

25. The proposition of law so culled out in the above noted decision clearly spells out that no appeal is maintainable against dropping of contempt proceedings against the contemnor under Section 19 of the Contempt of Courts Act, 1971, as the remedy lies under Article 136 of the Constitution of India before the Hon'ble Supreme Court.

26. So far as the issue with regard to maintainability of a Special Appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules is concerned, an appeal is maintainable only on those contingencies wherein the Contempt jurisdiction has been exercised while touching the merit of the controvercy or dispute between the parties for the purposes of implementation of the judgment or order and the same has been held to be deemed to have been issued in exercise of power conferred by Article 226 of the Constitution.

27. In the case of ***Midnapore People's Cooperative Bank Ltd.*** (supra), the Hon'ble Apex Court while answering point 'i' in paragraph-11 (IV and V) had held that any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt" and, therefore, not appealable under Section 19 of the Contempt of Courts Act, as the only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act would be maintainable. It was further provided that if the High Court for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy, as the same can be challenged in the intra-court appeal.

28. In the case of ***A.P. Verma*** (supra), a coordinate Bench of this Court has held as under: -

"Thus there can be no doubt that in any proceeding initiated under the Contempt of Courts Act, the High Court can either punish or discharge the alleged contemner and in doing so, it can pass all such ancillary orders which are necessary for exercise of such power but it cannot directions or orders regarding the main dispute or controversy between the parties which has led to the filing of writ petition by either of the parties. However, if any order or direction is made by the Court concerning the merit of the controversy or dispute between the parties, or for implementation of any judgment or order, it will be de hors the provision of Contempt of Courts Act and they can only be deemed to have been issued in exercise of power conferred by Article 226 of the Constitution. Such direction would, therefore, be amenable to an appeal under Chapter VIII, Rule 5 of the Rules of the Court as they are not issued in exercise of any power conferred by the Act."

29. In ***Sheo Charan vs. Nawal and others,*** **1997(3) A.W.C. 1909**, a coordinate Bench of this Court in paragraph-13 has held as under: -

"13. Learned counsel for the respondents has, however, submitted that as no appeal lies under Section 19 of the Act from the decision of single Judge, dismissing the contempt petition, the applicant will be rendered remediless, if his appeal under Rule 5 of Chapter VIII is not held maintainable. This submission is also devoid of merit. In State of Maharashtra v. Mahboob S. Allibhoy and another, (1996) 4 SCC 411, (supra), the Supreme Court has reiterated the rule that a contempt proceeding is not a dispute between the two parties and such a proceeding is a matter between the Court and the person, who is alleged to have committed contempt.

.....

The applicant is also not without remedy. He can challenge the decision of a Judge rejecting the contempt petition before the Supreme Court under Article 136 of the Constitution of India."

30. Further in the case of Hemendra Swaroop Bhatnagar vs. Sri P.S. Gosain reported in 2007 (1) AWC 1045, this Hon'ble Court had the occasion to consider the issue of maintainability of special appeal under Chapter VIII Rule 5 of the 1952 Rules against the judgment and order dropping the contempt proceedings wherein this Court has observed as under:

"7. Appeal under Section 19 is maintainable when the order is passed by Contempt Judge in exercise of jurisdiction to punish for contempt. In the present case the Contempt Judge has discharged the notice, hence, there is no question of filing of appeal under Section 19. ...

8. The question regarding maintainability of the special appeal against an order rejecting a contempt application or discharging a contempt has come for consideration before this Court earlier. A Division Bench judgment of this Court reported in 1998 (3) UPLBEC 2333; A.P. Verma, Principal Secretary, Medical Health and Family Welfare, U.P., Lucknow and Ors. v. U.P. Laboratory Technicians Association, Lucknow and Ors. had considered the said question. That Division Bench held in the said judgment that special appeal against an order refusing to initiate contempt proceeding is not maintainable.

9. ...

10. ...

11. The learned contempt Judge while discharging the contempt notice has not issued any direction or passed any order. The submission of the appellant's counsel that learned Judge has decided an issue on merit also cannot be accepted. The learned contempt Judge has only taken into consideration the earlier judgments of this Court contempt of which was alleged. The learned contempt Judge after taking into consideration all facts and circumstances observed that from the facts there does not appear to be any wilful or deliberate disobedience committed either by the Collector or by the Special Land Acquisition Officer. The order of contempt Judge discharging contempt notice cannot be said to be a judgment issuing any direction or deciding any issue on merits. ""

31. Recently, a Division Bench of this Court in the case of ***Ashwani Kumar vs. Mahendra Pratap Singh*** **in Special Appeal No. 400 of 2021,** vide order dated 6.7.2022 has considered the entire law on the subject and has held in paragraph 24 as under: -

"24. Thus, there is no doubt so far as the legal principles governing the exercise of jurisdiction by Division Bench of this

Court under Chapter VIII Rule 5 of the Rules of the Court in relation to an order passed by a Contempt Judge, are concerned. Midnapore Peoples' Coop. Bank Ltd. (supra) still holds the field, according to which in case learned Contempt Judge decides an issue relating to merits of the dispute between the parties, such judgment will be termed to be a judgment rendered by the learned Single Judge while exercising his jurisdiction under Article 226 of the Constitution of India and as such special appeal in such a situation would be maintainable."

32. While applying the above noted judgment in the facts of the present case, now this Court has to bestow its anxious consideration as to whether the present intra-court appeal is maintainable against the judgment and order of the learned Single Judge while declining to initiate contempt proceedings against the opposite parties.

33. As noticed above, the Hon'ble Apex Court and this Court has consistently held that an intra-court appeal is not maintainable against the order of the learned Single Judge exercising contempt jurisdiction in a contingency, when the contempt proceedings are not being initiated. The reliance placed upon the judgment in the case of ***Durga Nagpal*** (supra) is misconceived and misplaced as in the said case, the Hon'ble Judges while exercising appellate jurisdiction were confronted with the situation where the contempt court reviewed its own order after entertaining miscellaneous application for modification of the final judgment. The Division Bench opined that when accused are discharged and proceedings are closed, miscellaneous application for modification is not maintainable. In the said perspective, the Special Appeal was held to be maintainable. Since the present case originates from a judgment and order of the contempt court declining to exercise contempt jurisdiction, thus, the said judgment is of no aid to the appellants.

35. Accordingly, we are of the firm opinion that the present intra-court appeal against the judgment and order of the learned Single Judge dated 17.03.2023 declining to initiate contempt proceedings is not maintainable under Chapter VIII Rule 5 of the Rules of the Court.

36. Accordingly, the intra-court appeal is **dismissed** as not maintainable.

(2023) 6 ILRA 968
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Writ-C No. 4874 of 2023

Atma Prasad Shukla ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Pandey, Sri Sushil Kumar Pal

Counsel for the Respondents:
C.S.C.

Civil Law – The Urban Land Ceiling and Regulation Act, 1976- Section 8(4) - petitioner's land measuring 19349.75 square metres-declared surplus-under notice under section 8(3) of the Act- order under -notifications issued under Sections 10(1) and 10(3) of the Act-notice published under Section 10(5) of the Act-

actual physical possession of the declared surplus land was never taken-no evidence regarding initiation of proceedings under Section 10(6) of the Act-no compensation was paid-proceedings under section 10(3) of the Act-not saved by Section 3 of the Repealing Act, 1999-attempt of the respondent St. to mutate its name is illegal-petition allowed- respondents directed to restore the name of the petitioner in revenue records. (Paras 8 and 10)

HELD:

Since neither the respondents have taken actual physical possession of the surplus declared land nor have paid any compensation in terms of Section 10(3) read with Section 11 of the Act, 1976, therefore, even the proceedings under Section 10(3) of the Act, 1976 is not saved by saving clause contained in Section 3 of the Repealing Act, 1999. Since the respondents have neither paid any compensation in terms of Section 10(3) read with Section 11 of the Act, 1976 nor have taken actual and physical possession of the surplus declared land, therefore, the entire proceedings under the Act, 1976 with respect to the surplus declared land in question stood abated in terms of the Section 4 of the Repealing Act, 1999. The attempt of the respondents for mutation of name of St. in the khatauni of Fasli Year 1427-1432 by letter dated 20.09.2021 filed as Annexure-CA-9 to the counter affidavit, is wholly without authority of law and illegal. (Para 10)

Petition allowed. (E-14)

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Sushil Kumar Pal holding brief of Sri Sanjay Pandey, learned counsel for the petitioner and Sri Rajiv Gupta, learned Additional Chief Standing Counsel for the State-respondents.

2. This writ petition has been filed praying for the following relief:

"a. Issue a writ, order or direction in the nature of mandamus, directing and commanding the respondents not to take actual and physical possession from the petitioner.

b. Issue a writ, order or direction in the nature of mandamus, directing and commanding the respondents to release the surplus land of the petitioner from ceiling under the Repeal Act 1999 and re-registered the name of the petitioner over the revenue records as well as decide the application dated 10.10.2 022 of the petitioner."

Facts:-

3. Briefly stated facts of the present case are that the father of the petitioner namely Sri Devi Prasad Shukla owned various khasra plots of villages Singhpur, Mugdarpur and Khajuhi, Pargana Shivpur, Tehsil Sadar, District Varanasi, out of which land measuring 19349.75 square meters was declared surplus under the provisions of the Urban Land Ceiling and Regulation Act, 1976 (hereinafter referred to as 'the Act 1976') in Urban Ceiling Case No.600/473/652/5798/83-84 (State of U.P. vs. Devi Prasad Shukla). A notice dated 12.09.1985 under Section 8(3) of the Act, 1976 was issued which was served upon the aforesaid Devi Prasad Shukla on 13.10.1985. In paragraph-5 of the counter affidavit, it has been stated that objections were filed by the aforesaid Devi Prasad Shukla and thereafter, an order under Section 8(4) of the Act was passed on 17.11.1989 whereby 19349.75 square meters land was declared surplus. In paragraphs-6 and 7 of the counter affidavit, it has been stated that a notice under Section 9 of the Act, 1976 dated 22.02.1994 was issued. Thereafter, notification dated 22.02.1997 and

22.08.1998 were issued under Section 10(1) and Section 10(3) of the Act, 1976, which was published in the Government Gazette. A notice under Section 10(5) of the Act, 1976 was allegedly issued on 23.12.1998. In paragraphs-8 and 9 of the counter affidavit, the respondents have stated as under:

"8. That further it is submitted here that with regard to the land declare surplus for recording the name of the State Government upon the same and undated parwana/order was issued. A true Photostat copy of undated parwana/order is being annexed herewith and marked as ***Annexure No. CA-7*** *to this affidavit. Further, it is submitted here that for physical verification and identification of the land declared surplus, a letter was sent to the Secretary, Varanasi Development Authority, Varanasi on 28.03.2000 and the present matter is mentioned at serial no. 547 in the list annexed with the aforesaid letter. A true Photostat copy of letter dated 28.03.2000 are being annexed herewith and marked as* ***Annexure No. CA-8*** *to this affidavit.*

9. That it is also submitted here that in furtherance of the earlier order/parwana since the name of the State was not mutated in the revenue records and as such a reminder letter dated 20.09.2021 was sent to Tehsildar Sadar, Varanasi, upon the basis of which in the Khatauni of Fasli year 1427-1432, the name of the State was mutated in the revenue record. A true Photostat copy of letter dated 20.09.2021 along with Khatauni of Fasli year 1427-1432 are being collectively annexed herewith and marked as ***Annexure No. CA-9*** *to this affidavit."*

4. Since the respondents have attempted to mutate the name of the State over the aforesaid land in Fasli Year 1427-1432 vide letter dated 20.09.2021 and further attempted to dispossess the petitioner, therefore, the petitioner has filed the present writ petition.

Submissions:

5. **Learned counsel for the petitioner submits** that no notice under Section 8(4) or Section 10(5) was ever received by the father of the petitioner. He further submits that petitioner or his father neither ever surrendered the possession of the land in question to the respondents pursuant to the alleged notice under Section 10(5) of the Act, 1976 dated 23.12.1998 nor the actual physical possession was ever taken by the respondents. He further submits that no proceeding under Section 10(6) of the Act, 1976 was initiated and the petitioner continues to be in possession of the disputed land. He submits that even as per own averments of the respondents in their counter affidavit, actual and physical possession of the land in question was never taken and much after the enactment of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (hereinafter referred to as 'the Repealing Act, 1999'), the respondent wrote a letter dated 28.03.2000 for verification and identification of the land declared surplus. Thus, own averments of the respondents in paragraph-8 of the counter affidavit itself leaves no manner of doubt that the respondents never took actual physical possession of the disputed land and by Repealing Act, 1999, entire proceedings under the Act, 1976, stood abated.

6. **Learned Additional Chief Standing counsel supports** the action of the State-respondents.

Discussion and Findings:-

7. We have carefully considered the submissions of the learned counsels for the parties and perused the record of the writ petition.

8. We find that there is no whisper in the counter affidavit that actual and physical possession of the alleged surplus declared land was ever taken by the State-respondents prior to coming into fore of the Repealing Act, 1999. On the contrary, a clear averment has been made in paragraph-8 of the counter affidavit that a letter dated 28.03.2000 was written to the Secretary, Varanasi Development Authority, Varanasi for physical verification and identification of the land declared surplus. Thus, as on 28.03.2000, the respondents have not even identified the surplus declared land. There is nothing on record to show that actual and physical possession of the surplus declared land was ever surrendered by the owner namely Devi Prasad Shukla nor there is any evidence to show that proceeding under Section 10(6) of the Act, 1976 was initiated and actual physical possession of the surplus land was taken. Thus as per own averments of the respondents in paragraph-8 of the counter affidavit, it is evident that the State-respondents have never taken physical possession of the surplus declared land in question and the petitioner continued in physical possession of the said land. Even the name of the State was not mutated prior to the Repealing Act, 1999. It is only in the year 2021, i.e. after about 22 years that the respondents attempted to get the name of the State mutated in the khatauni of Fasli Year 1427-1432. After the death of Devi Prasad Shukla, the name of his heirs, i.e. the petitioner and others were mutated in khatauni and the petitioner's name continued in khatauni till the State's name was attempted to be mutated in khatauni of Fasli Year 1427-1432 on 20.09.2021. The respondents have also not stated in the counter affidavit that any amount of compensation was paid to the petitioner after notification under Section 10(3) of the Act, 1976.

9. Sections 3 and 4 of the Repealing Act, 1999 provides as under:

"3. Saving. *– (1) the repeal of the principal Act shall not affect-*

(a) the vesting of any vacant land under sub-section (3) of section 10, ***possession of which has been taken over by the State Government*** *or any person duly authorised by the State Government in this behalf or by the competent authority;*

(b) the validity of any order granting exemption under sub-section (1)of section 20 or any action taken therunder , notwithstanding any judgment of any Court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of section 20.

*(2)****Where-***

(a) ***any land is deemed to have vested in the State Government under sub-section (3) of section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and***

(b) any amount has been paid by the State Government with respect to such land, then, such land

shall not be restored unless the amount paid, if any, has been refunded to the State Government.

4. ***Abatement of legal proceedings-All proceedings*** *relating to any order made or purported to be made* ***under the***

principal Act pending immediately before the commencement of this Act, before any Court, tribunal or other authority shall abate:

Provided that this section shall not apply to the proceedings relating to sections 11, 12, 13 and 14 of the principal Act insofar as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority."

10. Since neither the respondents have taken actual physical possession of the surplus declared land nor have paid any compensation in terms of Section 10(3) read with Section 11 of the Act, 1976, therefore, even the proceedings under Section 10(3) of the Act, 1976 is not saved by saving clause contained in Section 3 of the Repealing Act, 1999. Since the respondents have neither paid any compensation in terms of Section 10(3) read with Section 11 of the Act, 1976 nor have taken actual and physical possession of the surplus declared land, therefore, the entire proceedings under the Act, 1976 with respect to the surplus declared land in question stood abated in terms of the Section 4 of the Repealing Act, 1999. The attempt of the respondents for mutation of name of State in the khatauni of Fasli Year 1427-1432 by letter dated 20.09.2021 filed as Annexure-CA-9 to the counter affidavit, is wholly without authority of law and illegal.

11. For all the reasons aforestated, **the writ petition is allowed**. The respondents are directed to restore the name of the petitioner in the Revenue Records i.e. khatauni and khasra and not to interfere with his occupation, use and enjoyment of the land in question.

(2023) 6 ILRA 972
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2023

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL J.
THE HON'BLE VIKAS BUDHWAR, J.

Special Appeal Defective No. 172 of 2023
alongwith
Special Appeal Defective No. 192 of 2023
alongwith
Special Appeal Defective No. 249 of 2023

State of U.P. & Ors. ...Appellants
Versus
Surendra Singh & Anr. ...Respondents

Counsel for the Appellants:
C.S.C.

Counsel for the Respondents:
Sri Chandra Shekhar Singh, Sri V.K. Singh (Sr. Advocate)

Civil Law – Service Law- The U.P. St. Aided Educational Institution Employees Contributory Provident Fund, Insurance Pension Rules, 1964 - teachers-learned single judge's direction under challenge- ad hoc services to be included for computation of pension – after their regularisation in service- the U.P. St. Aided Educational Institution Employees Contributory Provident Fund, Insurance Pension Rules, 1964- Amendment Act No.7/2016 w.e.f. 22.03.2016 in the U.P. Secondary Education Services Selection Board Act, 1982- services of petitioners stood regularised- Section 33 G of the Act- Rules 18, 19, 21, 34- no distinction between confirmation and regularisation- procedure properly followed- no infirmity in the judgement rendered by single judge- petitioner entitled to pension-

special appeal dismissed. (Paras 22, 23, 29, 30, 32, 34, 40, 41, 43 and 46)

HELD:

The procedure, prescribed under Section 33G of the Selection Board Act, 1982, thus, had recognized only such teachers who had been appointed in accordance with the then appointment Rules. Their selection had been made in accordance with the procedure prescribed in the relevant rules at the relevant point of time, on regularisation for substantive appointment, the selection had been made of only those teachers which were found suitable by the Selection Committee constituted under the provisions of the U.P. Secondary Education Services Selection Board Act, 1982. (Para 22)

The result is that the long continuous services rendered by the teachers against substantive posts in the institutions recognized under provisions of the Intermediate Education Act, 1921, had been recognized by the St. Government by bringing the provision for regularisation of short term or ad hoc appointments which had continued for years. In none of the writ petitions before us, it is the case of the respondent that the retired teachers were not eligible for regularisation. Moreover, as observed by the learned Single Judge the writ petitioners having earned the legal status of a permanent employee w.e.f. 22.03.2016, there cannot be any dispute to their eligibility to the post. The writ petitioners having completed the tenure of their permanent employment on substantive posts had retired from service on attaining the age of superannuation. (Para 23)

The clear language employed in the said Rule 19 is that services rendered by an employee will not be counted for pension unless he holds substantive post on permanent establishment. The continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall count as qualifying services. (Para 29)

Rule 21 further provides that an employee shall be eligible for superannuation/retiring/invalid pension only after completing 10 years of qualifying service, thus, provided the maximum limit of pension payable to employee completing 10 years or more of qualifying service. (Para 30)

The submission is that word used in Rule 19(b) is "confirmation on the post" "in continuation of temporary or officiating service rendered interruption" whereas in the instant case the writ petitioners were regularised by virtue of the provision which was brought on the statute book on 22.03.2016. The regularisation of service of an adhoc teacher by application of Section 33G of the Act, 1982 cannot be equated with confirmation of temporary or officiating services of an employee appointed on a substantive post on probation under the selection rules. (Para 34)

Having noted the reasons and the provisions of adhoc appointment of teachers against substantive vacancies or short term vacancies which were later converted into a substantive vacancies, we find that Section 33G for regularisation of ad-hoc appointment made under the above noted provisions was in recognition of the long services rendered by the teachers appointed on adhoc basis against substantive vacancy or short term vacancy which were later converted into substantive vacancy. The procedure for regularisation under Section 33G had taken care that the teachers appointed on adhoc basis possessed qualification prescribed in the statutory provisions and were suitable for appointment in a substantive capacity. (Para 40)

It was provided in Section 33G that such teachers must have been continuously serving the institution from the date of their appointment uptil the commencement of regularisation provision w.e.f 22.03.2016. Such teachers were working against substantive vacancies and their names were recommended for substantive appointment on their selection by the Selection Committee constituted under the statutory provisions/Act, 1982 to assess their suitability to the post. The substantive appointment of such teachers was kept on probation and only after they were found suitable, they were made permanent. (Para 41)

The procedure adopted for regularisation of adhoc teacher as provided in Section 33G of the Selection Board Act, 1982 does not give any room to make any distinction between confirmation of an employee or teacher working in temporary or officiating capacity or confirmation of adhoc teachers working on

substantive posts in a permanent establishment. The dictionary meaning of the word "confirmation", from the Black's Law Dictionary 8th Edition (South Asian Edition) shows the meaning of the word confirmation:- (i) as the act of giving formal approval; (ii) the act of verifying or corroborating; (iii) the act of ratifying a voidable eSt.; (iv) a declaration that corrects a null provision of an obligation in order to make the provision enforceable. (Para 43)

We may further note that the Rules, 1964 are special provisions applicable to the teachers and non-teaching employees serving in St. Aided Educational Institutions in the St. of U.P. The general provisions of U.P. Qualifying Service for Pension and Validation Act, 2021 defining the term 'qualifying service' in U.P. Retirement Benefits Rules, 1961 w.e.f 01.04.1961, applicable to 'officers' defined in Rule 3(6) of the Rules, 1961, which means the Government servant having a lien on permanent pensionable post under "the Government," would not be applicable to the writ petitioners. All the arguments of the learned Additional Advocate General to challenge the correctness of the decision of the learned Single Judge dated 30.09.2022 in Nand Lal (supra), subject matter of challenge in connected special appeals are found without any force. (Para 46)

Appeal dismissed. (E-14)

List of cases cited:

1. Sunita Sharma Vs St. of U.P. & ors. Writ-A No.25431 of 2018 decided on 20.12.2018 affirmed by the Special Appellate Court in Special Appeal (D) No.181 of 2020 (St. of U.P. Vs Sunita Sharma) vide judgement and order dated 11.06.2020

2. Nand Lal Vs St. of U.P. & ors. Writ A No.12070 of 2022

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Vikas Budhwar, J.)

1. The issue for consideration in these three connected appeals is one and the same. They have been heard together and are being decided by this common judgement.

2. This intra-Court appeal filed by the State and the Department of Education is directed against the orders of the learned Single Judge wherein the claim of the writ petitioners for including the ad-hoc services rendered by them, before regularization of their service, in the qualifying service, as per the U.P. State Aided Educational Institution Employees Contributory Provident Fund, Insurance Pension Rules' 1964, found favorable consideration. Direction was issued by the learned Single Judge in the judgement impugned to compute pension together with its dues within a time bound period and make payment. In one of the connected matters, the petitioners have been held to be entitled to interest at the rate of 8% from the date of the order till the date of actual payment, in case of failure, to make payment within the time provided therein.

3. The undisputed relevant facts of the matter are that all the writ petitioners herein had been appointed as Assistant Teachers on ad-hoc basis against the substantive vacancies in the institution in question, in accordance with the U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981.

4. With the enforcement of Amendment Act No.7/2016 wef 22.03.2016 in the U.P. Secondary Education Services Selection Board Act' 1982 (hereinafter referred to as the Act), the services of the writ petitioners stood regularized w.e.f. 22.03.2016. It is also not in dispute that all the writ petitioners/respondents herein

continued to work in permanent capacity against substantive vacancies till the date of their retirement on attaining the age of superannuation. The salary allowances and other dues have been paid to the writ petitioners/respondents herein. The dispute, however, pertains to the claim of reitral dues including pension. The appellants had rejected the claim of the writ petitioners for payment of pension and hence they approached the writ court.

5. Taking note of the stand of the writ petitioners and the decisions of this Court in **Sunita Sharma Vs. State of U.P. & others** Writ-A No.25431 of 2018 decided on 20.12.2018 affirmed by the Special Appellate Court in Special Appeal (D) No.181 of 2020 (State of U.P. Vs. Sunita Sharma) vide judgement and order dated 11.06.2020 as also the relevant statutory provisions, it was held by the learned Single Judge in the judgement and order dated 30.09.2022 in the case of **Nand Lal Vs. State of U.P. & others** Writ A No.12070 of 2022 connected with other writ petitions that the denial of the claim made by the writ petitioners was contrary to law.

6. It was held that the Rules' 1964 are specific rules applicable to permanent employees serving in the State aided education institutions of specified category. Rule 3 & 4 provides the category of the institution and the employees of the State Aided Education Institutions to whom benefits under the 1964 Rules would be applicable. It was held that there being no dispute that the writ petitioners were permanent employees on the date of retirement upon regularization granted under Section 33-G of the Act wef 22.03.2016, they would be included within the meaning of word “employee” defined in Rule 5(g) of the Rules' 1964. As per Rules 19 & 21 of the Rules' 1964, an employee who holds a substantive post of a permanent establishment, having performed ten years continuous service on the date of his superannuation would be entitled for the benefits of pensions and other dues. Under Rule 19(b), while counting qualifying services continuous temporary or officiating services followed without interruption by confirmation in the same or another post shall also be counted as qualifying services. It was, thus, held that from reading of Rule 19(a) & (b) and Rule 21, the requirement is that;- (i) the concerned employee have held a substantive post on a permanent establishment, on the date of his retirement; (ii) such employee must have performed 10 years of qualifying service on the date of his superannuation. It was noted that a retired employee would be eligible to pension, if he has completed 10 years of qualifying service on the date of his retirement. For computation of qualifying service, the provisions of Rule 19(a) and (b) have to be taken into consideration.

7. The arguments of the State-appellants/respondent therein that the writ petitioners having being regularized in a permanent vacancy after the cut off date i.e. 01.04.2005 whereafter the New Pension Scheme has been made effective, would be ineligible to pension under the Rules' 1964, has been turned down. The contention that Rule 19 (a) & (b) of the Rules' 1964 would not be applicable as the the date of regularization of the writ petitioners under Section 33G of the Act is 22.03.2016, being beyond the cut off date i.e. 31.03.2005, the petitioners are not entitled to payment of pension as they were borne in the cadre uptil 22.03.2016, has also been turned down. The U.P. Retirement Benefit Rules'

1961 and U.P. Qualifying Services for Pension and Validation Act' 2021 have been held to be inapplicable on the ground that the said enactments were covering the officers, such government servants who may hold a lien on a permanent pensionable post under the Government. The writ petitioners being teachers working in the State Aided Education Institution and not State owned institutions, could not be covered within the meaning of "officers" of the State Government. There did not ever exists any master-servant relationship between them and the State Government as may ever allow them to be described as "officers" of the State Government.

8. It was further noted that both sets of Rules namely U.P. Retirement Benefit Rules'1961 and the Rules' 1964 applicable to teachers of the State Aided Education Institutions, are Rules framed under Article 309 of the Constitution of India. The State had chosen to amend only the Pension Rules to government servant namely Rules' 1961 without making any parallel effort to amend another set of Rules' 1964 applicable to teachers at State-aided educational institutions. It is, thus, impossible to conceive that the petitioner's right to pension have been altered by the amendment made in U.P. Retirement Benefit Rules 1961 w.e.f 01.04.2005. The claim of the writ petitioners being covered by the Rules' 1964 had illegally been rejected for including the ad-hoc services rendered by them in the qualifying services (for the purpose of grant of retiral benefits including pension) under the Rules' 1964 by applying U.P. Retirement Benefit Rules' 1961 w.e.f. 04.04.2005.

9. In other decisions of the learned Single Judge dated 25.07.2022 and 23.05.2022 under challenge before us, the reliance is placed on the judgement of this Court in **Sunita Sharma (supra)** to hold that the issue pertaining to grant of pensionary benefits to the Assistant Teachers of State-aided education institutions under the Rules' 1964 had been set at rest. The writ petitioners have been held entitled to pensionary benefits in accordance with the Rules' 1964.

10. Pressing these intra court appeals, it is vehemently argued by Sri Neeraj Tripathi learned Additional Advocate General that ad-hoc services rendered by the Assistant Teachers prior to their regularization w.e.f 22.03.2016 in accordance with Section 33G of the Act, cannot be counted as temporary or officiating service on the post in question to compute the same as qualifying service within the meaning of Rules' 1964. It is submitted that the Assistant Teachers regularized under Section 33G of the Act were borne into the cadre on the date of their regularization which is 22.03.2016. By the said date, the amendments were incorporated in the U.P. Retiral Benefits Rules' 1961 and with the incorporation of sub rule (3) of Rule 2 in the Rules 1961 w.e.f. 01.04.2005, the said rules have been held to be inapplicable to employees entering service and post on or after April, 01.2005.

11. It is argued that the Old Pension Scheme as applicable to the employees of the State under the Retirement Benefits Rules 1961 has been held inapplicable to the employees borne on pensionable establishment whether temporary or permanent on entering services and post on or after 01.04.2005.

12. Rule 34 of the Rules 1964 has been pressed into service to assert that in a

matter concerning pension, which is not provided specifically under Rules 1964, the provision laid down in respect to the State government employees shall apply mutatis mutandis. It is argued that the Rules 1964 will only apply to those employees, who are covered in the definition "employee" in Rule 5(g) of the Rules 1964, a permanently employed person born on the establishment of an aided institutions. The writ petitioners having been appointed in permanent capacity on regularization cannot be said to be borne in the whole time teaching establishment of an aided institution, to be covered by the definition of "employee" under Rule 5(g) of the Rules' 1964. The provisions of Rule 19(a) & (b), therefore, would not be applicable so as to compute the ad-hoc services rendered by the writ petitioners prior to their regularization so as to count them as qualifying services within the meaning of Rules' 1964.

13. Even otherwise, with the promulgation of U.P. Qualifying Service for Pension of Validation Ordinance 2020, the term 'qualifying service' as per the U.P. Retirement Benefits Rules 1961 would only include the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed for the government for the post. As the writ petitioners/respondents herein have not been appointed either on a temporary or a permanent post in accordance with the provisions of the service Rules prescribed by the government for the said post, the services rendered by them on ad-hoc post, on account of their appointment under the Removal of Difficulties Order 1981 cannot be computed as qualifying service. It was argued that initial appointment of the petitioners were against the short term vacancies in accordance with the paragraph No.2 of the Removal of Difficulties (second) Order 1981 which was later converted into a substantive vacancy. The continuance of the writ petitioners/respondents on ad-hoc basis against substantive vacancies in accordance with Section 18 of the U.P. Secondary Education (Services) Selection Board Act' 1982 would not be of any benefit. The arguments is that the Regularization under Section 33G of the Act' 1982 with the amendments brought on 22.03.2016 cannot be equated with the appointment of a confirmed employee against a substantive vacancies on successful completion of the prohibition period after the date of appointment.

14. The provision of sub-section (6) of Section 33G of the U.P. Secondary Education Services Selection Board (Act 1982) has been placed before us to assert that services of adhoc teachers and the teachers who have been appointed against the short term vacancies were regularised from the date of commencement of U.P. Secondary Education Services Selection Board (amendment) Act 2016, which is 22.03.2016. The substantive appointment of the writ petitioners as teacher in the institution concerned, thus, came into being only on 22.03.2016. The writ petitioners, therefore, cannot derive benefit of services rendered by them in adhoc or short term capacity, in as much as, their appointments in such capacity cannot be said to have been made in accordance with the service rules.

15. Considering the above stand of the counsel for the appellants, we may note that the U.P. Secondary Education (Services Selection Board) Act, 1982 came into being on 27.07.1998, it was enacted to establish the Board named as Secondary

Education Services Selection Board for the selection of the teachers in institutions recognized under the Intermediate Education Act, 1921.

16. As per the Act 1982, it was the duty of the State Government to establish Board by notification, to be called as the U.P. Secondary Education (Services Selection Board).

17. Section 18 of the U.P. Secondary Education Services Selection Board Act, 1982 conferred power upon the management to make appointment purely on adhoc basis from amongst persons possessing requisite qualification subject to the condition that such appointment would cease on the joining of the post by candidate recommended by the Commission.

18. The U.P. Secondary Education Services Commission (Removal of Difficulties) Order, 1981 came into being in the circumstances where the U.P. Secondary Education Services Commission Ordinance, 1981 was promulgated on 10th July, 1981 with a view to establish the Secondary Education Service Commission and six or more Secondary Selection Boards for selection of teachers in institution recognized under the Intermediate Education Act, 1921. The establishment by the Commission and the Selection Board was likely to take sometime and even after the establishment of the said Commission and Boards, it was not possible to make selection of teachers for the first few months.

19. The purpose and object of the promulgation of the (Removal of Difficulties) Order, 1981, as noted above, further noted that there were number of vacancies in the posts of teachers in various institutions recognized under the Intermediate Education Act, 1921, existed and the failure or delay in filling up of such vacancies was likely to create difficulties.

20. The procedure for selection/appointment by promotion or by direct recruitment of a teacher on purely adhoc basis had been provided therein. The U.P. Secondary Education Services Commission (Removal of difficulties) (Second) Order, 1981, was brought into force for the same object as that for enforcement of the First Order, 1981. The second Order, 1981, however, provided procedure for filling up the short term vacancies on the posts of teachers in the institutions recognized under the Intermediate Education Act, 1921.

21. In light of the above provisions, when we read Section 33-G which was brought into force on 22.03.2016, it provided that (i) any teacher who-

(a) has been appointed by promotion or by direct recruitment in accordance with the paragraph-'2' of the (Removal of Difficulties) (Second) Order, 1981, as amended from time to time, and such vacancy was subsequently converted into a substantive vacancy;

(b) was appointed on adhoc basis vacancy against the substantive vacancy in accordance with the Section 18;

(c) possesses the qualifications prescribed in accordance with the provisions of Intermediate Education Act, 1921;

(d) has been continuously serving the institution from the date of such

appointment up to the date of commencement of the amendment Act, 2016 on 22.03.2016;

(e) has been found suitable for appointment in a substantive capacity by the Selection Committee in accordance with the procedure prescribed in clause (a) of sub-section (2) of Section 33C read with clause (b) of the said sub-section; shall be given substantive appointments by the Management.

(ii) Sub section (3) of Section 33-G provided that every such teacher appointed on the recommendation of the Selection Committee, in a substantive capacity, shall be deemed to be on probation from the date of such substantive appointment.

(iii) The date of substantive appointment of the teachers appointed on adhoc basis or against short term vacancies, which were subsequently converted into substantive vacancies, was thus, treated as 23.02.2016, the date of regularisation of the services of such teacher w.e.f the date of commencement of the Amendment Act, 2016.

(iv) Sub section (8) of Section 33G categorically provides that adhoc teachers who have not been appointed either in accordance with the provisions of (Removal of Difficulties) Order, 1981 or in accordance with the Section 18 of the U.P. Secondary Education Services Selection Board Act, 1982 and were otherwise getting salary only on the basis of interim/final orders of the Court shall not be entitled for regularisation.

22. The procedure, prescribed under Section 33G of the Selection Board Act, 1982, thus, had recognized only such teachers who had been appointed in accordance with the then appointment Rules. Their selection had been made in accordance with the procedure prescribed in the relevant rules at the relevant point of time, on regularisation for substantive appointment, the selection had been made of only those teachers which were found suitable by the Selection Committee constituted under the provisions of the U.P. Secondary Education Services Selection Board Act, 1982.

23. The result is that the long continuous services rendered by the teachers against substantive posts in the institutions recognized under provisions of the Intermediate Education Act, 1921, had been recognized by the State Government by bringing the provision for regularisation of short term or adhoc appointments which had continued for years. In none of the writ petitions before us, it is the case of the respondent that the retired teachers were not eligible for regularisation. Moreover, as observed by the learned Single Judge the writ petitioners having earned the legal status of a permanent employee w.e.f 22.03.2016, there cannot be any dispute to their eligibility to the post. The writ petitioners having completed the tenure of their permanent employment on substantive posts had retired from service on attaining the age of superannuation.

24. The submission of the learned Additional Advocate General that the writ petitioners were borne into the cadre only w.e.f from the date of their regularisation, i.e 22.03.2016 is to be seen in light of the above facts and the rules providing for pension other retiral benefits to the teachers serving in State aided institutions. The Rules, 1964 which came into force on

01.10.1964 provided in Rule 3 (4)(a) as under:-

"3. These rules shall apply to permanent employees serving in State aided educational institutions of the following categories run either by a Local Body or by a Private management and recognised by a competent authority as such for purposes of payment of grant- in-id;

(1) Primary Schools;

(2) Junior High Schools;

(3) Higher Secondary Schools;

(4) Degree Colleges;

(5) Training Colleges.

4. (a) These rules are intended to the employees of the State aided educational institutions, three types of service benefits, viz., Contributory Provident Fund, Insurance and Pension (Triple Benefit Scheme). The quantum of the benefits and the conditions by which they are governed are described in the succeeding Chapters."

25. The word 'employee' has been defined in Rule 5(g) of the 1964 Rules in the following terms:-

"Employee" means a permanently employed person borne on the whole-time teaching or non-teaching establishment of an aided institution, excluding-(a) the inferior staff, and (b) the ministerial staff of the institutions maintained by a Local Body."

26. Rule 17 contained in Chapter V provides eligibility of 'employee' defined above for pension and amongst other conditions provided therein,

"(i) retirement on attaining the age of superannuation".

27. Rule 18 contained in the same Chapter further provides that the amount of pension that may be granted shall be determined by the length of 'qualifying service' and provided as to how such computation shall be made.

28. Rule 19 relevant for our purpose is to be extracted as under:-

"19.(a) Service will not count for pension unless the employee holds a substantive post on a permanent establishment.

(b) Continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service. (See also C.S.R. Para 422).

(c) Leave without allowance, suspension allowed to stand as a specific penalty, overstayed of joining time or leave not subsequently regularised, and period of breaks in service shall not be reckoned as qualifying service.

(d) Period of breaks between 2 periods of service due to termination of service, for no fault of the employee shall not be treated as interruption involving forfeiture of post qualifying service. In other cases breaks due to other causes shall result in forfeiture of past service unless condoned by Government.

(e) Time passed on earned leave shall fully count as qualifying service, but

time passed on other kinds leave with allowances shall count as qualifying service as follows :

(i) If the total service is not less.than 13 years, but less than 30 years, one year of such leave shall count as qualifying service;

(ii) If the total service is not less than 30 years, two years of such leave shall counts as qualifying service.

Notes - (1) The term 'Earned Leave' means leave on full average pay.

(2) In case of a married woman employee time passed on maternity leave may be allowed to count as qualifying service, provided that the period covered by such leave and also earned leave shall not exceed what: would have been admissible had she availed of the whole of the earned leave to which she was entitled under the rules.

(3) 'Total Service' means total service rekoning from the date of commencement of service qualifying for pension and includes periods of leave referred to above.

(4) The service put in by an employee before he has completed 18 years of age or after attaining the age of superannuation unless extended by competent authority or on re-employment after retirement shall not qualify for pension.

(5) The entry relating to confirmation of an employee in the service book shall be countersigned.

(6) In cases not covered by these rules qualifying service shall be determined by Government and its decision shall be final."

29. The clear language employed in the said Rule 19 is that services rendered by an employee will not be counted for pension unless he holds substantive post on permanent establishment. The continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall count as qualifying services.

30. Rule 21 further provides that an employee shall be eligible for superannuation/retiring/invalid pension only after completing 10 years of qualifying service, thus, provided the maximum limit of pension payable to employee completing 10 years or more of qualifying service.

31. Rule 34 relied by the learned Additional Advocate General may also be noted herein to deal with his argument with regard to applicability of the said provision. Rule 34 reads as under:-

"34. In matters concerning pension/family pension not provided to specifically in these rules, the. corresponding procedure laid down in respect of State Government employees shall apply mutatis mutandis."

32. A careful and conjoint reading of the relevant provisions of Rules 1964, and the language employed therein, there remains no doubt that a permanent employee, a whole time teacher, working in a permanent establishment of aided institution, having rendered 10 years or more of qualifying service, which shall include continuous temporary or officiating services followed without interruption by

confirmation in the same or another post, shall be eligible for superannuation pension and other retiral benefits admissible under the Rules, 1964".

33. Learned Additional Advocate General tries to create a classification/distinction by providing different meaning to the words "confirmation" and "regularisation" to submit that appointment on a substantive post by regularisation in continuation of ad-hoc services rendered by the teachers in aided institutions would not be covered by the meaning given to the 'qualifying service' in sub-Rule (b) of Rule 19 of the Rules, 1964.

34. The submission is that word used in Rule 19(b) is "confirmation on the post" "in continuation of temporary or officiating service rendered interruption" whereas in the instant case the writ petitioners were regularised by virtue of the provision which was brought on the statute book on 22.03.2016. The regularisation of service of an adhoc teacher by application of Section 33G of the Act, 1982 cannot be equated with confirmation of temporary or officiating services of an employee appointed on a substantive post on probation under the selection rules.

35. capacity only after their selection, from the date of their substantive appointment which was 22.03.2016. The services rendered by them in adhoc capacity, prior to the date of their regularisation cannot be equated with the temporary officiating services rendered on a substantive post, followed by confirmation in the same or another post, to be counted as 'qualifying service' within the meaning of Rule 19(b) of the Rules, 1964.

36. For this reason, the Rule 34 of the Rules, 1964 as noted above will come into play and the corresponding procedure concerning pension as laid down in respect of the State Government employees shall apply mutatis mutandis. The result is that U.P. Retirement Benefits Rules 1961 and the U.P Qualifying Service for Pension and Validation Act, 2021 would be applicable to such employees/teachers who had entered into services on after 01.04.2005. Having been borne on a pension establishment, whether temporary or permanent, after 01.04.2005, none of the writ petitioners can be said to have completed 'qualifying service' for the purpose of entitlement of pension within the meaning of U.P. Qualifying Services for Pension and Validation Act, 2021 which has been enforced w.e.f 01.04.1961, the date of commencement of the U.P. Retirement Benefit Rules, 1961.

37. It was, thus, argued that the writ petitioners cannot be said to have completed 'qualifying services' for the purpose of entitlement of the pension nor they are entitled for the benefit of the old pension scheme as applicable to the whole time teachers permanently employed in establishment of an aided institution.

38. The writ petitioners having been borne into the cadre of permanent establishment of the aided institution only on 22.03.2016 cannot be held to be entitled for pension or other retiral benefits under the Rules, 1964.

39. We find inherent fallacy in the arguments of the learned Additional Advocate General, for an effort to make distinction between the word "confirmation" and "regularisation".

40. Having noted the reasons and the provisions of adhoc appointment of teachers against substantive vacancies or short term vacancies which were later converted into a substantive vacancies, we find that Section 33G for regularisation of ad-hoc appointment made under the above noted provisions was in recognition of the long services rendered by the teachers appointed on adhoc basis against substantive vacancy or short term vacancy which were later converted into substantive vacancy. The procedure for regularisation under Section 33G had taken care that the teachers appointed on adhoc basis possessed qualification prescribed in the statutory provisions and were suitable for appointment in a substantive capacity.

41. It was provided in Section 33G that such teachers must have been continuously serving the institution from the date of their appointment uptil the commencement of regularisation provision w.e.f 22.03.2016. Such teachers were working against substantive vacancies and their names were recommended for substantive appointment on their selection by the Selection Committee constituted under the statutory provisions/Act, 1982 to assess their suitability to the post. The substantive appointment of such teachers was kept on probation and only after they were found suitable, they were made permanent.

42. We may further note that such teachers who were not found suitable by the Selection Committee and were found ineligible to get a substantive appointment under the aforesaid provisions had ceased to hold the appointment, thereafter, which means that only those teachers who possessed eligibility qualification and were found suitable for appointment in adhoc capacity, by the Selection Committee were appointed in the substantive capacity and allowed to continue on permanent basis. All the writ petitioners herein have been made permanent and superannuated in permanent capacity while working on a substantive post.

43. The procedure adopted for regularisation of adhoc teacher as provided in Section 33G of the Selection Board Act, 1982 does not give any room to make any distinction between confirmation of an employee or teacher working in temporary or officiating capacity or confirmation of adhoc teachers working on substantive posts in a permanent establishment. The dictionary meaning of the word “confirmation”, from the Black's Law Dictionary 8th Edition (South Asian Edition) shows the meaning of the word confirmation:- (i) as the act of giving formal approval; (ii) the act of verifying or corroborating; (iii) the act of ratifying a voidable estate; (iv) a declaration that corrects a null provision of an obligation in order to make the provision enforceable.

44. The same meaning can be assigned to the word “regularization” for regularization of the services of an ad-hoc appointee.

45. The distinction drawn by the learned Additional Advocate General between the word “confirmation” provided in Rule 19(b) of Rules, 1964 and “regularisation” used in Section 33G for substantive appointment of adhoc teachers working in a permanent establishment of aided institution is imaginary. The continuous ad-hoc services rendered by the teachers followed without interruption, by confirmation of their services on the substantive post on selection by the

Selection Board in accordance with the statutory provision, shall qualify and be counted as "qualifying service", within the meaning of Rule 19(b) of the Rules 1964. The writ petitioners who have completed 10 years of qualifying service within the meaning of Rules, 1964, as noted above, shall be eligible for superannuation pension and other retiral benefits as applicable under the Rules, 1964.

46. We may further note that the Rules, 1964 are special provisions applicable to the teachers and non-teaching employees serving in State Aided Educational Institutions in the State of U.P. The general provisions of U.P. Qualifying Service for Pension and Validation Act, 2021 defining the term 'qualifying service' in U.P. Retirement Benefits Rules, 1961 w.e.f 01.04.1961, applicable to 'officers' defined in Rule 3(6) of the Rules, 1961, which means the Government servant having a lien on permanent pensionable post under "the Government," would not be applicable to the writ petitioners. All the arguments of the learned Additional Advocate General to challenge the correctness of the decision of the learned Single Judge dated 30.09.2022 in ***Nand Lal*** (supra), subject matter of challenge in connected special appeals are found without any force.

47. For the added reasons given above to the reasoning assigned by the learned Single Judge in the judgment of Nand Lal (supra) impugned, to allow the writ petitions no merit is found in the appeal. The other decisions of the learned Single Judge dated 25.07.2022 and 23.05.2022 in allowing the writ petitions relying upon the decision of this Court in ***Sunita Sharma*** (supra) also do not warrant any interference, for the reasons given above and the reasoning of the learned Single Judge in the judgment and order dated 30.09.2022 in ***Nand lal*** (supra), affirmed hereinabove.

48. For the above discussion, all the connected special appeals are found devoid of merits and hence **dismissed**.

(2023) 6 ILRA 984
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2023

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL J.
THE HON'BLE VIKAS BUDHWAR, J.

Special Appeal No. 184 of 2023

Ankit Chaudhary ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Siddharth Khare, Sri Ashok Khare (Sr. Adv.)

Counsel for the Respondents:
C.S.C.

Civil Law – service law- learned single judge's order upholding the cancellation of appointment of petitioner-petitioner appointed as constable-appointment cancelled on ground of impersonation-difference between cancellation of appointment- dispensation of services by way of dismissal, removal or termination-disciplinary proceedings not required-impugned order does not consider the forensic report provided by the petitioner-impugned order violates principles of natural justice- impugned order set aside-special appeal partly allowed. (Paras 20, 21, 23, 27, 29 and 30)

HELD:

The primary issue which needs to be considered, firstly is as to whether it was legally open for the appellant / writ petitioner to insist for holding regular departmental enquiry in the matter of cancellation of the candidature and delisting of his name from the list of selected candidates or not. Though the rival parties have cited umpteen number of decisions, but we would deal them later. Before delving into said issue, we have to bear in mind the nature of the order, which is being passed to the detriment of an employee/ candidate. There are two sets of the punitive order, namely an order cancelling the appointment for whatever reason it might be and secondly, an order dispensing with the services of an employee/ candidate either by resorting to dismissal, removal or termination. Another ancillary issue, which is relatable to the conduct of an employee/ candidate, namely a conduct prior to appointment and post appointment. In the first category, the conduct can be termed an act of fraud, while obtaining appointment. Second category personifies, a misconduct during the course of employment which definitely falls within the scope of departmental rules for taking disiplinary action against the employee either by way of resorting to the procedure for minor punishment or major punishment as the case may be. In the matters of cancellation of appointment relatable to obtaining of appointment by fraud, the parties before us have not produced any rule, for holding regular departmental proceedings. However, from the judgment so cited by the rival parties, it can be safely gathered that in the matter of a misconduct during the course of employment post appointment relatable to certain act or omission either forbidden or not required to be committed as per the Conduct Rules, regular departmental proceedings are to be held. (Para 20)

Here, in the present case, no regular departmental enquiry is required to be conducted as it is a case of cancellation of appointment. As regards reliance placed upon Subhash Chand Maurya's (supra) case is concerned, the same is also of no aid to the appellant/ writ petitioner as that was a case, wherein there was termination of the services of an employee. Similarly, Reeta Yadav's case (supra) is also not applicable to the present case, the same is related to the punishment of dismissal emanating from the allegation of submission of forged document in order to procure appointment in the department. (Para 23)

Recently, in the case of St. of Bihar & ors. Vs Devendra Sharma (2020) 15 SCC 466, the Hon'ble Apex Court has observed that an appointment made on the basis of forgery is void ab initio. More recently, the Hon'ble Apex Court in the case of Chief Executive Officer, Bhilai Steel Plant, Bhilai Vs Mahesh Kumar Gonnade, AIR 2022 SC 3356 has held that an appointment procured on the basis of false certificate does not create any equity. (Para 27)

Now a question arises as to whether non-consideration of the report of the Foresnsic Expert relied upon by the appellant/writ petitioner would vitiate the orders impugned before the writ court or not. Basically the very purpose for issuance of a show cause notice is to apprise the other person about the allegations which he/she has to meet, requiring the other party to submit its reply effectively. Here in the present case post issuance of show cause notice, the writ petitioner submitted his reply on 07.09.2022 along with the Forensic Expert's Report dated 24.08.2022 disputing the correctness, reliability and accuracy of the report of the Forensic Expert relied upon by the respondents. Once such a defence has been taken on the basis of the Forensic Report of the expert, then the principles of natural justice required the authority to take a decision after considering the contentions raised by the noticee. The order dated 07.10.2022 of the second respondent shows that the said exercise is lacking. In the opinion of the Court, the second respondent, U.P. Police Recruitment & Promotion Board, Lucknow, was required to consider and address the said issue while coming to a final conclusion as to which of the two reports, one submitted by the appellant/writ petitioner and the other obtained by the respondents was to be taken into consideration while forming a definite and conclusive opinion of commission of act of impersonation. Since the said exercise has not been taken, we find that the procedure known to law, has not been complied with by the second respondent, U.P. Police Recruitment & Promotion Board, Lucknow. (Para 29)

Appeal dismissed. (E-14)

List of Cases cited:

1. U.O.I. & ors. Vs Devendra Kumar Chaudhary, 2018(9) ADJ 570

2. Avatar Singh Vs U.O.I., (2016) 8 SCC 471

3. Smt. Reeta Yadav Vs St. of U.P., Writ-A No. 11046 of 2022, decided on 01.08.2022

4. Subhash Chand Maurya Vs St. of U.P., Writ-A No. 8117 of 2021 decided on 20.09.2021

5. R. Vishwanatha Pillai Vs St. of Kerala, (2004) 2 SCC 105

6. Devendra Kumar Vs St. of Uttaranchal (2013) 9 SCC 363

7. St. of Bihar & ors. Vs Kirti Narayan Prasad, (2019) 13 SCC 250

8. St. of Bihar & ors. Vs Devendra Sharma (2020) 15 SCC 466

9. Chief Executive Officer, Bhilai Steel Plant, Bhilai Vs Mahesh Kumar Gonnade, AIR 2022 SC 3356

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare, learned counsel for the appellant/ writ petitioner and Sri Suresh Singh, learned Addl. Chief Standing Counsel for the State-respondents.

2. This intra-court appeal is against the judgment and order dated 28.02.2023 of the learned Single Judge passed in **Writ-A No.22096 of 2022, (Ankit Chaudhary vs. State of U.P. and three others),** whereby the writ petition of the writ petitioner was dismissed.

3. The case of the appellant-writ petitioner before the learned Single Judge was that an advertisement was published in the month of January 2018 for recruitment on the post of **Constable Civil Police and Constable Provincial Armed Constabulary.** As per the writ petitioner, he being fully eligible and qualified in all respects applied for selection and appointment on the post of constable under the OBC category. The writ petitioner claims to have been allotted Roll No.3311050244 and Registration No.105166994282. The writ petitioner further claims to have participated in the written examination conducted on 19.06.2018 and after successfully clearing the physical examination and subjected to Document Verification/ Physical Standard Test (hereinafter referred to as "DV/PST") followed by medical examination was accorded appointment on 15.05.2019. Post appointment, the writ petitioner claims to have been sent for training at Fatehpur and thereafter, at Mainpuri.

4. While the writ petitoner was discharging the duty on the post of Constable in police, a complaint is stated to have been lodged against him on the allegation of impersonation, as in place of the writ petitioner, somebody else appeared in the selection process and the writ petitioner procured appointment while playing fraud. It is further alleged that there were other police constables, who had procured appointment while resorting to impersonation and thus, a first information report is stated to have been lodged by the police officials before the Police Station Etmaddaula, Agra registered as FIR No.0389 on 08.06.2021 against as many as 9 persons, though the writ petitioner was not marked as an accused in the said FIR. On 20.07.2021, the writ petitioner claims to have been summoned before the second respondent, U.P. Police Recruitment and

Promotion Board at Lucknow, in order to conduct enquiry and it is further alleged that the photograhs and biometrics of the writ petitioner were taken and, thereafter, he was sent to Agra District Jail, Agra. The writ petitioner thereafter is stated to have filed a **Criminal Misc. Bail Application No.34570 of 2021, (Ankit Chaudhary vs. State of U.P.),** wherein on 01.10.2021, this Court enlarged the applicant on bail, consequently, the writ petitioner was released from Jail on 26.10.2021.

5. Thereafter, the writ petitioner claims to have approached the respondents herein for according joining, but the same was refused. On 30.07.2021, an order is stated to have been passed by the second respondent, Chairman, U.P. Police Recruitment and Promotion Board, Lucknow, whereby on the basis of an exparte enquiry, it was found that the writ petitioner had obtained appointment as Police Constable by resorting to impersonation and by fraud, thus, his candidature was rejected and his name was delisted from the list of selected candidates. In continuation of the order dated 30.07.2021 of the second respondent, a consequential order was passed by the fourth respondent, Senior Superintendent of Police, Fatehpur, cancelling the appointment of the writ petitioner and delisting him from the list of selected candidates.

6. The writ petitioner further claims to have preferred **Writ-A No.19036 of 2021, (Ankit Chaudhary vs. State of U.P. and 3 others)** before this Court, which came to be disposed off by the learned Single Judge with the following directions: -

"Under such circumstances, the order impugned dated 30.07.2021 passed by the Chairman, U.P. Police Recruitment & Promotion Board, Lucknow and the order dated 07.12.2021 passed by the Superintendent of Police, Fatehpur cannot be sustained in the eyes of law and, therefore, are set aside. It shall, however, be open for the respondents to proceed against the petitioner after relying upon such evidence, which might be admissible in law. The petitioner shall definitely be given an opportunity to place his side of the case. This exercise shall be completed within a period of two months from the presentation of a certified copy of this order.

Needless to say that if any evidence is being used against the petitioner it shall always be supplied to the petitioner so that he has an opportunity to rebut the same.

This writ petition is, accordingly, partly allowed."

7. Consequent to passing of the order dated 11.04.2022 in **Writ-A No.19036 of 2021,** a show cause notice dated 02.08.2022 was issued by the Additional Secretary, Recruitment, U.P. Police Recruitment and Promotion Board, second respondent requiring the writ petitioner to show cause within a period of five days as to why the cancellation of his candidature and delisting the name of the petitioner from the list of selected candidates be not maintained. The show cause notice dated 02.08.2022 was followed by another notice dated 18.08.2022. On the receipt of the above noted show cause notices, the writ petitioner responded the same on 07.09.2022 clearly setting out that he had not resorting to any act of impersonation and he also disputed the Forensic Report of the Respondent, which was made the basis

of drawing adverse inference and also annexed the Forensic Investigation Report dated 24.08.2022. Further the writ petitioner requesting for cross-examination of the Forensic Expert report of which was relied upon by the respondents insisted for holding of regular departmental enquiry as per the Service Rules applicable to the Constables of the Police Department. The second respondent, the Chairman, U.P. Police Recruitment and Promotion Board, Lucknow, thereafter, proceeded to pass an order dated 07.10.2022 negating the claim set up by the writ petitioner while maintaining the previous stand of cancelling the candidature of the writ petitioner and delisting his name from the list of selected candidates, without holding a regular departmental enquiry.

8. Challenging the order dated 07.10.2022 passed by the second respondent, U.P. Police Recruitment and Promotion Board, Lucknow, the writ petitoner preferred **Writ-A No.22096 of 2022, (Ankit Chaudhary vs. State of U.P. and others)** seeking following relief:

"(i) a writ, order or direction in the nature of certiorari quashing the order dated 07.10.2022 passed by the Chairman, U.P. Police Recruitment & Promotion Board, Lucknow (Annexure No. 14 to this writ petition);

(ii) a writ, order or direction in the nature of mandamus commanding the respondent authorities to reinstate the petitioner in service with all consequential benefits on the post of Constable."

9. The above noted writ petition preferred by the writ petitioner came to be dismissed by the learned Single Judge by virtue of the judgment and order dated 28.02.2023.

10. Aggrieved against the order dated 28.02.2023 passed in **Writ-A No.22096 of 2022,** the appellant/ writ petitioner has preferred the present intra-court appeal.

11. Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare in support of the appeal has submitted that the learned Single Judge has erred in law in dismissing the writ petition raising challenge to the order dated 07.10.2022 cancelling the candidature of the petitioner and delisting his name from the list of selected candidates of Police Constables, inasmuch as, the present case is a classic example of illegality perpetrated by the respondents as without resorting to principles of natural justice, the appointment of the appellant/writ petitioner has been cancelled, which is in direct teeth of judgment of this Court in the earlier round of litigation in **Writ A No. 19036 of 2021** decided on 11.04.2022 mandating the respondents to comply with the principles of natural justice before taking any adverse action aginst the writ petitioner. In other words, the submission is that since the Forensic Report is nothing but an opinion of an Expert and it does not partake the character of a conclusive evidence. Until and unless opportunity is accorded to the writ petitioner to rebut the same while granting opportunity to cross-examine the author of the same, the said Forensic Report cannot be treated as a gospel truth. Once the said exercise was not undertaken, the entire proceedings stood vitiated.

12. Additionally, it is further sought to be argued on behalf of the appellant / writ petitioner that once a show cause notice was issued by the second respondent, enabling the appellant/ writ petitioner to submit his reply and the appellant / writ petitioner tendered its reply relying upon another Forensic Report, which was contrary to the Forensic Report relied upon by the respondents, it was incumbent upon the second respondent to have recorded reasons as to why the report of the appellant/ writ petitioner should not be given precedence.

13. In the nutshell, the submission is that the order passed by the second respondent cancelling the candidature of the writ petitioner and delisting his name from the list of selected candidates is a serious issue, which cannot be taken lightly in the manner, it has been done. The reply submitted by the writ petitioner to the show cause notice relying upon an independent Forensic Expert Report ought to be considered and taken note in the order impugned by the learned Single Judge.

14. Lastly, it has been submitted on behalf of the appellant/ writ petitioner and the writ petitioner specifically denied the allegations and requested for holding a regular departmental enquiry as per the Service Rules in order to find out the truth of the allegations, then resorting of a short-cut method of cancellation of appointment without holding the regular departmental enquiry itself tantamounts to violation of principles of natural justice, particularly, when the writ petitioner became a confirmed and regular employee post successfully completing two years of probation as per the **Uttar Pradesh Police Constable and Head Constable Service Rules, 2015** amended in 2017. Sri Ashok Khare, learned Senior Counsel has relied upon the decisions in the case of Union of India and others vs. Devendra Kumar Chaudhary, **2018(9) ADJ 570;** ***Avatar Singh vs. Union of India, (2016) 8 SCC 471; Smt. Reeta Yadav vs. State of U.P.***, **Writ-A No. 11046 of 2022**, decided on 01.08.2022 and ***Subhash Chand Maurya vs. State of U.P.***, **Writ-A No. 8117 of 2021** decided on 20.09.2021 to substantiate the above submissions.

15. Sri Suresh Singh, learned Addl. Chief Standing Counsel who appearing for the State respondents while countering the submission of the learned Senior Counsel for the appellant has sought to argue that the judgment and order of the learned Single Judge needs no interference in the present proceedings in view of the fact that it is an admitted case that the writ petitioner had impersonated and procured appointment by playing fraud. Further submission is that the order cancelling the candidature of the writ petitioner and delisting his name from the list of the selected candidates is based upon the report of Forensic Expert, copy whereof was duly provided to the appellant / writ petitioner. The appellant/ writ petitioner was made aware of the contents of the expert report and reasons for cancellation of appointment, merely because regular a departmental enquiry was not conducted, it would not be a ground to hold the order of the learned Single Judge being bad or vitiated, particularly, when there is no rule requiring holding of a regular departmental proceedings in the case of cancellation of initial appointment having been outcome of fraud. Sri Suresh Singh while elaborating the said submission has argued that there is a marked difference between the cancellation of appointment and dispensation of the services by way of

dismissal, removal or termination. According to him, since the present case falls within the category of cancellation of the appointment itself on the ground of practising fraud by impersonation, the procedure contemplated for holding a regular departmental enquiry would not be attracted. It is further argued on behalf of the respondents that the second respondent has considered the case of the writ petitioner from all angles and has formed a firm opinion on the basis of the report of the Forensic Expert that the writ petitioner had impersonated and obtained appointment by playing fraud. In order to buttress the above submissions, reliance has been made upon the judicial pronouncement of ***R. Vishwanatha Pillai vs. State of Kerala, (2004) 2 SCC 105, Devendra Kumar Vs. State of Uttaranchal (2013) 9 SCC 363 and State of Bihar and others vs. Kirti Narayan Prasad, (2019) 13 SCC 250.***

16. We have heard counsels for the respective parties and perused the record carefully.

17. Undisputedly, on the basis of the recruitment exercise undertaken by the second respondent, U.P. Police Recruitment and Promotion Board, Lucknow by way of publication of the advertisement in the month of January 2018, the writ petitioner applied for the post of Constable under OBC category and he was allotted Roll No.3311050244 and Registration No.105166994282. The petitioner cleared the written examination conducted on 19.06.2018, was subjected to DV/PST, Physical Efficiency Test and medical examination and accorded appointment on 15.05.2019. A complaint was lodged against the writ petitioner and the other candidates that they had obtained appointment while resorting to impersonation and practising fraud and, thereafter, the writ petitioner was arrested and consequently, by an order of this Court enlarged on bail.

18. Challenging the order dated 30.07.2021 and 07.12.2021 cancelling the candidature of the writ petitioner and delisting his name from the list of the selected candidates, the writ petitioner preferred **Writ-A No. 19036 of 2021 (Ankit Chaudhary vs. State of U.P. and others)** on the ground that in an exparte manner without issuing any show cause notice and granting opportunity to the writ petitioner to tender his reply on the basis of the report of the Forensic Expert, his services were dispensed with. This Court by virtue of the order dated 11.04.2022 quashed the orders dated 30.07.2021 and 07.12.2021 of the respondents being in violation of principles of natural justice leaving it open to them to proceed against the writ petitioner after relying upon the evidences, which might be available in law and the respondents were directed to give opportunity to the writ petitioner to place his side of the case. It was further provided that if any evidence is being used against the writ petitioner, it would be supplied to be writ petitioner so that he may have opportunity to rebut the same.

19. The remand, the respondents issued a show cause notice to the writ petitioner on 02.08.2022 followed by another notice dated 18.08.2022 requiring the writ petitioner to put forward his stand with regard to the allegations of impersonation as well as the inputs in the shape of the Forensic Report relied upon to hold the writ petitioner guilty of impersonation. The writ petitioner submitted his reply on 07.09.2022 raising

two issues; (a) a regular departmental enquiry under the Service Rules be conducted; (b) Opportunity to cross-examine the author of the Forensic Report be afforded to him; (c) the proceedings be dropped as the writ petitioner relies upon the Forensic Report dated 24.08.2022, which in turn negates and makes the Forensic Report of the respondents unreliable and inaccurate. According to the learned counsel for the appellant/writ petitioner, by a totally non-speaking and unreasoned order, while none of the contentions of the writ petitioner has been considered, his candidature has been cancelled followed by delisting his name from the list of selected candidates.

20. The primary issue which needs to be considered, firstly is as to whether it was legally open for the appellant / writ petitioner to insist for holding regular departmental enquiry in the matter of cancellation of the candidature and delisting of his name from the list of selected candidates or not. Though the rival parties have cited umpteen number of decisions, but we would deal them later. Before delving into said issue, we have to bear in mind the nature of the order, which is being passed to the detriment of an employee/ candidate. There are two sets of the punitive order, namely an order cancelling the appointment for whatever reason it might be and secondly, an order dispensing with the services of an employee/ candidate either by resorting to dismissal, removal or termination. Another ancillary issue, which is relatable to the conduct of an employee/ candidate, namely a conduct prior to appointment and post appointment. In the first category, the conduct can be termed an act of fraud, while obtaining appointment. Second category personifies, a misconduct during the course of employment which definitely falls within the scope of departmental rules for taking disiplinary action against the employee either by way of resorting to the procedure for minor punishment or major punishment as the case may be. In the matters of cancellation of appointment relatable to obtaining of appointment by fraud, the parties before us have not produced any rule, for holding regular departmental proceedings. However, from the judgment so cited by the rival parties, it can be safely gathered that in the matter of a misconduct during the course of employment post appointment relatable to certain act or omission either forbidden or not required to be committed as per the Conduct Rules, regular departmental proceedings are to be held.

21. Here, in the present case, the entire allegations leveled upon the writ petitioner are relatable to an act of impersonation while obtaining appointment. The respondents have relied upon the report of the Forensic Expert, which prior to the passing of the order dated 30.07.2021 and 07.12.2021 was not served to the writ petitioner and without issuing show cause notice adverse orders were passed. On challenge being raised by the writ petitioner, this Court in the earlier round of litigation vide order dated 11.04.2022 though noticed the argument of the writ petitioner that the regular departmental enquiry ought to have been conducted as per the Service Rules applicable, but in the operative portion of the order, which has been extracted in the earlier part of the judgment while setting aside the orders under challenge left it open to the respondents to proceed against the writ petitioner after relying upon the evidence which might be admissible in law and the writ petitioner was made entitled to

be given opportunity to place his version and any of the inputs, which would be relied was to be supplied to the writ petitioner to rebut the same. The said observations are not only clinching but also governs the further course of action, which is to be adopted post passing of order dated 11.04.2022. It is not the case of the appellant/ writ petitioner that a show cause notice was not issued to him as according to the writ petitioner, he was served with a show cause notice dated 02.08.2022 followed by another dated 18.08.2022 along with report of the Forensic Expert to which the writ petitioner tendered his reply on 07.09.2022 relying upon another report of the Forensic Expert dated 24.08.2022. Thus, the compliance of the orders of the learned Single Judge in the earlier round of litigation has been made by respondents.

22. Nonetheless the case of **Devendra Kumar Chaudhary (supra)** relied upon by appellant/writ petitioner is a case of regular departmental enquiry wherein during the course of the departmental proceedings, the employers relied upon the report of the Forensic Expert and the delinquent was denied opportunity to cross-examine the author of the same and in that context, this Court opined that the report of the Forensic Expert is only an opinion and in order to make it an admissible evidence, experts must appear before the enquiring authority so that the affected person against whom an expert opinion is being given may have an opportunity to cross-examine him. There is no quarrel to the said proposition of law, but the principles applicable for holding regular departmental enquiry cannot be applied in the case of cancellation of appointment.

23. Here, in the present case, no regular departmental enquiry is required to be conducted as it is a case of cancellation of appointment. As regards reliance placed upon ***Subhash Chand Maurya's*** *(supra)* case is concerned, the same is also of no aid to the appellant/ writ petitioner as that was a case, wherein there was termination of the services of an employee. Similarly, ***Reeta Yadav's*** case *(supra)* is also not applicable to the present case, the same is related to the punishment of dismissal emanating from the allegation of submission of forged document in order to procure appointment in the department.

24. In **Avtar Singh (supra)** the Hon'ble Apex Court while considering the issued with regard to suppression of material facts during the course of verification of antecedents had in para 35(9) observed as under:-

"In case the employee is confirmed in service, holding departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form."

25. The aforesaid observations in the shape of conclusions are only confined to holding a regular departmental enquiry before passing of the order of termination, removal or dismissal on the ground of suppression or submitting false information.

26. The judgment relied upon by Sri Suresh Singh, learned Addl. Chief Standing Counsel who appears for the respondents, in the case of ***R. Vishwanatha Pillai*** *(supra)* is a case, wherein it has been held that once an appointment has been procured on the basis of false certificate, then the employee does not hold a civil post and thus, he is not entitled to the

protection under Article 311(2) of the Constitution of India. Reiterating the said law in a subsequent decision in the case of ***Devendra Kumar*** *(supra),* the Apex Court has held that once an employee obtains appointment suppressing the material fact, then he is not entitled to the benefits as available under law. As regards the judgment in the case of ***Kirti Narayan Prasad*** *(supra),* the same also holds that an appointment made on the basis of vague or forged appointment letters is an illegal appointment void ab initio and thus, no rights accrue in favour of such employee.

27. Recently, in the case of **State of Bihar and others vs. Devendra Sharma (2020) 15 SCC 466,** the Hon'ble Apex Court has observed that an appointment made on the basis of forgery is void ab initio. More recently, the Hon'ble Apex Court in the case of **Chief Executive Officer, Bhilai Steel Plant, Bhilai vs. Mahesh Kumar Gonnade, AIR 2022 SC 3356** has held that an appointment procured on the basis of false certificate does not create any equity.

28. Interestingly, it is not the case of the appellant/writ petitioner that post order dated 11.04.2022 passed in **Writ A No. 19036 of 2021**, he was not supplied with the copy of the Forensic Report relied by the respondents in order to holding guilty of impersonation. It is also not the case of the apppellant/writ petitioner that he was denied access of any of the documents which was put in motion to his detriment. Pleadings further reveal that there is no allegation of mala fide against any official of the respondents. Primarily the grievance is for granting opportunity to cross-examine the expert whose Forensic Report has been relied upon to hold the appellant/writ petitioner guilty of impersonation and to conduct regular departmental enquiry as per the rules. The question of holding of regular departmental enquiry in the matter of cancellation of appointment is not provided under the rules, and thus, it would not be proper for us to direct the respondents to conduct an enquiry which is not contemplated under the rules. As regards the issue of cross-examination of the expert whose Forensic Report has been relied upon by the respondents is concerned, in absence of any provision entitling the writ petitioner to cross-examine the expert we are afraid of such type of directions cannot be issued. Moreover, it is also not open for the writ petitioner to insist for holding of regular departmental enquiry as the said issue had already raised in the earlier round of litigation in **Writ A No. 19036 of 2021 (Ankit Chaudhary Vs. State of U.P. and 3 Others)** decided on 11.04.2022 and thus, in absence of any effective relief granted to the writ petitioner while directing the respondents herein to conduct regular departmental enquiry, the said direction also cannot be issued so as to further accede to the request of cross-examining the expert whose Forensic Report was relied upon by the respondents.

29. Now a question arises as to whether non-consideration of the report of the Foresnsic Expert relied upon by the appellant/writ petitioner would vitiate the orders impugned before the writ court or not. Basically the very purpose for issuance of a show cause notice is to apprise the other person about the allegations which he/she has to meet, requiring the other party to submit its reply effectively. Here in the present case post issuance of show cause notice, the writ petitioner submitted his reply on 07.09.2022 along with the Forensic Expert's Report dated 24.08.2022

disputing the correctness, reliability and accuracy of the report of the Forensic Expert relied upon by the respondents. Once such a defence has been taken on the basis of the Forensic Report of the expert, then the principles of natural justice required the authority to take a decision after considering the contentions raised by the noticee. The order dated 07.10.2022 of the second respondent shows that the said exercise is lacking. In the opinion of the Court, the second respondent, U.P. Police Recruitment & Promotion Board, Lucknow, was required to consider and address the said issue while coming to a final conclusion as to which of the two reports, one submitted by the appellant/writ petitioner and the other obtained by the respondents was to be taken into consideration while forming a definite and conclusive opinion of commission of act of impersonation. Since the said exercise has not been taken, we find that the procedure known to law, has not been complied with by the second respondent, U.P. Police Recruitment & Promotion Board, Lucknow.

30. Accordingly, the judgment and order of the learned Single Judge dated 28.02.2023 passed in **Writ A No. 22096 of 2022** as well as the order dated 07.10.2022 passed by the second respondent, Chairman, U.P. Police Recruitment & Promotion Board, Lucknow, are set aside. The matter is remitted back to the second respondent, U.P. Police Recruitment & Promotion Board, Lucknow, to revisit the same afresh in light of the observations made hereinabove, by passing a reasoned and speaking order in accordance with law, as expeditiously as possible preferably within a period of two months from the date of production of the certified copy of the order.

31. It is further provided that setting aside of the judgment and orders of the learned Single Judge dated 28.02.2023 and 07.10.2022 of the second respondent, U.P. Police Recruitment & Promotion Board, Lucknow, shall not be construed that the appellant/writ petitioner would be entitled for reinstatement and grant of consequential benefits, if any, which would be subject to the final outcome of the fresh order to be passed by the second respondent.

32. With the aforesaid observation, the special appeal stands partly **allowed.**
