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ALLAHABAD SERIES



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had concealed their criminal history which is evident from para-3 of the said order dated 08.06.2023. Learned counsel has placed reliance on Section 44 of the Indian Evidence Act and for ready reference, Section 44 reads as under:-

“44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.—Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.”

5. Per contra, learned counsel for the opposite party nos.2 and 3 has stated that the opposite party no.2 Sadhna Singh has criminal history of three cases;

(i) Case Crime No.30 of 2023, u/s 395, 397, 354B, 448, 504, 323, 120-B of IPC, P.S. - Ganj, District - Rampur, was instituted by the complainant herein himself against the applicant and other co-accused persons in which closure report has been filed.

(ii) Case Crime No. 50 of 2014, u/s 420, 467, 468, 471 of IPC, P.S. - Ganj, District – Rampur, was also instituted against the applicant and she was enlarged on bail on 08.04.2015.

(iii) Case Crime No.180 of 2022, u/s 420, 467, 468, 471 of IPC, P.S. - Baradari, District – Bareilly. In the said case, investigation is going on and no summons/warrants were issued against her.

6. So far as the opposite party no.3 is concerned, there is a criminal history of one case i.e. Case Crime No.30 of 2023, u/s 395, 397, 354-B, 448, 504, 323, 120-B of

IPC, P.S. - Ganj, District – Rampur wherein she has been exonerated by the police and a closure report has been filed. The applicant has no knowledge of further proceedings in the said case.

7. Learned counsel for the applicant has further stated that the said anticipatory bail application was filed on 08.06.2023 and was allowed the same day, prior to it, first anticipatory bail application was filed before the same court and was withdrawn on 07.06.2023. The said order has been garnered by the applicant in a hurry by concealing the said fact of criminal history.

8. Considering the rival submissions advanced by the learned counsel for the parties and taking into consideration the fact that the opposite party nos. 2 & 3 while obtaining the bail order before the court concerned, had concealed the fact of their criminal antecedents which is also evident from para-3 of the impugned order dated 08.06.2023 coupled with the provisions of Section 44 of Indian Evidence Act, the said order dated 08.06.2023 passed by learned Sessions Judge, Rampur is not sustainable and is set aside.

9. In view of the above, the instant bail cancellation application is **allowed**. The impugned bail order dated 08.06.2023 passed by learned Sessions Judge, Rampur is hereby set aside.

10. However, two weeks' time from the date of pronouncement of this Judgment is granted to opposite party nos. 2 & 3 to surrender before the concerned Trial Court and thereafter it will be open for them 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 vs. Central Bureau*

Criminal Law-The Code of Criminal Procedure, 1973-Section 438--Anticipatory bail rejected by the Sessions court on the ground that the incident occurred on 27.04.2014, on which date the provisions of Section 438 Cr.P.C. were not applicable to the St. of U.P.---The Criminal Procedure Code (U.P. Amendment) Act, 2018 merely restores the benefit of anticipatory bail to persons apprehending arrest, which benefit was available to similarly situate persons in the rest of India immediately before enactment of the aforesaid Amendment Act and which benefit was available to the persons in the St. of U.P. also before enactment of Code of Criminal Procedure (U.P. Amendment) Act, 1976. This being a beneficial legislation, it cannot be restricted in its operation to offences committed subsequent to enactment of Act, 2019 and it will be available to all the persons 'apprehending arrest' after enactment of the Amendment Act, 2018, even if the offence was committed prior to enactment of the Amendment Act, 2018---

involvement in three other cases has been disclosed in para-28 of the affidavit.

5. The anticipatory bail of the applicant has been rejected by the Sessions court, Raebareli on the ground that the incident occurred on 27.04.2014, on which date the provisions of Section 438 Cr.P.C. were not applicable to the State of U.P., therefore, application cannot be entertained as the application under Section 438 Cr.P.C. is prospective and not retrospective.

6. The Code Of Criminal Procedure (Uttar Pradesh Amendment) Act, 2018 (U.P. Act No. 4 Of 2019) was notified on 06.06.2019. The 'Statement Of Objects And Reasons of the Amendment Act' states that Section 438 of the Code of Criminal Procedure 1973, regarding the provision of anticipatory bail, was omitted by the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No. 16 of 1976). There was continuous demand for its revival. The State Law Commission had, in its third report in 2009, recommended for reviving the provisions of the said section. A committee to consider the revival of the provisions of the said section had recommended that the provisions of the said section should be revived with certain modifications. After considering the recommendation of the said committee, it was decided to amend the Code of Criminal Procedure, 1973 in its application to Uttar Pradesh to revive the provisions of section 438 with certain modifications.

7. Section 2 of the Amendment Act provides that *In the Code 'of Criminal Procedure, 1973 as amended in its application to Uttar Pradesh, after Section 437-A the following section shall be inserted, namely:-*

“438. (1) Where any person has reason to believe that he may be arrested on accusation of

having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:—

i) the nature and gravity of the accusation;

ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii) the possibility of the applicant to flee from justice; and

iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended hi such application.

(2) Where the High Court or, as the case may be, the Court of Session,' considers it expedient to issue an interim order to grant anticipatory bail under subsection (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may. deem fit, and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:—

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement,

threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other Conditions as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

Explanation:—The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application.

(6) Provisions of this section shall not be applicable,—

(a) to the offences arising out of,—

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(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session.”

8. The Court will presume that a law, which affects substantive rights, are meant to have prospective operation only. In the same way, as regards procedural laws or the laws relating to a mere matter of procedure or of Forum, they carry retrospective impact. Declaratory, clarificatory or curative Statutes are allowed to hold sway in the past. The very nature of the said laws involve the aspect of public interest which requires sovereign Legislature to remove defects, clarify aspects which create doubt. The declaratory law again has the effect of the legislative intention being made clear.

9. In **T. Barai v. Henry Ah Hoe**, (1983) 1 SCC 177, the Hon'ble Supreme Court held that: -

“22. It is only retroactive criminal legislation that is prohibited under Article 20(1). The prohibition contained in Article 20(1) is that 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 prohibits nor shall he 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. It is quite clear that insofar as the Central Amendment Act creates new offences or enhances punishment for a particular type of offence no person can be convicted by

such ex post facto law nor can the enhanced punishment prescribed by the amendment be applicable. But insofar as the Central Amendment Act reduces the punishment for an offence punishable under Section 16(1)(a) of the Act, there is no reason why the accused should not have the benefit of such reduced punishment. The rule of beneficial construction requires that even ex post facto law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and common sense. This finds support in the following passage from Craies on Statute Law, 7th Edn., at pp. 388-89:

“A retrospective statute is different from an ex post facto statute. “Every ex post facto law...” said Chase, J., in the American case of Calder v. Bull “must necessarily be retrospective, but every retrospective law is not an ex post facto law. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive; it is a good general rule that a law should have no retrospect, but in cases in which the laws may justly and for the benefit of the community and also of individuals relate to a time antecedent to their commencement: as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law ex post facto within the prohibition that mollifies the rigour of the criminal law, but only those that create or aggravate the crime, or increase the punishment or change the rules of evidence for the purpose of conviction.... There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime.”

23. To illustrate, if Parliament were to reenact Section 302 of the Penal Code, 1860 and provide that the punishment for an offence of murder shall be sentence for imprisonment for life instead of the present sentence of death or imprisonment for life, then it cannot be that the courts would still award a sentence of death even in pending cases.

24. In Rattan Lal v. State of Punjab, the question that fell for consideration was whether an appellate court can extend the benefit of Probation of Offenders Act, 1958 which had come into force after the accused had been convicted of a criminal offence. The Court by majority of 2: 1 answered the question in the affirmative. Subba Rao, J. who delivered a majority opinion, concluded that in considering the question, the rule of beneficial construction required that even ex post facto law of the type involved in that case should be applied to reduce the punishment.

10. Therefore, the Criminal Procedure Code (Uttar Pradesh Amendment) Act, 2018 merely restores the benefit of anticipatory bail to persons apprehending arrest, which benefit was available to similarly situate persons in the rest of India immediately before enactment of the aforesaid Amendment Act and which benefit was available to the persons in the State of U.P. also before enactment of Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976. This being a beneficial legislation, it cannot be restricted in its operation to offences committed subsequent to enactment of Act, 2019 and it will be available to all the persons ‘apprehending arrest’ after enactment of the Amendment Act, 2018, even if the offence was committed prior to enactment of the Amendment Act, 2018. Therefore, the

reason given by the learned Session court for rejection of the anticipatory bail application is incorrect.

11. Having considered the aforesaid facts and circumstances of the case and keeping in view the fact that there is an old animosity between the parties regarding which two FIRs had been filed on previous occasions; that besides the version of the informant, there is no other material to support the allegations; there is some variance in the version of the incident and in the statement of victim recorded under Sections 161 Cr.P.C. and 164 Cr.P.C. and that the applicant is 60 years old person and without making any observations which may affect the outcome of the case, I am of the view that the aforesaid facts are sufficient for making out a case for granting anticipatory bail to the applicant.

12. In view of the above, the anticipatory bail application of the applicant is allowed. In the event of arrest/ appearance of **applicant-Allama Zamir Naqvi Alias Tahir** before the learned Trial Court in the aforesaid complaint case, he shall be released on anticipatory bail on his furnishing personal bond and two solvent sureties, each in the like amount, to the satisfaction of S.H.O./Court concerned on the following conditions and subject to any other conditions that may be fixed by the Trial Court:

(i). That the applicant shall appear before the trial court on each date fixed, unless personal presence is exempted;

(ii). That the applicant shall not, directly or indirectly make any inducement,

threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

(iii). That the applicant shall not pressurize/ intimidate the prosecution witness.

13. Let a copy of this order be sent to the Sessions court for being brought to the notice of the Presiding Officer who has passed the order dated 15.02.2023.

(2023) 11 ILRA 11

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 23.11.2023

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. Anticipatory Bail Application U/S
438 Cr.P.C. No. 11869 of 2023

Smt. Rajbala

...Applicant

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Applicant:

Sri Udai Chandani

Counsel for the Opposite Parties:

G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Section 438 – Indian Penal Code, 1860 – Sections 420, 120-B, 467 & 468 – Anticipatory Bail – Forgery and Cheating – False Affidavit – Criminal History – Senior Citizen

The applicant, Smt. Rajbala, sought anticipatory bail in Case Crime No. 0350 of 2022 under Sections 420, 120-B, 467, and 468 IPC, alleging false implication in a case involving a forged affidavit submitted to influence a murder investigation (Case Crime No. 212 of 2020). She

claimed to be a 72-year-old woman with health issues, cooperative in investigation, and argued that no prima facie evidence linked her to the alleged offences. The St. opposed, citing her criminal history, but could not dispute the lack of direct evidence. Held: (1) The anticipatory bail application was allowed. (2) No prima facie evidence established the applicant's role in preparing or knowing about the forged affidavit, and the ingredients for offences under Sections 420, 467, and 468 IPC were not met. (3) The applicant's criminal history (14 cases, with acquittals in two, bail in eight, protection in two, and one dropped) was explained, and per Satyendra Kumar Antil Vs CBI, prior cases without convictions do not justify denying bail absent strong evidence. (4) As a senior citizen with ailments, and with the charge sheet filed, custodial interrogation was unnecessary. (5) Anticipatory bail was granted with conditions, including cooperation with investigation, no tampering with evidence or witnesses, and surrender of passport, per Sushila Aggarwal Vs St. (NCT of Delhi) and Shri Gurbaksh Singh Sibbia Vs St. of Punjab. (6) The court emphasized that bail is the rule and jail the exception under Article 21, absent exceptional circumstances.

Case Law Cited:

1. Usha Cakraborty & anr. Vs St. of W.B. & anr., 2023 Live Law (SC) 67
2. Prabhakar Tiwari Vs St. of U.P., (2020) SCC OnLine SC 75
3. Shri Gurbaksh Singh Sibbia & ors. Vs St. of Pun., AIR 1980 SC 1632
4. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr., (2020) 5 SCC 1
5. Md Asfak Alam Vs St. of Jharkhand & anr., Criminal Appeal Nos. 2207 of 2023 (SLP (Crl.) No. 3433 of 2023), decided on 31.07.2023
6. Arnesh Kumar Vs St. of Bihar & anr., (2014) 8 SCR 128
7. Satyendra Kumar Antil Vs Central Bureau of Investigation & anr., (2022) 10 SCC 51

8. Siddharam Satilingappa Mhetre Vs St. of Maharashtra & ors., (2011) 1 SCC 694

9. Citation: Smt. Rajbala Vs St. of U.P. & anr., (2023) 11, Criminal Misc. Anticipatory Bail Application U/S 438

10. Cr.P.C. No. 11869 of 2023, decided on 23.11.2023 (All. HC, Allahabad)

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

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

2. This anticipatory bail application (under section 438 Cr.P.C.) has been moved seeking bail in Case Crime No.0350 of 2022, under sections 420, 120-B, 467, 468 IPC, P.S. Chhaprauli, District Baghpat, during the pendency of application.

3. As per the prosecution case as mentioned in the FIR lodged by the police that the police went to Village Nangal, P.S. Chhaprauli for investigation on the application given by one Mr Yognder Singh son of Bakhtawar and Yogendra Singh son of Malook Singh, residents of Village Nangal, P.S. Chhaprauli, District Baghpat, who were of the same village. It is alleged that the police informed to the applicant Yogendra Singh, about the application given by Yogendra Singh to higher authorities, then the applicant Yogendra Singh told that he does not have any information about the said complaint/application nor he had given any such complaint. It is further alleged that on thorough interrogation, the applicant Yogendra told that about 01 year ago, one Sharanveer son of Harkhayal, resident of his village, along with 04 other persons came to his house in

a white Colored Scorpio car and the four persons along with him were from village Tikri, police station Doghat. The four said persons narrated him the involvement of applicant (Rajbala) in the Paramveer Tugana murder case and asked him to give an affidavit that at the time of Paramveer murder case that happened in Village Kurdi there was no woman present at the scene of incident as by giving such an affidavit, life of applicant (rajbala) will be saved from the said murder case and saying this all the four persons left his house. It is further alleged that to get this affidavit signed, after three days, the said Sharanveer son of Harkhyal took the applicant Yogendra along with another friend of his village namely, Yogendra son of Bakhtawar to Meerut in a vehicle and there got a blank paper signed. It is further alleged that after some time, it came to light that Sharanveer and others had given a fake affidavit in their name to higher authorities, regarding which neither he had any information nor know the contents of the letter and further the same was not written by them. It is further alleged that marriage of sister of Sharanveer son of Harkhayal, resident of his village, is solemnized in Village Tikri and she used to go at the house of applicant (Rajbala). It is therefore, alleged that the police after investigation found that the said letter was forged and signed fraudulently in which the role of Sharanveer son of Harkhayal, and four other unknown persons has been found suspicious and further an attempt has been made to influence the investigation of Case Crime No. 212 of 2020, under Sections 147/148/149/34/307/302/506/120B IPC, in which the applicant was accused, therefore the present case has been lodged under Sections 420/120B/467/468 IPC.

4. It is contended by learned counsel for the applicant that applicant has been falsely

implicated in the present case due to political rivalry. It is further submitted that applicant is a senior citizen lady aged about 72 years old and is suffering from various old age diseases. In the FIR, false allegation has been levelled against the applicant. The applicant is having definite apprehension that she may be arrested by the police any time.

5. Learned counsel for the applicant further submitted that the entire allegation from the face of F.I.R., where informant is a police officer, is based upon the hearsay input, where nothing surfaced during the course of investigation to connect the applicant, prima facie, with the allegations levelled against her in the present FIR. It is also submitted that applicant though involved in various case but she has explained the criminal history according to which she is on bail and has not been convicted in any case. The applicant has been made accused merely on the basis of presumptions and assumptions. He submits that necessary ingredients to constitute the alleged offence are missing in this case. He has not committed any offence. There is no ingredient of Section 420 of IPC in the FIR. It is further submitted that to attract the offence under Sections 467, 468 of IPC, it is mandatory on the part of the prosecution to establish that the alleged affidavit was either prepared by the applicant or its preparation was in the knowledge of the applicant. The basis requirement/ingredients to bring home the accusation under the alleged offences are as under:-

Offence punishable under Section 467 IPC, the basic ingredients are:- (i) commission of forgery; (ii) that such commission of forgery must be in relation to a document purporting to be (a) a valuable property; or (b) a will; or (c) an authority to adopt a son; or (d) which purports to give authority to any person to

make or transfer any valuable security; or (e) the receive the principle, interest or dividends thereon; or (f) to receive or deliver any money, movable property or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or (g) an acquittance or receipt for the delivery of any movable property or valuable security.

Offence punishable under Section 468, IPC, the basic ingredients are (i) Commission of forgery, (ii) that he did so intending that the document or electronic record forged shall be used for the purpose of cheating. Offence punishable under Section 420, IPC.

Offence punishable under Section 420 IPC, the basic ingredients are:- To constitute the said offence there must be deception i.e., the accused must have deceived someone; that by such deception the accused must induce a person (i) to deliver any property; or (ii) to make, alter, destroy a whole or part of the valuable security or anything which is signed or sealed and which is capable of being converted into a valuable property; or (iii) that the accused must have done so dishonestly. The offence punishable under Section 120B, IPC, to constitute criminal conspiracy, there must be agreement between two or more persons. The agreement should be to do or cause to be done some illegal act, or some act which is not illegal, by illegal means, provided that where the agreement is other than one to commit an offence, the prosecution must further prove; or (iv) that some act besides the agreement was done by or more of the parties in pursuance of it.

6. In support of the above contention, learned counsel for the applicant has relied upon the recent case

of **Usha Cakraborty and Another Vs State of West Bengal and another, 2023 Live Law (SC) 67**. It is further submitted that Section 438 Cr.P.C. provides that any person who has reason to believe that he may be arrested on accusation of having committed a non bailable offence, in the event of arrest shall be released on bail, and the court may, after taking into consideration, inter alia, the following factors, namely, (i) the nature and gravity of the accusation; (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a court in respect of any cognizable offence; (iii) the possibility of the applicant to flee from justice and; (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested. It is submitted that in the present case, applicant has been criminal history of fourteen cases including the present case and she has explained the same in paragraph no. 55 of the affidavit in a tabular form, as per which she has been acquitted in two cases, enlarged on bail in eight cases, protection has been granted in two cases and one case has been dropped.

7. It is further submitted by learned counsel for the applicant that despite the alleged offence being grave and serious, and there being several criminal cases pending against the accused, these factors by themselves cannot be the basis for refusal of prayer for bail, which includes anticipatory bail also. In support of his argument, he relied upon the case of **Prabhakar Tiwari Vs State of UP, (2020) SCC Online SC 75**. It is further submitted that there is no direct or indirect evidence against the applicant to bring-out her role in participation of alleged offence.

8. It is strenuously submitted by learned counsel for the applicant that the applicant has joined the investigation as and when required by the Investigating Officer. He further submitted that there is not even an iota of admissible evidence against the applicant and she has been falsely implicated. He further submitted that now the charge sheet stands filed, so there is no requirement of any sort of custody or custodial interrogation of the applicant. In support of his argument, learned senior counsel relied upon the judgements of **Shri Gurbaksh Singh Sibbia and others Vs state of Punjab, AIR 1980 SC 1632; Sushila Aggarwal and others Vs State (NCT of Delhi) and another, (2020) 5 SCC 1.**

9. Learned counsel has also drawn attention of the Court towards a recent judgement of Hon'ble Apex Court in the case of **Md Asfak Alam Vs The State of Jharkhand and another (Criminal Appeal Nos, 2207 of 2023** arising out of Special Leave Petition (Criminal) No. 3433 of 2023 decided on 31.07.2023, wherein the Apex Court emphasizes the paramount importance of personal liberty and issued landmark guidelines regarding anticipatory bail. The Apex Court has held that arrest should not be made routinely, and the exercise of this power must be guided by the necessity of custodial investigation or preventing the accused from tampering with evidence or influencing witnesses. The Apex Court, referring to various cases, including *Arnesh Kumar v. State of Bihar and Another*, (2014) 8 SCR 128, to lay down the guidelines for granting anticipatory bail, emphasizes that such bail should be granted unless there are exceptional circumstances. It is, therefore, prayed that applicant shall abide with all the conditions imposed by

this Court, if granted anticipatory bail by this Court.

10. Learned AGA has opposed the prayer for bail, but could not dispute the said facts.

11. While considering bail application of the accused with a criminal history, it throws an onerous responsibility upon the Courts to act judiciously with reasonableness because arbitrariness is the antithesis of law. The criminal history must be of cases where the accused was convicted, including the suspended sentences and all pending FIR, wherein the applicant stands arraigned as an accused. **In reckoning the number of cases as criminal history, the prosecutions resulting in acquittal or discharge, or when Courts quashed the FIR; the prosecution stands withdrawn, or prosecution filed a closure report; cannot be included.** Perusal of the explanation of criminal history in tabular form under paragraph no. 55 shows that applicant has been acquitted in two cases and one cases has been dropped and in rest cases she is either on bail or has been granted protection. Four cases appears to have been slapped by the prosecution after the present case.

12. It is cardinal principle that Bail is a rule and Jail is an exception, which has been well recognized by Apex Court more specifically on the touchstone of Article 21 of the Constitution. The said principle has been reiterated by the Apex Court in **Satyendra Kumar Antil Vs Central Bureau of Investigation and another, 2022 (10) SCC 51.**

13. Learned AGA could not show any exceptional circumstances which would

warrant denial of bail to the applicant. No material, facts or circumstances has been shown by learned AGA for the State that the accused may tamper with the evidence or witnesses or the accused is of such character that her mere presence at large would intimidate the witnesses or that accused will use her liberty to subvert justice or tamper with the evidence.

14. Hence without expressing any opinion on the merits of the case and considering the nature of accusations and antecedents of applicant, she is directed to be enlarged on anticipatory bail as per the Constitution Bench judgment of the Apex Court in the case of **Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98**. The future contingencies regarding anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court. This Court has also taken into consideration the law laid down by the Hon'ble Apex Court in the case of **Siddharam Satiligappa Mhetre Vs State of Maharashtra and others, reported in (2011) 1 SCC 6941**, wherein the Apex Court has reiterated the law laid down by the Constitutional Bench in the Case of **Shri Gurubaksh Singh Sibbia and others, reported at (1980) 2 SCC 665**. Further this court has also considered that the applicant herein is a lady accused, a senior citizen of 72 years and is suffering from various old age ailments. In absence of prima facie strong evidence a person cannot be denied bail on the ground that he or she was having several cases against him/her. If the material on record is not sufficient in view of the court to establish reasonable prima facie case bail cannot be denied based upon antecedents, though in the present matter, criminal history is well explained. It would be a different matter altogether where bail

is sought, but the prosecution makes out a reasonably strong prima facie case based upon material in such eventuality the antecedents of the case may be extremely relevant for consideration.

15. In the event of arrest, the applicant shall be released on anticipatory bail. Let the applicant Smt Rajbala involved in the aforesaid crime be released on anticipatory bail on furnishing a personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the trial court concerned with the following conditions:-

(1) The applicant shall co-operate with the Investigating Officer during investigation and shall report to the Investigating Officer as and when required for the purpose of conducting investigation;

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

(3) The applicant shall not leave the country during the currency of trial without prior permission from the concerned trial Court.

(4) The applicant shall surrender her passport, if any, to the concerned Court forthwith. Her passport will remain in custody of the concerned Court.

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

(6) In case, the applicant misuses the liberty of bail, the Court concerned may take appropriate action in accordance with law and judgment of Apex Court in the case of Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98.

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

16. In default or misuse of any of the conditions, the Public Prosecutor/ Investigating Officer/ first informant-complainant is at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant.

17. With the aforesaid observations/ directions, the application stands disposed of.

(2023) 11 ILRA 17
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.11.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application U/S
 438 Cr.P.C. No. 11952 of 2023

Banti Sharma @ Brahm Prakash Sharma
...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Sri Ravi Pandey

Counsel for the Opposite Parties:
 G.A.

Criminal Law -Code of Criminal Procedure, 1973 – Sections 438, 482, 397, 239 & 41-A – Indian Penal Code, 1860 – Sections 420 & 406 – Anticipatory Bail – Cheating and Criminal Breach of Trust – Forum Shopping – Pending Regular Bail Application

The applicant, Banti Sharma @ Brahm Prakash Sharma, sought anticipatory bail in Case Crime No. 02 of 2019 under Sections 420 and 406 IPC, alleging false implication in a case where he, as a company supervisor, was accused of usurping money deposited as policy bonds. He claimed cooperation during investigation, compliance with Section 41-A Cr.P.C., and no criminal history, noting prior unsuccessful challenges to the charge sheet and discharge application. The St. opposed, citing the applicant's non-appearance, issuance of a non-bailable warrant (NBW), and a pending regular bail application, arguing forum shopping. Held: (1) The anticipatory bail application was rejected as devoid of merit. (2) Filing an anticipatory bail application while a regular bail application was pending constituted misuse of the court's process. (3) The applicant's multiple prior petitions (two under Section 482 Cr.P.C. and one revision under Section 397 Cr.P.C.) and failure to appear before the trial court despite an NBW indicated forum shopping, per K. Jayaram Vs BDA and Shivam Vs St. of U.P.. (4) The court found no grounds to grant anticipatory bail, clarifying that observations were limited to the bail application and would not affect the trial's merits.

Case Law Cited:

1. K. Jayaram Vs BDA, (2022) 12 SCC 815

2. Shivam Vs St. of U.P. & anr., AIROnline 2021 All 484

3. Satender Kumar Antil Vs Central Bureau of Investigation & anr., Special Leave to Appeal (Crl.) No(s) 5191 of 2021, decided on 07.10.2021

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

1. List has been revised.

2. Heard Sri Ravi Pandey, learned counsel for the applicant, Sri Pranshu Kumar, learned A.G.A. for the State and perused the material placed on record.

3. The present application for anticipatory bail has been filed for anticipatory bail in Case Crime No.02 of 2019, under Sections 420, 406 I.P.C., Police Station Harduaganj, District Aligarh, during the pendency of trial.

PROSECUTION STORY:

4. As per prosecution story, the applicant, who happens to be the Supervisor in the company, alongwith other co-accused persons is stated to have usurped the money of several persons who had deposited their money in the company as policy bond.

RIVAL CONTENTIONS: *(Arguments on behalf of applicant)*

5. Learned counsel for the applicant has submitted that the applicant has been falsely implicated in the present case. The applicant is not named in the FIR and his name has come up later on during investigation, although it is referred in the FIR that unknown Supervisor was also involved in the said crime. Learned counsel has stated that the applicant is a *bona fide* person and has cooperated during investigation and complied with the provisions of Section 41-A Cr.P.C. Learned counsel has further stated that subsequently the final report (charge-sheet) was submitted against the applicant and he had

challenged the same before this Court by filing an Application U/S 482 Cr.P.C. No.20556 of 2022, which was disposed of vide order dated 31.8.2022 and the applicant was directed to file discharge application before the court concerned under Section 239 Cr.P.C. The order dated 31.8.2022 is reproduced herein as under:-

"Heard learned counsel for applicant and learned A.G.A. representing opposite party No. 1.

This application under section 482 Cr. P. C. has been filed to quash the charge-sheet dated 9.7.2020 arising out of Case Crime No.02 of 2019 under Sections 420, 406 IPC, P.S.-Harduaganj, District-Aligarh and also the cognizance and summoning order passed by ACJM, Court No.6 in Case No.1167 of 2021 (State vs. Deshraj).

It is well settled that charge sheet can be challenged only on limited grounds namely criminal proceedings are not maintainable before the Court concerned or Court has no jurisdiction to entertain the same. Grounds urged by learned counsel for applicant in challenging to the impugned charge sheet relate to disputed defence of applicant, which cannot be taken into consideration in proceedings under Section 482 Cr. P. C.

In view of above, no case for interference is made out. Consequently, prayer for quashing the charge sheet is refused.

So far as direction to Court below to consider the discharge application of applicant in terms of Section 239 Cr. P. C. is concerned, it is provided that in case any discharge application is filed by applicant before Court below, same shall be considered in accordance with law.

With the aforesaid direction, the application is finally disposed of."

6. Learned counsel for the applicant has further stated that the said discharge application was rejected vide order dated 13.9.2022 by the trial court, as such, the applicant had challenged the said order before this Court by filing Criminal Revision No.4149 of 2022, which was dismissed vide order dated 6.4.2023 by this Court. Subsequent to it, the applicant had filed another petition under Section 482 Cr.P.C. for quashing the entire proceedings and the orders dated 1.5.2023 and 12.4.2023, which was also disposed of vide order dated 11.7.2023 of this Court passed in Application U/S 482 Cr.P.C. No.22332 of 2023. The order dated 11.7.2023 is reproduced herein as under:-

"Heard learned counsel for the applicant, learned A.G.A. for the State-opposite party and perused the record.

This application under Section 482 Cr.P.C. has been filed by the applicant with the prayer to quash the orders dated 01.05.2023 and 12.04.2023 as well as entire proceedings of Case No. 1167 of 2021, (State v. Deshraj and others) arising out of Case Crime No. 02 of 2019, under Sections 406, 420 I.P.C., Police Station Hardua Ganj, District Aligarh.

After arguing the matter at some length, learned counsel for the applicant prays for withdrawal of this application with liberty to the applicant to file bail application before the court of competent jurisdiction.

Learned A.G.A. has no objection to such request.

*In view of the above, the instant application is **disposed of** as withdrawn with liberty to the applicant to appear before court concerned and file appropriate application for bail, which shall be decided in the light of the judgment of the Hon'ble Supreme Court in **Satender Kumar Antil v.***

Central Bureau of Investigation and another, Special Leave to Appeal (Crl.) No (s) 5191 of 2021, decided on 07.10.2021.

For a period of three weeks no coercive action shall be taken against the applicant."

7. Learned counsel for the applicant has further stated that subsequent to it in compliance of the aforesaid order dated 11.7.2023 of this Court, the applicant had filed regular bail application on 28.7.2023 but the same has not been decided by the court concerned. In the meantime, the said regular bail application being pending the applicant had filed anticipatory bail application before the Sessions Judge, Aligarh on 1.8.2023 which has been rejected by the Special Judge (EC Act)/Additional Session Judge, Aligarh vide order dated 28.8.2023, as such, the applicant has applied for anticipatory bail before this Court. Learned counsel has further stated that the applicant has no criminal history to his credit and is entitled for anticipatory bail.

(Arguments on behalf of opposite party)

8. Per contra, learned A.G.A. has vehemently opposed the anticipatory bail application on the ground that the applicant had twice agitated the provisions of Section 482 of Cr.P.C. and once the provisions of Section 397 Cr.P.C. before this Court by filing criminal revision and failed in it, and subsequently, filed anticipatory bail application pending regular bail application filed in the court concerned on 28.7.2023, as such, the matter tantamounts to forum shopping.

9. Learned A.G.A. has also placed reliance on the judgment of the Apex Court

passed in the case of **K. Jayaram vs. BDA, (2022) 12 SCC 815**, whereby it has been held as follows:-

"In order to check multiplicity of proceedings pertaining to the same subject-matter and more importantly to stop the menace of soliciting inconsistent orders through different judicial forums by suppressing material facts either by remaining silent or by making misleading statements in the pleadings in order to escape the liability of making a false statement, the parties have to disclose the details of all legal proceedings and litigations either past or present concerning any part of the subject-matter of dispute which is within their knowledge. In case, according to the parties to the dispute, no legal proceedings or court litigations was or is pending, they have to mandatorily state so in their pleadings in order to resolve the dispute between the parties in accordance with law."

10. Learned A.G.A. has further stated that NBW has been issued against the applicant on 18.11.2022 and he is not appearing before the court concerned. The present application is just misuse of process of Court and law. Learned A.G.A. has further stated that the applicant is not entitled for anticipatory bail in the light of paragraph-43 of the settled law of this Court in the case of **Shivam vs. State of U.P. and Another reported in AirOnline 2021 All 484**.

CONCLUSION:

11. Filing of an anticipatory bail application, while there being a regular bail application pending, is misuse of process of Court. The applicant is used to filing multiple applications and petitions at various forums including the High Court. These acts are a classic example of forum shopping and it

cannot be permitted to keep on going so eternally.

12. After taking into consideration the rival contentions, the fact that applicant had filed several petitions before this Court thrice and failed and there is pending regular bail application of the applicant before the court concerned and coupled with the said arguments tendered at Bar in the light of the judgment in **Shivam (supra)**, I do not find it a fit case for grant of anticipatory bail to the applicant.

13. The present anticipatory bail application is hereby found devoid of merits and is accordingly **rejected**.

14. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of anticipatory bail application and the said observations shall have no bearing on the merits of the case during trial.

(2023) 11 ILRA 20

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 19.09.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. First Bail Application No. 37420 of 2020

Rakesh Kumar		...Applicant
	Versus	
State of U.P.		...Opposite Party

Counsel for the Applicant:

Sri Pradeep Singh, Sri Anjani Kumar Rai, Sri Manu Pathak, Sri Tarun Kumar Gupta

Counsel for the Opposite Party:

G.A., Sri Nityanand Srivastava, Sri Pramod Kumar
Srivastava

Criminal Law - Code of Criminal Procedure, 1973 – Section 438 – Indian Penal Code, 1860 – Sections 419, 420, 466, 467, 468 & 471 – Bail – Cheating and Forgery – Civil Dispute – Criminal History – Parity with Co-Accused

The applicant, Rakesh Kumar, sought bail in Case Crime No. 721 of 2018 under Sections 419, 420, 466, 468, and 471 IPC, alleging false implication in a case involving a fabricated will, Parivar Register, and School Leaving Certificate to dispute the informant's mother's parentage. The informant claimed his mother was the daughter of Late Shiv Sewak, while the applicant contended she was not, supported by a registered will. The dispute was pending in a civil suit. The applicant disclosed a criminal history of 14 cases, all bailed, and noted a co-accused was already granted bail. The informant opposed, citing the applicant's criminal history and alleged violations of prior bail conditions. Held: (1) The bail application was allowed. (2) The dispute was primarily civil, involving parentage, with a pending suit, and the FIR appeared to criminalize a civil matter. (3) The applicant's criminal history was explained, with bail granted in all cases, and alleged post-bail offences (including non-cognizable reports and bailed cases) did not bar relief. (4) Parity with the co-accused, triable offences by a Magistrate, and no merit in the informant's objections justified bail. (5) The court distinguished Harjit Singh Vs Inderpreet Singh and Mokhtar Ansari Vs St. of U.P., noting the absence of post-bail heinous crimes, and applied Roger Shashoua Vs Mukesh Sharma to emphasize context-specific precedent application. (6) Bail was granted with conditions to prevent evidence tampering or witness influence.

Case Law Cited:

Harjit Singh Vs Inderpreet Singh @ Inder & anr., Criminal Appeal No. 883 of 2021, decided on 24.08.2021

2. Mokhtar Ansari Vs St. of U.P., Criminal Misc. Bail Application No. 46494 of 2021, decided on 13.06.2022 (All. HC)

3. Roger Shashoua Vs Mukesh Sharma, (2017) 14 SCC 722

4. Regional Manager Vs Pawan Kumar Dubey, cited in Roger Shashoua

5. Director of Settlements Vs M.R. Apparao, cited in Roger Shashoua

6. CIT Vs Sun Engg. Works (P) Ltd., cited in Roger Shashoua

7. Ambica Quarry Works Vs St. of Guj., cited in Roger Shashoua

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

1. Heard Sri Anjani Kumar Rai Advocate, the learned counsel for the applicant, the learned A.G.A. for the State, Sri Pramod Kumar Srivastava Advocate, the learned Counsel for the informant and perused the record.

2. The present bail application has been filed by the applicant with the prayer to enlarge him on bail in Case Crime No. 721 of 2018, under Sections 419, 420, 466, 468, 471 I.P.C., Police Station Saini, District Kaushambi.

3. The aforesaid case has been registered on the basis of an application under Section 156 (3) Cr.P.C. filed on 18-12-2018 by the informant Kuldeep @ Shivam Tiwari against five named accused persons, including the applicant, alleging that the informant's mother Raju Devi, d/o Late Shiv Sewak is the genuine legal heir of Late Shiv Sewak. The accused persons have fabricated an unregistered will of Late Shiv Sewak and they have also fabricated copies of Parivar Register and School Leaving Certificate to establish that the applicant's mother was daughter of Surajbali s/o Vishwanath.

4. In paragraph 7 of the affidavit it has been stated that prior to lodging the

instant F.I.R., the informant's mother Raju Devi had filed a Complaint Case No. 5041 of 2017 (Smt. Raju Devi Vs. Dayasanker and Others), under Sections 419, 420, 467, 468, 471 IPC, P.S. Saini, District Kaushambi in which the applicant has been granted bail by means of an order dated 17-05-2019, copy whereof has been annexed as Annexure No. 4 to the affidavit.

5. The informant Kuldeep lodged another F.I.R. dated 24-10-2019 against the four accused persons, including the applicant, by way of an application under Section 156(3) Cr.P.C., which was registered as Case Crime No. 92 of 2019, under Sections 419, 420, 467, 468, 471 I.P.C., P.S. Kadadham, District Kaushambi, in which the applicant has been granted bail by means of an order dated 08-09-2020, a copy whereof has been annexed as Annexure No. 6 to the affidavit.

6. The applicant contends that the informant's mother is daughter of one Surajbali, resident of Saurai Alipur Bhadar, District Fatehpur and she is not daughter of Late Shiv Sewak son of Kedar Nath, resident of Saurai Bujurg, Kaushambi. To support this contention, a copy of a registered will dated 23-05-1990 executed by Late Shiv Sewak has been annexed as Annexure no. SRA-5 to the 5th Supplementary rejoinder affidavit wherein the testator had stated that he had no son or daughter.

7. Per contra, the informant claims that his mother Raju Devi is daughter of Late Shiv Sewak son of Kedarnath. The learned counsel for the informant has stated that the informant has filed a Suit No. 843 of 2022 in the Court of Civil Judge (J.D.), Kaushambi seeking cancellation of the aforesaid registered will

dated 23-05-1990 executed by late Shiv Sewak.

8. The question whether Shiv Sewak had any son or daughter or not or whether the informant's mother Smt. Raju Devi is in fact daughter of Shiv Sewak or she is daughter of Surajbali, is a question which is yet to be determined by the competent Court after both the parties have had an opportunities to lead evidence in support of their respective contentions.

9. It has been averred in the affidavit filed in support of the bail application that the applicant is an innocent person, he has been falsely implicated in the case and he is in jail since 20-04-2020. It has also been stated that the co-accused Sarvnam Tiwari has already been released on bail by means of an order dated 10-12-2021 passed in Criminal Misc. Bail Application No. 45861 of 2021.

10. In para 18 of the affidavit the applicant's criminal history of 14 cases has been disclosed, in all of which the applicant has been granted bail.

11. Sri. Pramod Kumar Srivastava, the learned counsel for the informant has vehemently opposed the prayer for grant of bail to the applicant and he has submitted that keeping in view the applicant's long criminal history, he should not be released on bail. He has further submitted that the applicant is already accused in a case under Section 307 I.P.C. which has subsequently been converted under Section 308 I.P.C. and in such a situation the applicant's released on bail would result in a threat to the informant.

12. Replying to the aforesaid submission, the learned counsel for the applicant has submitted that the F.I.R. in

Case Crime No. 42 of 2019, (Annexure no. SCA-5 to the 5th Supplementary Counter Affidavit filed by the informant) had been filed against four accused persons, including the applicant and the allegation against the applicant was that he had exhorted his sons Pankaj Pandey and Neeraj Pandey and nephew Hiramani Pandey. The applicant has already been granted anticipatory bail in the aforesaid case by means of an order dated 26-09-2019 passed in Criminal Misc. Bail Application No. 37997 of 2019.

13. The learned counsel for the informant has relied upon a judgment passed by the Hon'ble Supreme Court in the case of **Harjit Singh Vs. Inderpreet Singh @ Inder and another** passed in Criminal Appeal No. 883 of 2021 decided on 24-08-2021, wherein the Hon'ble Supreme Court has held that: -

"From the material on record, it is clear that as and when he is granted bail, he came out of the jail, committed another offence and again went to jail. Even the High Court cancelled the bail in another case vide order dated 26-07-2019 specifically observing that while on bail during the pendency of the appeal, they were involved in other cases of heinous crime. From the material on record, it appears that there is a high possibility of threat and danger to the life and safety of the appellant herein/complainant and his family members, as is evident from the criminal history of respondent no.1, detailed above."

14. It is a well settled law that precedents are not to be read as statutes. The judgments passed by the Hon'ble Supreme Court and the High Court are to

be read in the light of the factual background in which they are rendered. It is also equally settled that a difference of factual background in which the case was passed makes a word of a difference in an application of the precedence.

15. While examining the applicability of the aforesaid decision, it would be appropriate to have a look at the law regarding application of precedents, as explained by the Hon'ble Supreme Court in **Roger Shashoua v. Mukesh Sharma** (2017) 14 SCC 722, in the following words:--

"55. It is well settled in law that the ratio decidendi of each case has to be correctly understood. In Regional Managerv.Pawan Kumar Dubey, a three-Judge Bench ruled : (SCC p. 338, para 7)

"7. ... It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."

56. In Director of Settlements v. M.R. Apparao, another three-Judge Bench, dealing with the concept whether a decision is "declared law", observed : (SCC p. 650, para 7)

"7. ... But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of

on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. ..."

57. In this context, a passage from *CIT v. Sun Engg. Works (P) Ltd.* would be absolutely apt : (SCC pp. 385-86, para 39)

"39. ... It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. ..."

58. In this context, we recapitulate what the Court had said in *Ambica Quarry Works v. State of Gujarat* : (SCC p. 221, para 18)

"18. ... The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. (See Lord Halsbury in *Quinn v. Leathem*)..."

59. From the aforesaid authorities, it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the court to

cogitate on the judgment regard being had to the facts expositied therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment dehors from the context and understand the ratio decidendi which has the precedential value. That apart, the court before whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following a syllogistic process."

16. A perusal of the aforesaid passage relied upon by the learned counsel for the informant indicates that in that case while deciding an appeal filed against an order of the High Court granting bail to the respondents, the Hon'ble Supreme Court had allowed the appeal and cancelled the bail on the ground that after being released on bail, the accused had committed an offence under Section 302 I.P.C. and in view of this peculiar factual backdrop the Hon'ble Supreme Court had found it a fit case for cancellation of the bail. In the present case there is no such allegation against the applicant. Therefore, I am of the view that the aforesaid decision rendered by the Hon'ble Supreme Court in **Harjit Singh (Supra)** was given keeping in view the peculiar background of that case and the same does not lay down a ratio of general application.

17. The learned counsel for the informant has next relied upon a judgment of this Court in **Mokhtar Ansari Vs. State of U.P.** passed in **Criminal Misc. Bail Application No.**

46494 of 2021 decided on 13-06-2022.

18. In the aforesaid judgment this Court had relied upon the judgment of Hon'ble Supreme Court in **Harjit Singh (Supra)** and this Court rejected the prayer for bail on the ground that the applicant had a criminal history of 21 cases which were being tried by different sessions, divisions and districts. In the present case the applicant has some cases lodged against him in district Kaushambi alone out of which two cases have been lodged by the informant and one has been lodged by the informant's mother, therefore, the ratio laid down by this Court in the case of **Mokhtar Ansari (supra)** does not apply to the factual background of the present case and the same is distinguishable.

19. It is prima facie apparent from the allegations levelled in the application under Section 156 (3) Cr.P.C. that the dispute between the parties is essentially of a civil nature and the F.I.R. has been lodged merely in an attempt to give a colour of criminality to a civil dispute.

20. The learned counsel for the informant has drawn attention of the Court to the averments made in paragraph no. 5 of the 5th Supplementary Counter Affidavit in which the applicant's criminal history of 14 cases, which have already been mentioned in paragraph 18 of the affidavit, has been reiterated. He has submitted that the applicant has been released on bail by means of an order dated 17-05-2019 in Bail Application No. 20871 of 2019 and after his release on bail, he has violated the conditions imposed by this Court in the bail order dated 17-05-2019 and he has again indulged in commission of as many as five cases. The details whereof have been

mentioned in paragraph 8 of the Supplementary Counter Affidavit.

21. In reply to the 5th Supplementary Counter Affidavit, 5th Supplementary Rejoinder Affidavit has been filed and in paragraph 10 thereof, an explanation regarding the 5 cases alleged by the informant have been disclosed; 2 cases mentioned in paragraph 8 of the Supplementary Counter Affidavit are non-cognizable reports; in Case Crime No. 92 of 2019, under Sections 419, 420, 467, 468, 471 I.P.C., P.S. Kadadham, District Kaushambi, the applicant has already been released on bail by means of an order dated 08-09-2020 passed by this Court in Criminal Misc. Bail Application No. 19752 of 2020, a copy whereof has been annexed as Annexure no-6 to the affidavit filed in support of the bail application; in Case Crime No. 42 of 2019, under Sections 323, 504, 506, 307, 325 IPC, P.S. Kadadham, District Kaushambi, the applicant has been granted anticipatory bail by means of an order dated 26-09-2019 passed in Criminal Misc. Bail Application No. 37997 of 2019 and in Case Crime No. 10 of 2020, under Section 2/3 of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, P.S. Kadadham, District Kaushambi, the applicant has already been granted bail. Therefore, I do not find any merit in the submissions of the learned counsel for the informant that the aforesaid cases debar the applicant from seeking the relief for bail.

22. Having considered the aforesaid facts and submission and keeping in view the facts that there is a civil dispute between the parties involving a dispute regarding parentage of the informant's mother, which dispute is yet to be determined by a competent court of law and the suit has already been filed by the informant which is pending before the

Court of Civil Judge (J.D.), Kaushambi; that all the offences alleged against the applicant are triable by the Magistrate and that the co-accused Sarvnam Tiwari has already been released on bail, I am of the view that the applicant is also entitled to be released on bail pending conclusion of the trial.

23. The bail application is accordingly allowed.

24. Let the applicant - **Rakesh Kumar** be released on bail in Case Crime No. 721 of 2018, under Sections 419, 420, 466, 468, 471 I.P.C., P.S. Saini, District Kaushambi on his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned subject to following conditions:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

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

25. In case of breach of any of the above condition, the prosecution shall be at liberty to move an application bail before this Court seeking cancellation of bail.

(2023) 11 ILRA 26

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 03.11.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Criminal Misc. First Bail Application No. 42050 of 2023

Angad Rai @ Jhullan Rai **...Applicant**
Versus

State of U.P. **...Opposite Party**

Counsel for the Applicant:

Sri Shashi Bhushan Kunwar, Sri Pradeep Kumar Rai, Sri Kamal Kishore (Senior Advocate)

Counsel for the Opposite Party:

G.A.

Criminal Law - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 – Sections 2(b), 2(c), 3(1) & 19(4) – Indian Penal Code, 1860 – Section 386 – Bail – Public Order vs. Law and Order – Gang Chart – Non-Application of Mind

The applicant, Angad Rai @ Jhullan Rai, sought bail in Case Crime No. 314 of 2023 under Section 3(1) of the U.P. Gangsters Act, alleging misuse of the Act to frustrate his prior bail in a case under Section 386 IPC (Case Crime No. 111 of 2023). The gang chart alleged the applicant, a member of Mukhtar Ansari's gang, threatened witnesses, disturbing public order. The applicant argued the allegations were a law and order issue, not public order, and the gang chart omitted his prior bail order. The St. opposed, citing the Act's strict bail provisions under Section 19(4). Held: (1) The bail application was allowed. (2) The gang chart's failure to mention the applicant's prior bail order dated 26.05.2023 indicated non-application of mind, and the allegations of witness threats constituted a law and order issue, not public order, per Banka Sneha Sheela Vs St. of Telangana. (3) The twin conditions under Section 19(4)(b) were satisfied: no prima facie evidence supported guilt under the Gangsters Act, and no material suggested the applicant would commit similar offences if released, per Mohd Muslim @ Hussain Vs St. (NCT of Delhi) and Ranjitsingh Brahmajeetsing Sharma Vs St. of Maharashtra. (4) The St.'s failure to challenge the prior bail order or seek its cancellation weakened its case. (5) Bail was granted with conditions to ensure court

attendance and prevent evidence tampering or witness intimidation.

Case Law Cited:

1. Banka Sneha Sheela Vs St. of Telangana & ors., (2021) 9 SCC 415
2. Ram Manohar Lohia Vs St. of Bihar, (1966) 1 SCR 709: AIR 1966 SC 740
3. Mohd Muslim @ Hussain Vs St. (NCT of Delhi), 2023 LiveLaw (SC) 260
4. Ranjitsingh Brahmajeetsing Sharma Vs St. of Mah., (2005) 5 SCC 294
5. U.O.I. Vs Ratan Malik, (2009) 2 SCC 624

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

1. Heard Sri Kamal Kishore, Senior Advocate assisted by Sri Shashi Bhushan Kumar and Pradeep Kumar Rai, the counsel for the applicant and Sri P. C. Srivastava, Additional Advocate General assisted by Sri Arvind Kumar, Additional Government Advocate.

2. The present bail application has been filed seeking enlargement of bail of the applicant in FIR No.0314 of 2023 instituted against the applicant under section 3(1) of the U.P. Gangsters and Antisocial Activities (Prevention) Act, 1986 Police Station Kotwali, District Ghazipur hereinafter referred to as 'Gangster Act'.

3. The averments, in brief, are that the applicant was being tried for an offence under section 386 IPC vide case crime no.111 of 2023, P.S. Kotwali, District Ghazipur. The applicant applied for bail in the said case and was enlarged on bail vide order dated 26.05.2023, contained in Annexure no.3. Subsequently, according to the counsel

for the applicant, with a view to frustrate the enlargement on bail, the offence under section 3(1) of the Gangster Act was imposed against the applicant vide case crime no.314 of 2023.

4. The contention of the counsel for the applicant is that in the Gang Chart prepared and filed on record as Annexure no.2, it was stated that the applicant being the gang member of the Gang Leader Mukhtar Ansari was involved in criminal offences, which has led to fear in general public and because of the applicant causing such criminal acts, the 'public order' was adversely affected and there was a fear amongst the people. It was also recorded that on account of the said fear, no one was ready and willing to give evidence. In the gang chart which was prepared in pursuance to the rules framed under the Act, it was stated that on 03.03.2023, an information was received that in a case being tried against the applicant as Case No.2 of 2020 arising out of crime no.1202 of 2009, date 14.03.2023 was fixed for evidence and on account of trying to influence the witnesses in the said case, on 28.02.2023 at about 3:30 pm, the elder brother of the applicant along with certain other persons threatened the witnesses not to give any evidence and a demand of Rs.5,00,000/- (Five Lacs) was also made from the said witness, failing which it was threatened that the children of the witness shall be eliminated. Based upon the said incident, a view was formed that the entire gang indulged in threatening the people. Based upon the said view, the Gang Chart was prepared on 26.06.2023 in terms of the Rule 18 of the Rules framed under the Gangsters Act and the FIR in question was registered against the applicant and two other persons for trying the applicant

for an offence under section 3(1) of the U.P. Gangster Act.

5. The contention of counsel for the applicant is that with regard to alleged threat issued to the alleged witnesses for not deposing in the case against the applicant, the applicant had applied for bail and was granted bail by the Trial Court vide order dated 26.05.2023 which bail order has not been challenged by the State and no application has been moved for cancellation of the bail. If the material as indicated in the Gang Chart was present, it was incumbent upon the State to have taken the steps for cancellation of the bail, which were not taken for the reasons best known to the State. He argues that despite not filing any bail cancellation application, the State chose to avoid release of the applicant in the said case, which is primarily a misuse of the power conferred upon the State. He argues that subsequent to the lodging of the FIR in question, the said witness to whom allegedly threats were issued has also deposed and the said case has reached the stage of Section 313 Cr.P.C. In the light of the said, he argues that the applicant should be enlarged on bail.

6. Learned Additional Advocate General, on the other hand, has strongly opposed the bail application by arguing that in terms of the provisions contained in the U.P. Gangster Act, the State is duly empowered to take steps for punishing a Gangster in terms of Section 3 of the Gangster Act. He argues that the word 'Gangster' has been defined under section 2(c) of the said Act, which is as under :

Section 2(c) : "gangster" means a member or leader, or organizer

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. He further argues that the word 'gang' has further been defined under section 2(b) of the said Act which is as under :

Section 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, 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 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the *Suppression of Immoral Traffic in Women and Girls Act, 1956* (Act No. 104 of 1956), or

(vi) offences punishable under *Section 3 of the Public Gambling Act, 1867* (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under *Section 171-E of the Indian Penal Code* (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

(xvi) offences punishable under the *Regulation of Money Lending Act, 1976*;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the *Prevention of Cow Slaughter Act, 1955* and the *Prevention of Cruelty to Animals Act, 1960*;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities.

(xix) offences punishable under the *Unlawful Activities (Prevention) Act, 1966*;

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of *Sections 5, 7 and 12 of the Arms Act, 1959*;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the *Indian Forest Act, 1927* and *Wildlife Protection Act, 1972*;

(xxiv) offences punishable under the *Entertainment and Betting Tax Act, 1979*;

(xv) indulging in crimes that impact security of State, public order and even tempo of life.”

8. He, thus, argues that in terms of definition of ‘gang’ as contained under section 2(b)(iv), the activities as done by the applicant would fall within the definition of ‘gang’ and thus the applicant

was rightly being tried under the offence in question. He further argues and draws my attention to the mandate of section 19(4) of the U.P. Gangsters Act to argue that in addition to the general provisions of grant of bail as specified under the Cr.P.C. the mandate cast by Section 19(4) are to be followed and the power of grant of bail stands circumscribed to the extent as indicated in sub-section (4) of section 19 of the Act. Section 19(4) is quoted hereinbelow :

19. Modified application of certain provisions of the Code. -

(1)

(2).

(3)

(4) *Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless :*

(a) *the Public Prosecutor has been given an opportunity to oppose the application for such release, and*

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

9. In view of the submissions of the parties as recorded hereinabove, this Court is to decide as to whether on the basis of the materials produced, the applicant is entitled to be enlarged on bail or not?

10. To appreciate the arguments raised at the bar, it is essential to note that Section 3 of the 'Act' provides for penalty to a person who commits an offence as a gangster and the punishment

prescribed is for a period of two years which can be extended up to ten years and also with a fine which shall not be less than rupees five thousand. As the 'Gangster Act' is a special Act which creates rigorous conditions, particularly in terms of grant of bail as specified in section 19(4) of the Act, is to be interpreted more strictly as it is fairly well settled that stricter the provisions contained in a penal statute, the stricter has to be interpretation.

11. Section 2(b) of the Act, which defines 'gang' upon a plain reading means that the

'gang' has to be a group of person who act either singly or collectively and use violence, 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.

12. Thus, to include a person within the definition of 'gang', it is incumbent that there should be material to demonstrate that a group of persons are acting either singly or collectively; they are using violence or threat. The most essential aspect is that the object should be to disturb the public order or for gaining any undue temporal pecuniary material or advantage for himself.

13. In the scheme of the Act adequate safeguards are inbuilt and provide for certain tests to be cleared before launching prosecution under the Act. One of the safeguards provided is in the relevant rules providing for the manner of preparation of

gang-chart, which, in the present case has been prepared and is on record as Annexure no.2.

14. To appreciate the scheme of Rules, it is essential to refer to the Rules 5, 6, 7, 8, 9, 10, 11 and 12 provide for the steps which are necessarily to be taken before initiating prosecution under the Act and have to include an abstract in terms of Rule 13 which prescribes as under :

13. Specific statement of offences committed for economic, material and temporal or similar other benefits - *While writing the abstract below the gang-chart and particulars separately with the gang-chart, the particulars of those offences shall be specifically mentioned:*

(i) which have been committed for pecuniary, materialistic and temporal or similar benefits; or

(ii) which disturb the public order; or

(iii). Which are a ground for detention under the National Security Act, 1980

Rule 15 specifically prohibits the arbitrary selection against any gang member, the same is reproduced as under :

15. Arbitrary selection of gang/member of gang prohibited.-

(1) There should not be a situation of arbitrary selection against any gang under this Act.

(2) If action is not to be taken against any member of a gang who has committed a criminal act in association with the said gang, then in such a case clear and reasonable grounds for not mentioning his name in the gang and gang-chart shall be recorded with reasons and

(3).The final decision as to whether to include or not to include the

name of member of a gang in the gang and gang-chart shall be at the discretion of the Commissioner of Police/District Magistrate.

15. It is essential to also note the mandate of Rule 17 which prescribes that the competent authority is bound to exercise its own independent mind while forwarding the gang chart. The format of gang chart is prescribed in Rule 18.

16. In the present case, as per the gang chart, which led to the lodging of the first information report, it has been mentioned that because of the alleged acts committed by the applicant, there was a disturbance of public order (traceable to requirement prescribed under Rule 13(ii)). The chart was prepared on 26.06.2023, however, in the entire chart, there is no mention of the bail order passed in favour of the applicant on 26.05.2023, thus, the gang chart prepared prima facie suffers from non-application of mind as the same is without considering the material documents which was the bail order dated 26.05.2023.

17. In any event, the forming of the view that on account of alleged threat issued by the applicant to the witness, there was a fear and disturbance of 'public order', prima-facie is not justified, if the court is to interpret the meaning of the phrase 'public order' as used under section 2(b) of the U.P. Gangster Act. Although, the word 'public order' has not been defined under the Act or the Rules framed thereunder, the use of word 'public order' has to be interpreted in the light of the mandate cast by Article 21

and Article 19 (2) of the Constitution of India.

18. The phrase ‘public order’ came up for consideration before the Supreme Court in the case of **Banka Sneha Sheela vs. State of Telangana and others; (2021) 9 SCC 415** wherein the Supreme Court had the occasion to consider the distinction between ‘law and order’ and ‘public order’ and ‘security of State’. Although the Supreme Court had rendered the judgment in the context of a law prescribed for preventive detention, the basis would equally apply to penal statutes like the cases under the Gangsters Act. The Supreme Court dealt with the difference in between the three, i.e. ‘law and order’, ‘public order’ and ‘security of State’. The relevant paragraph of the judgment are quoted as under :

“13. As is well-known, the expressions “law and order”, “public order”, and “security of State” are different from one another. In Ram Manohar Lohia v. State of Bihar [Ram Manohar Lohia v. State of Bihar, (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608] the question before this Court arose under a preventive detention order made under Rule 30 of the Defence of India Rules, which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. This Court set out the distinction between a mere law and order disturbance and a public order disturbance as follows : (SCR pp. 738-39 & 745-46 : AIR pp. 755 & 758-59, paras 42 & 51-52)

“42. The Defence of India Act and the Rules speak of the conditions under which preventive detention under the Act can be ordered. In its long title and the preamble the Defence of India Act speaks

of the necessity to provide for special measures to ensure public safety and interest, the defence of India and civil defence. The expression “public safety” and interest between them indicate the range of action for maintaining security, peace and tranquillity of India whereas the expressions “defence of India” and “civil defence” connote defence of India and its people against aggression from outside and action of persons within the country. These generic terms were used because the Act seeks to provide for a congeries of action of which preventive detention is just a small part. In conferring power to make rules, Section 3 of the Defence of India Act enlarges upon the terms of the preamble by specification of details. It speaks of defence of India and civil defence and public safety without change but it expands the idea of public interest into maintenance of public order, the efficient conduct of military operations and maintaining of supplies and services essential to the life of the community. Then it mentions by way of illustration in clause (15) of the same section the power of apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain (the authority empowered to detain not being lower in rank than that of a District Magistrate), suspects, on grounds appearing to that authority to be reasonable—

(a) of being of hostile origin; or

(b) of having acted, acting or being about to act or being likely to act in a manner prejudicial to—

(i) the defence of India and civil defence;

(ii) the security of the State;

(iii) the public safety or interest;

(iv) the maintenance of public order;

(v) *India's relations with foreign States;*

(vi) *the maintenance of peaceful conditions in any part or area of India; or*

(vii) *the efficient conduct of military operations.*

It will thus appear that security of the State, public safety or interest, maintenance of public order and the maintenance of peaceful conditions in any part or area of India may be viewed separately even though strictly one clause may have an effect or bearing on another. Then follows Rule 30, which repeats the above conditions and permits detention of any person with a view to preventing him from acting in any of the above ways. The argument of Dr Lohia that the conditions are to be cumulatively applied is clearly untenable. It is not necessary to analyse Rule 30 which we quoted earlier and which follows the scheme of Section 3(15). The question is whether by taking power to prevent Dr Lohia from acting to the prejudice of "law and order" as against "public order" the District Magistrate went outside his powers.

51. *We have here a case of detention under Rule 30 of the Defence of India Rules which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. It follows that if such a person is not detained public disorder is the apprehended result. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. Does the expression "public order" take in every kind of disorders or only some of them? The answer to this serves to distinguish "public order" from "law and*

order" because the latter undoubtedly takes in all of them. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under Rule 30(1)(b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances.

52. *It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By*

using the expression “maintenance of law and order” the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules.

14. There can be no doubt that for “public order” to be disturbed, there must in turn be public disorder. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects “law and order” but before it can be said to affect “public order”, it must affect the community or the public at large.

15. There can be no doubt that what is alleged in the five FIRs pertain to the realm of “law and order” in that various acts of cheating are ascribed to the detenu which are punishable under the three sections of the Penal Code set out in the five FIRs. A close reading of the detention order would make it clear that the reason for the said order is not any apprehension of widespread public harm, danger or alarm but is only because the detenu was successful in obtaining anticipatory bail/bail from the courts in each of the five FIRs. If a person is granted anticipatory bail/bail wrongly, there are well-known remedies in the ordinary law to take care of the situation. The State can always appeal against the bail order granted and/or apply for cancellation of bail. The mere successful obtaining of anticipatory bail/bail orders being the real ground for detaining the detenu, there can be no doubt that the harm, danger or alarm or feeling of insecurity among the general public spoken of in Section 2(a) of the *Telangana Prevention of Dangerous Activities Act* is make-believe and totally absent in the facts of the present case.

19. To tear these observations out of context would be fraught with great danger when it comes to the liberty of a

citizen under Article 21 of the Constitution of India. The reason for not adopting a narrow meaning of “public order” in that case was because of the expression “in the interests of” which occurs in Articles 19(2) to 19(4) and which is pressed into service only when a law is challenged as being unconstitutional for being violative of Article 19 of the Constitution. When a person is preventively detained, it is Articles 21 and 22 that are attracted and not Article 19. Further, preventive detention must fall within the four corners of Article 21 read with Article 22 and the statute in question. **To therefore argue that a liberal meaning must be given to the expression “public order” in the context of a preventive detention statute is wholly inapposite and incorrect. On the contrary, considering that preventive detention is a necessary evil only to prevent public disorder, the Court must ensure that the facts brought before it directly and inevitably lead to a harm, danger or alarm or feeling of insecurity among the general public or any section thereof at large.**

19. In the context of the said judgment, if the averments made in the gang chart as well as in the first information report are treated to be gospel truth for the sake of arguments, the same would at best fall within the definition of ‘law and order problem’ and not ‘public disorder’, thus, prima-facie, the allegations, the materials contained in the gang chart and the information recorded in the first information report, prima facie cannot include the offence to fall under section 2(b) of the Act.

20. To deal with the second argument of the learned AGA with regard to circumscription of the power of grant of bail, by virtue of Section 19(4) of the Act, the

same places restriction on this court to grant bail unless the public prosecutor has been heard, which stands satisfied in the present case. The other two twin conditions prescribed in section 19(4) (b) of the Act has to be satisfied that there are 'reasonable ground' for believing that the applicant is not guilty of such offence and that he is not likely to commit any offence while on bail. A similar phrase containing a similar restriction with regard to manner in which, the reasonable belief has to be formed by the Court used similarly in the context of NDPS Act, came up for interpretation before the Hon'ble Apex Court in the case of *Mohd Muslim @ Hussain v. State (NCT of Delhi)*; 2023 LiveLaw (SC) 260 wherein the Supreme Court while interpreting the said phrase recorded as under :

"18. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is "not guilty of such offence" and that he is not likely to commit any offence while on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be a prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that

the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws – be balanced against the public interest.

19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and

reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India vs. Ratan Malik). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having 19 (2009) 2 SCC 624 regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail. "

21. In view of the law as explained and a provision which is similar to the one used in section 19(4)(b), the interpretation given by the Supreme Court in the case of **Mohd Muslim @ Hussain (supra)** would squarely apply to the cases emanating from the U.P. Gangsters Act. Thus, on the basis of the said interpretation, this court can form a view that the applicant may not be prosecuted for the offence on the basis of the material particularly when the material to form a view that there was a disturbance of 'public order' is missing. In view thereof, the first of the twin conditions stands satisfied.

22. As regards the second of the twin conditions, there is no material on record to suggest that the applicant is wanted in any case of a similar nature where he has threatened the accused, thus, in view of the law laid down in the case of **Ranjitsingh Brahmajeetsing Sharma vs. State of Maharashtra, (2005) 5 SCC 294**, this court can form a view that the accused, if

enlarged on bail, would not indulge in a similar offence.

23. On the basis of the interpretation and the findings recorded above, the applicant is entitled for the bail. Thus, the bail application is allowed.

24. Let the applicant **Angad Rai Alias Jhullan Rai** be released on bail in aforesaid first information report number subject to his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned with the following conditions:

(a) The applicant shall execute a bond to undertake to attend the hearings;

(b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and

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

(2023) 11 ILRA 36

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 09.11.2023

BEFORE

**THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA,
J.**

Capital Case No. 9 of 2020

With

Reference No. 6 of 2020

And

Capital Case No. 2 of 2021

And

Government Appeal No. 23 of 2021

Sonu @ Paua @ Beedi & Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:

From Jail, Sri Mohd. Raghib Ali, Sri Raj Kumar Kesari, Sri Saghir Ahmad (Sr. Advocate)

Counsel for the Opposite Party:

A.G.A.

Criminal Law-The Code of Criminal Procedure, 1973-Sections 276, 313, 366 & 367 - The Evidence Act,1872- Sections 119 & 165---Proper procedure has not been followed in recording of the St.ment of accused under Section 313 Cr.P.C. it is open for the Court to cure the defect by directing the court below to formulate questions separately, in respect of each circumstance, as appears against the accused, so as to record his version in terms of Section 313 Cr.P.C--- Directions issued to the court of sessions to record the St.ment of the accused under Section 313 Cr.P.C. afresh, by formulating proper questions to put as circumstance relied upon by the prosecution against the accused. The proceedings, in that regard, would be concluded within a period of two months and the St.ment of accused shall be remitted to this Court at the earliest. .(E-15)

List of the cases referred:-

1. Rahul Vs St. of Delhi, 2023 (1) SCC 83
2. Supreme Court in Varkey Joseph Vs St. of Kerala, rep. By the Circle Inspector of Police Puthencruz, Kerala, reported in 1993 AIR (SC) 1892
3. Indrakunwar Vs St. of Chandigarh, 2023 SCC OnLine SC 1364

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

1. This Court is ceased of proceedings under Section 366 of the Cr.P.C. for confirmation of death sentence awarded to the accused appellants, as well as the appeals filed by the accused against their conviction and sentence. The confirmation proceedings were placed earlier before the Court on 28.4.2023. It transpired that a young lady was subjected to sexual assault and then done to death in an incident occurred on 6.9.2018. The younger brother of the deceased was assaulted with a knife and his throat was cut. The injured brother temporarily lost his voice. This brother was produced during the trial as PW-5. Heavy reliance is placed upon the statement of PW-5 for conviction and sentence of the accused appellants.

2. When the statement of PW-5 was placed before this Court, it was seen that his statement was noted in such a manner that the substance of his statement could not be deciphered.

3. We deem it appropriate to reproduce pages 74 and 78 of the paper book, as it reveals the manner in which the statement was recorded. Pages 74 and 78 are reproduced hereinafter:-

“Page-74:-20-2-19

गवाह नितिन को मुख्य परीक्षा में पूछे गये प्रश्नो का लिखकर दिये गये जबाब निम्न है।

नीतीन	हा अमरजीत
सोनू	नीचे था
10	दाढी
हा	चाकू से काठी
पाप	कमरे में
कोट	मेरी दीदी को बोरी में ले जा
जज साब	रहा था
5 तारीक 9 2018	मेरी दीदी के हाथ और सिर
नही	बार नकरे थे
5 तारीक से 9	जाल पे
हा	कमरे में
मेरी गरदन काटी	मे बेहू हो गया कमरे में
अंकुर	तोरी दर
बीच वाले न	हा हा

अंकुर कमरे में टी०वी देखता रहा था मेरी दीदी की चीक की आवाज आई अंकुर सोनू अउआ मम्मी माम के गई पापा जंगल गये में और दीदी, हा हा	sd. Nitin 20-2-19

"Page-78:- प्रति परीक्षा में पूछे गये प्रश्नों के उत्तर

T.S.S. हा कीलास 4 हापुड़ में नहीं टीचर दीन नहीं पता हा जब नहीं था बोत सारा था हा कूल था बाई ललीत पताना कोन था हा/हा हा हा नहीं हा दील्ली पतानी नहीं हा हा हीमामू ममी के साथ नहीं	T.V. हा नहीं पतानी नहीं पतानी नहीं अंकुर सोनू अमरजी नहीं sd. Nitin 21-2-19"

4. Though the Trial Judge had connected the answers to various questions posed to PW-5, but since the questions and answers scripted were not relatable, as such this Court found it difficult to rely upon the statement of PW-5 in respect of the incident. A detailed order was accordingly passed on 28.4.2023 for the statement of PW-5 to be recorded again, which is reproduced hereafter:-

"1. Heard Sri Saghir Ahmad, learned Senior Counsel, as Amicus Curiae, assisted by Sri Mohd. Raghieb Ali, learned counsel for the appellants in Capital Appeal No. 9 of 2020; Sri Raj Kumar Kesari, learned counsel for the appellant in Capital Appeal No. 2 of 2021; Sri Mohd. Afzal,

learned counsel for the respondent in Government Appeal No. 23 of 2021 and Km. Meena, learned AGA for the State.

2. These two capital appeals alongwith government appeal arise out of an incident dated 6.9.2018 in which a young lady was subjected to sexual assault and then done to death and her brother was assaulted with a knife and his throat was cut. The injured brother apparently lost his ability to speak. The trial court recorded statement of the injured brother who has appeared as PW-5 and relying upon his testimony awarded capital sentence to the two accused.

3. On behalf of accused appellants, it is urged that the statement of PW-5 has not been recorded in the manner stipulated in law, inasmuch as, the principles laid down in Section 276 (2) Cr.P.C. have not been followed. Sri Saghir Ahmad, learned Senior Counsel appearing as Amicus Curiae has also referred to and relied upon Section 119 of the Evidence Act, which provides as under:-

"119. Dumb witnesses.--A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence."

Reliance is also placed upon Section 137 of the Evidence Act, in that regard.

4. We have perused the statement of PW-5, which is in question-answer form. The original record also contains two pages, on which, handwritten answers of PW-5 exists alongwith his signatures at the bottom of the page. On this handwritten answers, there is no reference to the question pursuant to which such answer is given. It is thus difficult to read the

testimony of PW-5. We are thus of the considered view that the testimony of PW-5 has not been recorded in consonance with law.

5. In our opinion, interest of justice would require that the matter be remitted to the court below for the limited purposes of recording the statement of PW-5, afresh, in accordance with law. We are persuaded to take such view as it is the settled principle of law that any error on part of the court below in recording of evidence should not occasion in failure of justice, specially in view of the fact that both the parties are heavily relying upon the testimony of PW-5. The additional facet is that accused appellants are facing capital punishment primarily on the testimony of PW-5. It goes without saying that the incriminating material emanating from the statement of PW-5 would be confronted to the accused appellants so as to record their testimony under section 313 Cr.P.C.

6. Considering the seriousness of the incident as well as the rights which are likely to be affected of the individuals, it would be appropriate to follow the aforesaid course so as to arrive at a just conclusion. Learned counsel for the parties also have no objection to such course being followed subject to all contentions being left to be raised at the appropriate stage.

7. In such circumstances, we direct the original records of this case to be sent to the concerned court through District Judge, Hapur, forthwith with the direction upon the court concerned to record the statement of PW-5, afresh, in accordance with the provisions contained in the Code of Criminal Procedure as well as Indian Evidence Act and also comply with the requirement of section 313 Cr.P.C. on such material. This would be done within a period of three months.

8. Court concerned after complying with the above direction shall send back the records to this Court.

9. List this matter on 11.09.2023.”

5. In compliance of the above discussions, the copy of the statement of PW-5 as also the statement of accused under Section 313 Cr.P.C. have now been placed before us.

6. Sri Saghir Ahmad, learned Senior Counsel assisted by Sri Mohd. Raghbir Ali, who appears as Amicus Curiae in the matter, submits that the manner in which statement of PW-5 has been recorded shows complete non-compliance of the procedure required to be followed while recording the statement of witness, as also shows lack of awareness about the purpose of recording statement of accused under Section 313 Cr.P.C. Learned Senior Counsel submits that Section 313 Cr.P.C. confers an important right upon the accused to be confronted of the substance of evidence led by the prosecution, against them, at the trial, with the intent to elicit explanation of accused. Learned Senior Counsel submits that the manner in which the statement has been recorded of the accused, under Section 313 Cr.P.C., leaves much to be desired.

7. In order to appreciate the submissions advanced at the bar, we have carefully perused the statement recorded of PW-5, which is in question-answer form. The presiding Judge has posed questions directly to the witness for recording his chief examination. Some of the questions posed to the witness are reproduced hereinafter:-

“प्रश्न- घटना किस तारीख की है?

उ०- 5/9/2018

प्र०- उस वक्त तुम कहाँ थे?

उ०- मैं घर पर टी०वी० देख रहा था।

प्र०- समय क्या हुआ था?

उ०- समय सुबह के समय 9-10 बजे थे।

प्र०- क्या हुआ था उस दिन?

उ०- मेरी बहन की चीखने की आवाज आई। बहन मुझसे बड़ी थी। उसका नाम भूमि यादव था। मैं बाहर गया तो अंकुर व सोनू बहन को मार रहे थे।

प्र०- किस चीज से मार रहे थे?

उ०- गला घोट रहे थे। एक गला घोट रहा था। इतना ध्यान नहीं कौन गला घोट रहा था। फिर कहा सोनू गला घोट रहा था। फिर मैं वहाँ पहुँचा तो अंकुर ने मेरी गर्दन काट दी। मैंने अंकुर व सोनू को दीदी के साथ गलत काम करते देखा था।

प्र०- अंकुर ने आपकी गर्दन किस चीज से काट दी?

उ०- चाकू से। चाकू अंकुर के हाथ में था।”

8. Before recording the statement of the witness, the presiding Judge has made general enquiries from the witness and found that he was studying in Class-8th and was fully competent to depose before the court. The witness was not administered any oath. The court further noticed that though the witness is not clear as he stutters, nevertheless his reply is intelligible. The recital containing the opinion of the court is reproduced hereinafter:-

“साक्षी पूछे गए प्रश्नों को भलि भांति समझकर उत्तर देने में सक्षम है। साक्षी वर्तमान में बोलने में सक्षम है यद्यपि साक्षी की बोली पूर्णतयः स्पष्ट तथा साफ नहीं है। परन्तु साक्षी द्वारा बताए जा रहे उत्तर समझ में आ रहे हैं।”

9. Learned Senior Counsel for the appellant places reliance upon Section 276 of the Code of Criminal Procedure, 1973, which is reproduced hereinafter:-

“276. Record in trial before Court of Session.— (1) In all trials before a Court of

Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the residing Judge himself or by his dictation in open Court, or under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down, or cause to be taken down, any part of such evidence in the form of question and answer.

(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record.”

10. It is argued that chief examination of witness was required to be recorded in the form of a narrative and not in the question-answer form. Reliance is also placed upon Section 119 of the Evidence Act, 1872.

11. Section 276 Cr.P.C. prescribes the procedure to be followed for recording evidence and has to be read in conjunction with the provisions contained in the Evidence Act, 1872. Section 118 of the Indian Evidence Act specifies as to who may testify while Section 119 of the Indian Evidence Act relates to witnesses, who are unable to communicate verbally. Section 119 of the Indian Evidence Act, 1872 is reproduced hereinafter:-

“119. Witness unable to communicate verbally. — A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence:

Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or

a special educator in recording the statement, and such statement shall be video graphed.”

12. A bare perusal of Section 119 of the Evidence Act would make it explicit that where a witness is unable to speak he may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Recording of such evidence is to be treated as oral evidence. A combined of Section 276 Cr.P.C. read with Section 119 of the Evidence Act makes it clear that in a trial before the court, the evidence of each witness shall be taken down in writing either by the presiding Judge himself or by his dictation in open court. Sub-section (2) of Section 276 of the Cr.P.C. contains an important provision, as per which the evidence of witness is required ordinarily to be taken down in the form of a narrative. A discretion, however, is vested with the presiding Judge to take down or cause to be taken down any part of such evidence in the form of question and answer. A combined reading of the provisions make it explicit that ordinarily the statement of witness would be recorded in the form of a narrative but for reasons, as is found expedient in the opinion of the presiding Judge, such evidence can also be taken in the form of question-answer.

13. There is a reason behind such scheme. The examination-in-chief is supposed to contain the narrative of the witness regarding the incident in question. Ordinarily the narrative must come in the witnesses own expression for the evidence to remain natural. It is this version of the witness on which the accused gets the right of cross-examination. However, when the statement of the witness is recorded in the

form of question-answer the narrative could be guided by the questions posed.

14. Section 276(2) Cr.P.C. while requiring the narrative of witness to be recorded in chief examination permits any part of such evidence to be taken down in the form of question answer. A discretion is recognized in the presiding Judge to take down or cause to be taken down such part of the evidence in question answer form. Section 119 of the Act of 1872 will be applicable only where the witness is unable to communicate verbally, which is not the case here. PW-5 can clearly communicate verbally and though he stutters but his reply is intelligible. Reference to Section 119 of the Act of 1872 has no relevance in this case.

15. Learned Senior counsel Sri Saghir Ahmad contends that Section 276(2) Cr.P.C. since uses the expression ‘shall’ as such the provision has to be treated as being mandatory and does not permit the entire narrative of witness to be recorded in question answer form.

16. In order to effectively deal with the contention it would be apposite to refer to the provision itself as well as the stipulations contained in other applicable legislations.

17. Section 276(2) Cr.P.C. does not specify as to which part of the evidence is required to be taken down in question answer form and which form is to be taken down in the form of narrative. Though the statute uses the expression ‘shall’ indicating the provision to be mandatory but that itself is not conclusive of the intent or the nature of the provision. The statute vests discretion with the presiding Judge in choosing which part of evidence has to be

in the form of narrative and which to be in the nature of question answer.

18. The object of a fair criminal trial is to unearth the truth. The presiding Judge has therefore been vested with vast discretion to put questions to the witness to cull out the truth of the matter. It is for this reason that the discretion in the presiding Judge is not specified/defined while conferring jurisdiction upon him to choose such part of the evidence to be recorded in the form of question answer. No consequences are otherwise provided in the code if the strict adherence is not followed in recording of evidence.

19. The intent of the statute has also to be gathered from the use of term 'ordinarily' in sub-section (2) of Section 276 Cr.P.C. The term 'ordinarily' suggests the way things are normally or usually done. It excludes definiteness or compulsiveness required for the provision to be treated as mandatory.

20. Sri Rajiv Lochan Shukla, advocate, in opposition to the proposition argued on behalf of appellants relies upon Section 165 of the Indian Evidence Act, 1872 which defines Judge's power to put questions. Section 165 of the Act of 1872 is reproduced hereinafter:-

“165. Judge's power to put questions or order production.—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order,

nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question: Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved: Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.”

21. Section 165 of the Act of 1872 vests wide discretion in the Judge to ask any question he pleases, in any form, about any fact relevant or irrelevant to discover or to obtain proof of relevant facts. Such power is not circumscribed. The presiding Judge is otherwise expected to participate actively in the trial by putting questions to the witnesses in order to ascertain the truth.

22. In *Rahul Vs. State of Delhi*, 2023 (1) SCC 83, the Supreme Court has emphasized the role of presiding Judge during the conduct of trial to ascertain the truth of the matter. The observations made by the Court in para 43 to 45 are relevant and are reproduced hereinafter:-

“43. The Court is constrained to make these observations as the Court has noticed many glaring lapses having occurred during the course of the trial. It has been noticed from the record that out of the 49 witnesses examined by the prosecution, 10 material witnesses were not

cross-examined and many other important witnesses were not adequately cross-examined by the defence counsel. It may be reminded that Section 165 of the Evidence Act confers unbridled powers upon the trial courts to put any question at any stage to the witnesses to elicit the truth. As observed in several decisions, the Judge is not expected to be a passive umpire but is supposed to actively participate in the trial, and to question the witnesses to reach to a correct conclusion.

44. This Court while not accepting the submission that it was improper for the Court to have interjected during the course of cross-examination of the witness, had observed in *State of Rajasthan v. Ani* [*State of Rajasthan v. Ani*, (1997) 6 SCC 162 : 1997 SCC (Cri) 851] thus : (SCC pp. 166-67, paras 11-13)

“11. We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial court to put “any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant” in order to discover relevant facts. The said section was framed by lavishly studding it with the word “any” which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power whenever he deems it *necessary to elicit truth*. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the court. This is clear from the words “relevant or irrelevant” in Section 165. Neither of the parties has any right to raise objection to any such question.

12. Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is

nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the Judge performing the role only of a *spectator or even an umpire* to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses in the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a Judge felt that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence-collecting process. It is a useful exercise for the trial Judge to remain active and alert so that errors can be minimised.

13. In this context it is apposite to quote the observations of Chinnappa Reddy, J. in *Ram Chander v. State of Haryana* [*Ram Chander v. State of Haryana*, (1981) 3 SCC 191 : 1981 SCC (Cri) 683] : (SCC p. 193, para 2)

“2. The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a

criminal court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth.’ ”

(emphasis in original)

45. In the instant case, material witnesses examined by the prosecution having not been either cross-examined or adequately examined, and the trial court also having acted as a passive umpire, we find that the appellant-accused were deprived of their rights to have a fair trial, apart from the fact that the truth also could not be elicited by the trial court. We leave it to the wisdom and discretion of the trial courts to exercise their powers under Section 165 of the Evidence Act for eliciting the truth in the cases before them, howsoever heinous or otherwise they may be.”

23. A co-joint reading of Section 276(2) Cr.P.C. and Section 165 of the Act of 1872 in light of the discussions held above would clearly indicate that the procedure of ordinarily recording the evidence of a witness in the form of narrative and recording only part in question answer form is directory and not mandatory.

24. Sri Saghir Ahmad also submitted that the questions posed to the witness (PW-5) were in the nature of leading questions and have thus caused prejudice to the accused.

25. Leading question is defined in Section 141 of the Act of 1872 and has to be read in conjunction with Section 142 which are reproduced hereinafter:-

“141. Leading questions.—Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

142. When they must not be asked.—Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.”

26. What exactly constitutes the leading evidence in a trial has been aptly put by the Supreme Court in *Varkey Joseph Vs. State of Kerala*, rep. By the Circle Inspector of Police Puthencruz, Kerala, reported in 1993 AIR (SC) 1892. Para 11 of the judgment in *Varkey Joseph (supra)* is reproduced hereinafter:-

“11. Leading question is one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have confirmed by the answer. Leading question may be used to prepare him to give the answers to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in chief examination to the subject of the enquiry/trial. The court may permit leading question to draw the attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggests to the witness the answer the prosecutor expects must not be allowed unless the witness, with the permission of

the court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give his own account of the matter making him speak as to what he had seen. The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen. Sections 145 and 154 of the Evidence Act are intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Sections 143 and 154 provide the right to cross-examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but Section 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witness intends to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner to which the witness answer merely "yes" or "no"; but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. The counsel must leave the witness to tell unvarnished tale of his own account. Sample leading questions extracted

hereinbefore clearly show the fact that the prosecutor led the witnesses to what he intended that they should say on the material part of the prosecution case to prove against the appellant which is illegal and obviously unfair to the appellant offending his right to fair trial enshrined under Article 21 of the Constitution. It is not a curable irregularity."

27. We have considered the submissions advanced on behalf of the appellant in this regard. The questions and the answers put to PW-5 during examination-in-chief have been perused by us. We do not find any question posed by the presiding Judge to be in the form of leading question. Moreover, no objection was otherwise taken on behalf of the accused during trial to posing of such questions as was required in terms of Section 142 of the Act of 1872. We, therefore, reject the argument of Sri Ahmed on this score, too.

28. Next submission of Sri Ahmed is with regard to non-compliance of Section 313 Cr.P.C. in recording of the statement of the accused with reference to the incriminating circumstances emerging against him from the evidence of PW-5. It is submitted that each circumstance ought to have been separately put as a question to the accused for recording his statement for protecting the right of accused under Section 313 Cr.P.C.

29. We have perused the records and we find that the entire evidence of PW-5 has been put to the accused for recording his statement under Section 313 Cr.P.C., instead of separately putting each circumstance as a separate question for eliciting an intelligible reply from the accused.

30. Section 313 Cr.P.C. confers an important right in the accused to explain the circumstances that emerge against him on the basis of evidence led by the prosecution in the case. The right of the accused has been analyzed by the Supreme Court in *Indrakunwar Vs. State of Chandigarh*, 2023 SCC OnLine SC 1364. After referring to the applicable judgments on the issue, the Court has crystallized the principles for exercise of power under Section 313 Cr.P.C. in para 35 which are reproduced hereinafter:-

“35. A perusal of various judgments rendered by this Court reveals the following principles, as evolved over time when considering such statements.

35.1 The object, evident from the Section itself, is to enable the accused to themselves explain any circumstances appearing in the evidence against them.

35.2 The intent is to establish a dialogue between the Court and the accused. This process benefits the accused and aids the Court in arriving at the final verdict.

35.3 The process enshrined is not a matter of procedural formality but is based on the cardinal principle of natural justice, i.e., *audi alterum partem*.

35.4 The ultimate test when concerned with the compliance of the Section is to enquire and ensure whether the accused got the opportunity to say his piece.

35.5 In such a statement, the accused may or may not admit involvement or any incriminating circumstance or may even offer an alternative version of events or interpretation. The accused may not be put to prejudice by any omission or inadequate questioning.

35.6 The right to remain silent or any answer to a question which may be false

shall not be used to his detriment, being the sole reason.

35.7 This statement cannot form the sole basis of conviction and is neither a substant

ive nor a substitute piece of evidence. It does not discharge but reduces the prosecution's burden of leading evidence to prove its case. They are to be used to examine the veracity of the prosecution's case.

35.8 This statement is to be read as a whole. One part cannot be read in isolation.

35.9 Such a statement, as not on oath, does not qualify as a piece of evidence under Section 3 of the Indian Evidence Act, 1872; however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution.

35.10 The circumstances not put to the accused while rendering his statement under the Section are to be excluded from consideration as no opportunity has been afforded to him to explain them.

35.11 The Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defence. The defence so articulated must be carefully scrutinized and considered.

35.12 Non-compliance with the Section may cause prejudice to the accused and may impede the process of arriving at a fair decision.”

31. The presiding Judge instead of formulating questions precisely containing the substance of evidence adduced against the accused for the purposes of eliciting his response, virtually reproduced the entire statement of the witness recorded in the form of question-answer. This is not how the question is to be put to an accused.

32. The substance of the evidence of PW-5 was required to have been

specifically formulated, as separate question, and then put to the accused, which has not been done.

33. When the entire statement in the question-answer form is put as the circumstance, it would be difficult for the accused to come up with his defence or the explanation in respect of the substance of evidence led against him. Section 313 Cr.P.C. is by now well-recognized as conferring an important right upon the accused to explain the circumstances put against him by the prosecution in the form of evidence to elicit his reply. Unless questions are put in the manner required in law such circumstance cannot be relied upon against the accused.

34. The manner in which statement of accused is recorded under Section 313 Cr.P.C., without formulating the question and confronting the accused with the circumstances, which has surfaced against him in respect of charges levelled has clearly denied opportunity to the accused to explain the circumstances.

35. This reference is made to this Court under Section 366 Cr.P.C. While answering the reference this Court is required to exercise its powers under Section 366 and 367 Cr.P.C. In the event this Court finds that proper procedure has not been followed in recording of the statement of accused under Section 313 Cr.P.C. it is open for this Court to cure the defect by directing the court below to formulate questions separately, in respect of each circumstance, as appears against the accused, so as to record his version in terms of Section 313 Cr.P.C.

36. In light of the discussions aforesaid, we direct the court of sessions to

record the statement of the accused under Section 313 Cr.P.C. afresh, by formulating proper questions, in light of the above directions, to be put as circumstance relied upon by the prosecution against the accused. The proceedings, in that regard, would be concluded within a period of two months and the statement of accused shall be remitted to this Court at the earliest.

(2023) 11 ILRA 47

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 01.11.2023

BEFORE

**THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE MOHD. AZHAR HUSSAIN
IDRISI, J.**

Criminal Appeal No. 4982 of 2019

With

Criminal Appeal No. 5346 of 2019

And

Criminal Appeal No. 5347 of 2019

**Rajesh Kumar @ Pappu ...Appellants
Versus**

State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellants:

Mrs. Vatsala, Sri Dharmendra Singh (Sr. Advocate), Sri Lav Srivastava, Sri Santosh Rai, Sri L.M. Singh, Sri V.P. Srivatava (Sr. Advocate)

Counsel for the Opposite Parties:

G.A., Sri Anurag Vajpeyi, Sri Praveen Kumar Singh

Criminal Law-The Code of Criminal Procedure, 1973-Section 374,386(b)(i) & 391- Postmortem report totally belies the prosecution story that the alleged named accused persons gave gun shot to the deceased persons under the shed of pumping set and thereafter dragged their cadavers to the 'Well' and thrown them into it--- The interest of appellants was literally butchered by the hand of

their counsel who have strangely admitted the genuineness of the documents produced by the prosecution. Neither its author was examined to establish its contents nor the circumstances in which that document was authored. Unless and until the genuineness of any document is not put under the crucible and thoroughly examined by the counsel for defence so as to elucidate and establish its authenticity, a concession given by the counsel for defence would certainly come into the purview of gross injustice to the appellants---It is the binding duty of the presiding officer to observe that there is a level play ground for both the parties and no one should be at advantageous position. In fact this is the undercurrent of Section 391 Cr.P.C. which empowers the appellate Court to examine the entire gamut of facts and circumstances of the case and reach to a conclusion as to whether the counsel for either of the parties are assisting the court in a fair and judicious way and manner---As soon as the appellants have admitted the genuineness of documents, immediately the eyebrows of the presiding Judge ought to have been raised and he should try to lift the veil so as to unearth the truth of the case by summoning the various witnesses on its own---Matter remanded.

Appeals partly allowed.(E-15)

List of the cases referred:-

1. Sessions Judge, Nellore Vs Intha Ramana Reddy, 1972 CrLJ 1485,
2. Brigadier Sukhjit Singh (Retd) MVC Vs St. of U.P. & ors., 2019 (16) SCC 172,
3. Zahira Habibullah H. Sheikh & anr. Vs St. of Guj., AIR 2004 (SC) 3114,
4. Akhtar & ors.Vs St. of Uttaranchal, Criminal Appeal No.1590 of 2007 decided on 9th April, 2009
5. St. of Rajasthan Vs Asharam @ Anshumal, 2023 SCC Online SC 423
6. Munna Pandey Vs St. of Bihar, Criminal Appeal no.1271-1272 of 2018) dated 04th September, 2023

(Delivered by Hon'ble Mohd. Azhar Hussain Idrisi, J.)

(1). Heard Shri V.P. Srivastava, learned Senior Counsel assisted by Shri Santosh Kumar Rai and Shri L.M. Singh, learned counsel for the appellants and Shri Praveen Kumar Singh, learned counsel for the informant as well as Shri Ghanshyam Kumar, learned A.G.A.-I for the State of U.P. Perused the record of the case.

(2). Since all the three appeals were admitted on 20.2.2020 and the lower court record is available. Learned counsel for contesting parties are ready and willing to argue the case finally on the merit of the case. They have furnished the summary of the case, moot issues to be raised during arguments and have also supplied the citations on which they want to rely upon. Thus, the Court has got no option or even objection to decide all the three appeals finally with the help and aid of respective counsels for the parties as well as learned counsel for the State.

(3). After the arguments and the judgment was reserved, the Court has lay its hand over a very valuable quotation which gives an insight about the issue involve and plays a pivotal role in deciding these appeals. It reads thus :-

“Justice has nothing to do with what goes in the courtroom; Justice is what comes out of a courtroom.”

By Clarence Darrow

Aforementioned lines would act as beacon light for us while deciding aforementioned appeals. Elaborating these golden lines, it is evident that courtroom proceeding is an arena whereby two legal opponents representing their respective clients, muster their legal acumen to

impress upon the Judge. But it is the Judge and his verdict on the issue and his endeavour to search out the truth by using his robust legal sense, come out his final verdict on the issue.

Thus, from aforesaid, it is established that answer of the aforesaid gobbet is the litmus test for any judgment and deciding the 'issue' between the parties.

INTRODUCTORY :-

(4). The learned Special Judge (SC/ST Act), Varanasi vide judgment and order dated 15/16.7.2019 while deciding S.S.T. No.212 of 1999 (State vs. (i) Radhey Shyam Lal s/o Ghorahu Srivastava, (ii) Pratap s/o Ram Awadh (iii) Jagannath s/o Ram Awadh and (iv) Rajesh Kumar @ Pappu @ Gandhi s/o Mohan Srivastava), who were convicted for offence u/s 302/34, 201 of I.P.C. and Section 3(2)(5) of SC/ST Act and were sentenced for life imprisonment and a fine of Rs.50,000/- for the offence u/s 201 I.P.C. for seven years rigorous imprisonment and a fine of Rs.20,000/- and u/s 3(2)(5) SC/ST Act for life sentence and a fine of Rs.50,000/- were awarded and in the case of default in paying the fine amount the additional duration of simple imprisonment were also awarded. All the sentences would run concurrently.

(5). Aggrieved by the aforesaid judgment and order of sentence Rajesh Kumar @ Pappu has filed Criminal Appeal No.4982 of 2021, Radhey Shyam Lal has filed Criminal Appeal No.5346 of 2019 and Pratap and Jagannath have filed Criminal Appeal No.5347 of 2019. For the sake of brevity and convenience, all the three appeals are being jointly decided by a common judgment.

(6). After having the marathon arguments advanced by the counsels for the rival parties, it is imperative to give a bird's eye view to the prosecution story as mentioned in the F.I.R. and other undisputed facts.

(7) **FACTUAL MATRIX :**

(I) Shri Shyam Narayan Ram on 22.4.1998 around 5.30 in the morning have succeeded in lodging the F.I.R. for the incident said to have been taken place on 21/22.4.1998 itself around 01.00 in the night, under Sections 302/34 and Section 3(2)(5) of SC/ST Act against (i) Radhey Shyam Lal, (ii) Pratap Kumhar, (iii) Pappu @ Gandhi and (iv) Jagannath for the alleged killing of his parent Mohan Ram and Smt. Bodha Devi. The distance between the place of occurrence and the police station is hardly six kilometres.

(II) The First Informant is permanent resident of Police Station Dhanapur, Chandauli. The parent of the informant Mohan Ram and Bodha Devi (parent of informant) used to sleep in the shade of a pumping set belonging to one Kamla Singh.

On the fateful day, both of them went to the agriculture field, near the pumping set. From the FIR itself, it is admitted that there was some dispute regarding the landed property between the rival groups i.e. deceased and appellants. In addition to this, about two days back Pratap Kumhar was taking out some nut and bolts from the trolley belonging to Panna Lal, and when objected by Panna Lal, then Pratap Kumhar started hurling filthy abuses and have extended threats. On this score, the named accused persons (i) Radhey Shyam Lal, (ii) Pratap Kumhar, (iii) Jagannath and (iv) Pappu @ Gandhi came on the place of incident around 01.00 in the

pitch dark of night and they jointly have committed the offence by giving a gun shot injury to his parent Mohan Ram and Bodha Devi (the deceased persons). After hearing the noise of gun shot, the Informant; Ram Dular (PW-2) and Dashmi who were also harvesting the agriculture crop of Kamla Singh at nearby place from pumping station, have seen/heard the incident in the moonlight and also when they came to the tubewell in the light of the bulb having sufficient lights, have seen that Radhey Shyam Lal was carrying a gun, Pratap Kumhar was having a country made pistol (Katta) and Jagannath and Pappu were dragging the informant's parent Mohan Ram and Bodha Devi and thereafter thrown their body into the Well. The informant and others got horrified as the assailants were carrying guns with them. They hide themselves and only after the resile of the assailants, informant came on the spot and have seen the parent inside the Well. They have raised the alarm and the co-villagers came on the spot. They were scared, resultantly they could not inform the police in the night itself. They came to police station early in the morning at 5.30 of 22.4.1998 to lodge the FIR.

(8). From the aforesaid factual matrix as culled out from F.I.R., it is clear that it was the pitch dark, around midnight when the parent of the informant were murdered by the name accused persons by using their firearms. The informant and other witnesses have seen that assailants were dragging the corpus of Moham Ram and Bodha Devi to the Well and they have thrown their body into the Well. Previous animosity on account of some landed property and an incident two days prior are the trigger points for alleged offensive by the appellants against the parent of the first informant.

(9). After lodging of FIR, (i) on 22.4.1998 the police has recovered a blood soaked 'Sitarami' (scarf), allegedly belongs to appellant Pratap, from the place of occurrence. A 'Fard' of alleged blood soaked Gamchha/Sitarami/scarf belonging to Pratap was prepared by the police (Exb-5). (ii) on 22.4.1998 at 10.30 p.m. the police has recovered a SBBL licensee gun belonging to Radhey Shyam. The police has recovered SBBL licensee gun and one empty cartridge of 12 bore. The barrel of the gun was smelling 'gun powder', which was marked as (Exb.-6). (iii) On the same day, during investigation, the police after approaching the place of incident under the shade of pumping set, the police has recovered the three empty cartridges of 12 bore, one live cartridge of 12 bore of KF Special brand, dot, *tikli* and pallets were also recovered and a fard of which was prepared and exhibited as (Exb.-7). (iv) During investigation the police has also recovered blood soaked earth and plain soil from the place of occurrence (Exb.Ka-8), suggestive of the fact that incident took place under the shade. All these exercises/recoveries were done by the police on 22.4.1998 during investigation.

(10). In addition to this, after lodging of the FIR, an inquest proceeding was initiated of Bodha Devi and Mohan Ram @ Fazihat. The proceeding of inquest of Bodha Devi was started on 8.05 a.m. on 22.4.1998 and concluded at 9.45 a.m., whereas the inquest of Mohan Ram @ Fazihat was started at 06.45 a.m. on the same day and ended at 08.00 a.m.

We have perused the contents of the inquest reports as well as contents of F.I.R., the information was given to the police that the deceased were murdered by

giving a gun shot injury '(goli mar kar hatya kar di gayi hai).'

In addition to this, one of the startling feature of this inquest report was that after taking out the dead body from the Well, the dead bodies of the deceased persons were absolutely 'naked', except the lady Bodha Devi was covering her breasts by the blouse. Not a single clothe was over their persons. In the inquest report all the Panch have observed that none of the deceased persons have sustained any gun shot injury over their persons. After conclusion of the inquest, dead body of Bodha Devi was handed over to constables on 22.4.1998 at 9.45 a.m., whereas the dead body of Mohan Ram was handed over on 22.4.1998 at 08.00 a.m. to same set of constables for further formalities of postmortem. Both these inquest reports were marked as Exb.Ka-9 and Exb. Ka-10 on 28.4.2005.

(11). Autopsy report of Bodha Devi is of 24.4.1998, though her dead body was handed over to the constables to carry out her postmortem on 22.4.1998 at 09.45 a.m. It is interesting to mention that the postmortem report of Mohan Ram @ Fazihat too, is of 23/24.4.1998 by the Medical Officer, SSPG Hospital, Varanasi. It is worthwhile to mention here, that from Chandauli Police Station to SSPG Hospital, Varanasi is barely 76 kms far. This unwarranted delay in bringing the dead body to the SSPG Hospital, Varanasi goes to the core of the prosecution case and remain unexplained by the prosecutor. No probable justification coming forward for this serious lapse in the prosecution case, which was unfortunately ignored by the learned trial Judge in his impugned judgment.

(12). The postmortem report of the deceased Bodha Devi dated 22/24.4.1998 at 2.30 p.m. indicates that she has sustained 7 injuries over her person, but none of the injuries were caused by any firearm. As per opinion of the doctor, the cause of death is serious damage in the spinal cord and fracture over the vertebrae. Similarly, the autopsy report of Mohan Ram @ Fazihat dated 24.4.1998 indicates that he has sustained 16 injuries over his person, but none of them are caused by the firearm and cause of death is the same i.e. serious damage in the spinal cord causing his death. At this juncture, the prosecution has to bridge, the alleged recovery of blood soaked scarf of Pratap from the place of occurrence, blood soaked earth from the shade of pumping set where they used to sleep, empty and live cartridges, tickli, pallets, suggesting that two persons have died by gun shot. But the postmortem report totally belies the prosecution story that the alleged named accused persons gave gun shot to the deceased persons under the shed of pumping set and thereafter dragged their cadavers to the 'Well' and thrown them into it.

(13). Yet another aspect of the issue which deserve attention of the Court is that though the postmortem of Mohan Ram @ Fazihat was initiated on 23.4.1998 itself, but there was serious dispute regarding the fact that there is no firearm injury found over his person and on this issue a dispute arose, as such, the C.M.O., Varanasi postponed the postmortem and on 24.4.1998 the S.O., Dhanapur was called for and the postmortem was concluded on 24.4.1998 at 2.00 p.m.

(14). During investigation, the police has concluded all the necessary formalities viz; sending the recovered cartridges to the

FSL for its examination, preparing the site plan, sending the alleged Sitarami/Angauchha to the FSL and concluding the investigation have submitted its report u/s 173(2) Cr.P.C. against all the named accused persons namely; (i) Radhey Shyam Lal, (ii) Pratap, (iii) Jagannnath and (iv) Rajesh Kumar @ Pappu @ Gandhi u/s 302, 201 I.P.C. and 3(2)(5) of SC/ST Act and on 30.6.1998 the cognizance of the offence was taken by the concerned Magistrate.

(15). Being a cognizable offence, the case was remitted to the court of Sessions on 18.02.1999, and thereafter, the learned Session Judge, after framing the charge and explaining to accused persons, have framed the charge u/s 302/34, 201 I.P.C. and Section 3(2)(5) of SC/ST Act and the accused persons declined to admit their guilt and have insisted to be tried.

(16). The prosecution has produced the following documents to establish their case. Surprisingly, the counsel for the defence without calling their respective authors, have abruptly and blindly admitted the genuineness of those documents as a result thereof the learned trial Judge by one stroke of pen on one and same day have exhibited the following documents:-

(i) Tehrir Report (Exb Ka-1), (ii) Chik FIR (Exb Ka-2), (iii) GD Entry (Exb Ka-3), (iv) Site plan (Exb Ka-4), (v) Fard recovery of blood soaked Sitarami/scarf (Exb Ka-5), (vi) Fard recovery of the gun (Exb Ka-6), (vii) Fard empty cartridges/miss cartridge/live cartridge (Exb Ka-7), (viii) blood stained earth and plain soil (Exb Ka-8), (ix) Panchnama/inquest report (Exb Ka-9 and Ka-10), (x) police form 13 (Exb Ka-11 and Ka-12), (xi) Photonash (Exb Ka-13 and Ka-

14), (xii) report by SHO, PS. Lanka (Exb Ka-15), (xiii) report by Dhanapur police station (Exb Ka-16), (xiv) Chemical examination report (Exb Ka-19), (xv) postmortem reports (Exb Ka-21 & 22), (xvi) charge sheet (Exb Ka-23), (xvii) FSL reports (Exb Ka-24 & 25). These are the documentary evidences which were placed by the prosecution to establish their case. In addition to this the oral testimony of P.W.-1 Shyam Narayan Ram and P.W.-2 Ram Dular (witnesses of fact) were examined.

(17). **Shri V.P. Srivastava, learned Senior counsel has urged that this is the most startling feature of the entire prosecution is that an extraordinary strange and suicidal attempt was made by the counsel for the defence that without bringing the respective authors of the aforesaid documents and cross-examining them, the counsel for the defence abruptly and strangely have accepted the genuineness of the aforesaid documents. This indeed was a Judicial Harakiri by the defence counsel, who for the reasons best known to him, without calling these witnesses have accepted the genuineness, and accordingly, the learned Trial Judge in a most mechanical fashion exhibited all the documents as an admitted one.**

Not only this, defence counsel has never produced any defenct witness to establish the innocence of the appellants. In addition to it, scholars have embraced by their experience that- *multa exercitatione facilius quam regulis percipies*: (A seasoned law practitioner perceive many things more easily by experience than by rules). Because knowing rules is one thing, but knowing how they are enforced and how they apply to a specific case is quite another.

(18). At this juncture, the Court has laid his hands to a famous quotation of Harry Browne :

“A fair trial is one in which the rules of evidence are honored, the accused has competent counsel, and the judge enforces the proper court room procedures- a trial in which every assumption can be challenged.”

There is also proverb in this regard that “Non in legendo sed in intelligendo leges consistent” which make us understand that laws depend not on being read but on being understood.

(19). Shri V.P. Srivastava, learned counsel for the appellants have submitted that on 12.01.2000 the two affidavits carrying the thumb impression/signature of Shyam Narayan Ram and Ram Dular s/o Buddhu Harijan, were filed in the court of Special Judge, SC/ST Act, Varanasi. Shyam Narayan Ram, the informant, in his affidavit dated 12.01.2000 states as under :

“समक्ष- न्यायालय स्पेशल जज एस.सी.एस.टी. वाराणसी

सत्र परीक्षण संख्या 212 सन् 99

शपथ पत्र श्याम नारायण उम्र 25 वर्ष पुत्र स्व० मोहन उर्फ फजिहत हरिजन निवासी मीरापुर थाना-धानापुर जनपद चन्दौली बहलफ निम्नलिखित बयान करता है:-

1. यह कि शपथकर्ता बहलफ बयान करता है कि मुकदमा में वह वादी है उसके पिता व माता का मर्डर किया गया है न्यायालय के आदेशानुसार वह न्यायालय हाजिर हो रहा है।

2. यह कि दिनांक 21.04.98/22.04.98 वह कमला सिंह के खेत में गेहूँ काट रहा था रात में करीब 1 बजे फायर हुआ था वह शोर सुनकर कमला सिंह के पम्पिंगसेट पर आया। वहाँ पर हमने नहीं देखा कि अभियुक्त गण राधेश्याम लाल, पप्पू उर्फ गांधी, प्रताप, जगरनाथ जो हमारे गांव के हैं मौजूद हैं। रात में करीब तीन बजे माता पिता को खोजा गया था। एफ०आई०आर० की सूचना मेरे बहनोई ने दिया एवं जहां कहा अंगूठा निशान लगा दिया।

जब हम लोग रात में पम्पिंग सेट पर गये थे उस समय वहां अंधेरा था।

3. यह कि शपथकर्ता बहलफ बयान करता है कि वास्तव में पुलिस ने उससे कोई बयान नहीं लिया है।

यह कि शपथकर्ता बहलफ बयान करता है कि वह जो कुछ हलफनामा दे रहा है वह सब सही है।

नि०अं० श्याम नारायण

सत्यापन

मैं, मुजहिर बहलफ सत्यापित करता हूँ कि हलफनामा हाजा दफा 1 ता 4 सब सच व सही है कोई बात इसमें असत्य नहीं है और न छिपायी गई है। इबारत तसदीक दीवानी कचहरी वाराणसी।

दिनांक: 12.01.2000 शपथ कर्ता

नि०अं० श्याम नारायण”

Ram Dular, in his affidavit dated 12.01.2000 states as under :

“समक्ष- न्यायालय स्पेशल जज एस.सी.एस.टी. वाराणसी

मुकदमा नं० 212 सन् 99

सरकार बनाम राधेश्याम वगै०

शपथ पत्र

शपथ पत्र राम दुलार पुत्र बुद्धू हरिजन निवासी मीरापुर थाना-धानापुर जिला-चन्दौली बहलफ निम्नलिखित बयान करता है:-

1. यह कि शपथ कर्ता बहलफ बयान करता है कि वह मुकदमा हाजा में अभियोजन पक्ष का गवाह नं० 2 है।

2. यह कि शपथ कर्ता बहलफ बयान करता है कि दिनांक 22.04.98/21.04.98 ई० की रात को वह घर पर सोया हुआ था। रात करीब तीन बजे गांव में हल्ला हुआ, सोर सुनकर कमला सिंह के पम्पिंग सेट पर हम लोग गये। बोधा देबी व मोहन की लाश कुएँ में थी हम खेत में कटाई नहीं कर रहे थे न ही मेरे साथ श्याम नारायण थे। हमने किसी को गोली मारते हुए या बन्दूक के बटों से अथवा लाठी से नहीं देखा है न ही हमने पुलिस के सामने बयान दिया है न ही पुलिस हमसे कुछ पूछी है। न्यायालय द्वारा सम्मन मिलने पर प्रार्थी हाजिर अदालत हुआ है।

3. यह कि शपथ कर्ता बहलफ बयान करता है कि घटना के विषय में वह कुछ देखा नहीं है बल्कि लाश को रात में 3.30 बजे के करीब जब श्यामनारायण टार्च जलाकर देख रहे थे तब हमने भी लाश को कुएँ के अन्दर पड़ा हुआ देखा था।

सत्यापन

मैं मुजहिर बहलफ सत्यापित करता हूँ शपथपत्र हाजा दफा 1 ता 3 मेरी निजी जानकारी में सत्य सच व सही है कोई बात न तो असत्य है और न छिपायी गई है। इबारत तसदीक अन्दर अहाता दीवानी कचहरी वाराणसी में किया।

दिनांक: 12.01.2000 शपथ कर्ता
रामदुलारे"

(20). In continuation of the same, in the year 2019 the learned DGC (Crl) have moved three applications u/s 29ख, 30ख and 31ख u/s 311 Cr.P.C.. Vide order dated 20.5.2019 all these three applications were disposed of by the court concerned, whereby the application No.29ख and 30ख were rejected on the ground that since the matter is of oldest category, and therefore, there is no need of summoning the desired prosecution witnesses for re-examining them. Order dated 20.5.2019 while disposing of all three applications by the Special Judge, SC/ST Act, Varanasi is quoted herein below :

"20-05-2019

पत्रावली पेश हुई। पुकार करायी गयी। अभियुक्तगण अनुपस्थित है, जिनकी हाजिरी जरिये अधिवक्ता आज के लिये माफ की गयी।

पत्रावली वास्ते आदेश प्रार्थनापत्र संख्या 29ख, 30ख, व 31ख नियत है।

दिनांक 17.05.2019 को पत्रावली वास्ते बहस नियत थी। दौरान बहस विद्वान विशेष अभियोजक द्वारा यह अवगत कराया गया कि पूर्व में दिनांक 12.05.2005 को अभियोजन द्वारा प्रस्तुत उपरोक्त प्रार्थनापत्र का निस्तारण नहीं किया गया अतः मामले में निर्णय से पूर्व उक्त प्रार्थनापत्रों का निस्तारण आवश्यक है अतः न्यायालय द्वारा पूर्व तिथि पर उपरोक्त प्रार्थनापत्रों पर बहस सुनी गयी।

प्रार्थनापत्र 29ख इस आशय का प्रस्तुत किया गया है कि मामले में मृतकों की पोस्ट मार्टम आख्या मे अंकित मृत्यु का कारण स्पष्ट करने के लिये चिकित्सक एस०के० श्रीवास्तव को तलब किया जाय।

प्रार्थनापत्र 30ख इस याचना के साथ अंकित किया गया है कि फर्द खून लगा गमछा, फर्द एस०बी०बी०एल० बन्दूक, फर्द कारतूस, फर्द खून आलूदा मिट्टी व सादी मिट्टी एवं नक्शा नजरी को साबित करने के लिये विवेचक को तलब किया जाय।

प्रार्थनापत्र 31ख इस याचना के साथ दिया गया है कि धारा 313 द०प्र०सं० के बयान में कुछ प्रश्न पूछने से रह गये हैं अतः उन प्रश्नों को पूछने के लिये दोबारा 313 द०प्र०सं० का बयान कराया जाय।

उपरोक्त प्रार्थनापत्र के समर्थन में विशेष अभियोजक द्वारा यह तर्क दिया गया कि मामले में दो व्यक्तियों की हत्या की गयी है और अभियोजन का वाद साबित करने के लिये उपरोक्त साक्ष्यों की आवश्यकता है अतः समस्त प्रार्थनापत्र स्वीकार किया जाय।

बचाव पक्ष के विद्वान अधिवक्ता द्वारा उपरोक्त प्रार्थनापत्रों का विरोध इस आधार पर किया गया कि मामला अतिप्राचीन है। प्रार्थनापत्र सन् 2005 में प्रस्तुत किये गये थे, जबकि उससे पूर्व औपचारिक साक्षी तलब किये जाने के स्तर पर बचाव पक्ष द्वारा समस्त अभियोजन प्रपत्रों की औपचारिक प्रमाणिकता को स्वीकार कर लिया गया है, इसलिये साक्षीगण को मात्र प्रपत्र साबित करने के लिये तलब किये जाने की आवश्यकता नहीं है और ऐसा किये जाने पर मामले में अनावश्यक विलम्ब कारित होगा। अतिरिक्त बयान 313 द०प्र०सं० के सन्दर्भ में बचाव पक्ष का कथन है कि यदि न्यायालय उचित पाती है तो कभी भी व किसी भी स्तर पर अभियुक्तगण के अतिरिक्त परीक्षा कर सकती है।

उभय पक्षों के तर्कों को सुना एवं पत्रावली का परिशीलन किया।

वर्तमान वाद की घटना 22-04-1998 की है जिसमें आरोप दिनांक 01-10-1999 को विरचित किया गया। मामले में दो साक्षी पी०डब्ल्यू०-1 श्याम नारायण व पी०डब्ल्यू०-2 राम दुलार को परीक्षित किया जा चुका है। अंतिम साक्षी दिनांक 28-04-2005 को परीक्षित किया गया। उसके पश्चात् दिनांक 28-04-2005 को ही बचाव पक्ष के विद्वान अधिवक्ता द्वारा अभियोजन प्रपत्रों के औपचारिक प्रमाणिकता को स्वीकार किया गया। तत्पश्चात् दिनांक 04-05-2005 को धारा 313 द०प्र०सं० के अन्तर्गत अभियुक्तगण के बयान दर्ज किये गये।

उपरोक्त प्रक्रिया समाप्त होने के उपरान्त दिनांक 12-05-2005 को प्रश्नगत प्रार्थनापत्र अभियोजन की ओर से प्रस्तुत किया गया। दिनांक 24-05-2005 को धारा 311 द०प्र०सं० के अन्तर्गत अभियोजन द्वारा प्रार्थनापत्र प्रस्तुत कर पन्नालाल को परीक्षित किये जाने की याचना की गयी। उक्त प्रार्थनापत्र निरस्त करने के आदेश दिनांकित 24-04-2005 के विरुद्ध अभियोजन द्वारा माननीय उच्च न्यायालय के समक्ष याचिका संख्या 5560/2005 योजित की गयी जिसमें आदेश दिनांकित 16-05-2005 पारित कर अभियोजन को एक अवसर दिया गया। तत्कालीन पीठासीन अधिकारी द्वारा माननीय उच्च न्यायालय के आदेश के अनुपालन में अभियोजन को अवसर दिया गया और अभियोजन द्वारा साक्षी के परीक्षित न करने के कारण अवसर दिनांक 26-05-2005 को

समाप्त कर दिया गया। उक्त आदेश के विरुद्ध वादी की तरफ से प्रकीर्ण वाद अन्तर्गत धारा 482 द०प्र०सं संख्या 6421/2005 योजित किया गया और याचिका सूचीबद्ध होने तक वाद की कार्यवाही स्थगित कर दी गयी। उक्त आदेश के माध्यम से याचिका को जुलाई सन् 2005 के अंतिम सप्ताह में सूची बद्ध करने का आदेश पारित किया गया और आदेश के अनुपालन के सम्बन्ध में न्यायालय से आख्या आहूत की गयी। तत्कालीन पीठासीन अधिकारी द्वारा आख्या 05-07-2005 को प्रेषित की जा चुकी है।

वर्तमान में माननीय उच्चतम न्यायालय द्वारा एशियन रिसर्फेसिंग आफ रोड एजेन्सी प्राइवेट लिमिटेड बनाम सी०बी०आई० में पारित आदेश के अनुपालन में आदेश दिनांक 14-02-2019, 26-02-2019 एवं 11-03-2019 पारित कर स्थगन आदेश के समाप्त होने की अवधारणा करते हुए पत्रावली वास्ते बहस नियत की गयी।

निस्तारण प्रार्थनापत्र 29ख व 30ख:-

उपरोक्त दोनों प्रार्थनापत्रों में अभियोजन द्वारा अभियोजन प्रपत्रों व उनमें उल्लिखित तथ्यों को साबित करने के लिये साक्षी को तलब करने की याचना की गयी। जबकि बचाव पक्ष द्वारा अभियोजन प्रपत्रों की औपचारिक प्रमाणिकता को स्वीकार किया गया और तथ्यों से इन्कार किया गया। उल्लेखनीय है कि औपचारिक प्रमाणिकता अर्थात् प्रपत्रों का निष्पादन स्वीकार करने के उपरान्त उसके तथ्यों की प्रमाणिकता को अभियोजन द्वारा प्रस्तुत मौखिक साक्ष्य के आधार पर परखा जा सकता है। ऐसी दशा में मामले की प्राचीनता को ध्यान में रखते हुए औपचारिक साक्षियों को तलब किये जाने की आवश्यकता यह न्यायालय नहीं पाती है।

तदनुसार प्रार्थनापत्र 29ख व 30ख निरस्त किया जाता है।

प्रार्थनापत्र 31ख का निस्तारण:-

उक्त प्रार्थनापत्र के माध्यम से हेतुक परिस्थिति एवं रोशनी आदि के बावत अतिरिक्त बयान अन्तर्गत धारा 313 द०प्र०सं की याचना की गयी। उल्लेखनीय है कि उक्त प्रार्थनापत्र दिनांक 12-05-2012 को योजित किया गया था। पत्रावली के परिशीलन से यह परिलक्षित होता है कि दिनांक 16-05-2005 को उपरोक्त बिन्दुओं के सन्दर्भ में अतिरिक्त बयान अन्तर्गत धारा 313 द०प्र०सं दर्ज किया जा चुका है। अर्थात् यह उपधारणा की जायेगी कि दिनांक 16-05-2005 को प्रार्थनापत्र स्वीकार करते हुए बयान अन्तर्गत धारा 313 द०प्र०सं दर्ज किया जा चुका है। दूसरे शब्दों में कहा जाय तो प्रार्थनापत्र 31ख स्वतः निस्तारित हो चुका है।

उपरोक्तानुसार प्रार्थनापत्र के निस्तारण के उपरान्त इस न्यायालय के समक्ष पत्रावली में बहस सुनकर निर्णय पारित करने के अलावा अन्य कोई विकल्प शेष नहीं है।

अतः पत्रावली दिनांक 22-05-2019 को वास्ते बहस पेश हो।

विशेष न्यायाधीश (एस०सी०/एस०टी०) एकट वाराणसी”

(21). The aforesaid affidavits were taken on record, finds reference in para 19 of the judgment, but it seems from the judgment that, Dashmi who is one of the eye-witness along with the informant and Ram Dular have allegedly managed to extract the aforesaid affidavits from the respective deponents taking the advantage of their illiteracy and on very next date when they came to know about this affidavit, they have filed yet another affidavit on 19.2.2000 denying the contents of earlier affidavit as clarified by P.W.-1 and P.W.-2 in their respective depositions. On similar lines, P.W.-2 has also given his testimony denying the contents of paper No.10ख, their alleged affidavit. It has been contended that both of the witnesses have not given their affidavits on their own sweet wills. When they came to know about the fraud by own man and an eye-witness Dashmi, they have rectified their mistake by giving yet another affidavit 16-ख/1. But there is no denial of the fact that the informant and Ram Dular has given two affidavits which finds reference in para 19 of the instant judgment.

(22). Shri Srivastava, learned counsel for the appellants, have contended that it is just possible that there might be some genuine confusion that the informant does not want to prosecute the appellants and that is why they have given their affidavits on 12.2.2000, though which was later on withdrawn by the P.W.-1 and P.W.-2.

In this backdrop of the case, the defence counsel might have given this

concession, while admitting the genuineness and authenticity of the documents produced by the prosecution, otherwise there could not be any conceivable good reason that the defence counsel without looking to the papers gave a sweeping nod, while admitting the genuineness of those papers. This indeed an extraordinary situation rather a judicial hara-kiri by the defence counsel, which normally no defence counsel would do. It's true that accepting and admitting the genuineness of those documents is now admissible under Section 294 of Cr.P.C. It is a settled proposition of law that if genuineness of any document filed by a party is not disputed by the opposite party, it can be read as substantive evidence as per provisions of sub-section (3) of Section 294 of Cr.P.C. Accordingly, the postmortem report and other documents, if its genuineness is not disputed by the defence counsel, the said postmortem report can be read as a substantive evidence to prove the correctness of its contents without summoning its author. The order dated 28.4.2005 passed by the Special Judge, SC/ST Act in S.T. No.212 of 1999 reads thus :

“Case called out.

Accused persons Radhey Shyam Lal, Pratap Jagannath and Rajesh Kumar @ Pappu @ Gandhi are present in persons on bail with their learned defence counsel Sri P.N. Tripathi.

Remaining cross examination of P.W.-2 Ram Dulare is concluded today.

Learned prosecution counsel Sri Ajai Kumar Singh assisting through public prosecutor Sri Suresh Singh, learned ADGC (CrI.) for State, refused to produce and examine any more witness of fact and prayed for summoning formal witnesses.

Learned defence counsel Sri P.N. Tripathi examined the record of the case in

the light of statement of examined fact witnesses and proposed to admit genuineness of prosecution papers sought to be formally proved by the formal witnesses with the prayer for not to summon formal witnesses by dispensing formal proof of the prosecution papers by summoning the formal witnesses. Accordingly, he was allowed. Learned defence counsel admitted genuineness of all prosecution papers, not proved by examined fact witnesses P.W.-1 and P.W.-2. Accordingly, summoning of formal witness is dispensed with and the prosecution papers, of which genuineness is admitted by defence, are exhibited. Accordingly, prosecution evidence is closed. Fix 4.5.05 for recording statement of accused persons u/s 313 Cr.P.C.

Sd.-Ill.

Spl. J. (SC & ST) Act.”

DISPOSAL OF APPLICATION
U/S 391 Cr.P.C. FILED BY THE
APPELLANT :

(23). After reading of aforesaid order dated 28.4.2005, it speaks volumes about Sri P.N. Tripathi, learned counsel for the defence, who allegedly declined to cross-examine the prosecution witnesses. Not only this for the reasons best known to the concerned counsel, without summoning the remaining formal or witnesses of fact and insist them to establish the genuineness of documents and their contents, abruptly and strangely foregone his valuable right to cross-examine the remaining witnesses. Consequently, the learned trial Judge by one stroke of pen, Exhibited all the prosecution documents. This order by itself smacks foul. Under the normal circumstances, acceptance of the genuineness of the prosecution documents is only a rare and exceptional case, but the way and the manner the defence counsel

has accepted was never before and detrimental to the interest of his party, to whom he is representing in the court of law. The court should have raised his eyebrows immediately on this extraordinary, uncommon behaviour of the learned defence counsel. The court is not helpless or it cannot dance on the tune of the counsels.

(24). It is urged by learned senior counsel Shri Srivastava, for the appellants that this would be extremely harsh and heavy upon the appellants. No doubt that the counsel for the defence has shown his 'professional incompetence' or he was under some mistaken conception that the parties are coming to truce and summoning of the evidence/author of the document may cause unwarranted dragging of the case, as such, he has accepted their genuineness. But fact remains that this has caused a bundle load of complication in the matter, resultantly the appellants were condemned and convicted for the offences, which they have never done or might have falsely implicated by the prosecution.

(25). While pendency of instant appeals, an application u/s 391 Cr.P.C. was filed by the counsel for the appellants on 07.10.2020 with the prayer to *allow this application for additional evidence and summon the Investigation Officer Sri Rajiv Ranjan Maurya, then posted at Police Station Dhanapur, District Chandauli and Dr. A.K. Srivastava, Medical Officer, SSPG Hospital Kabirchaura, Varanasi for examination and recording of their statements as additional evidence.*

In the affidavit filed in support of application u/s 391 Cr.P.C., it has been mentioned that :-

"4. That along with the appeal appellant also filed bail application but the same has been rejected vide order dated 30.7.2020 and appeal has been directed to be placed for hearing after preparation of paper book.

5. That in the above noted case only first informant Shyam narayan was examined as P.W.-1 whereas alleged eye witness Ram Dular was examined as P.W.-2 and except these two witnesses no other prosecution witnesses have been examined.

6. That at the time of submission of chargesheet in the case, prosecution has shown 30 witnesses including Investigating Officer Sri Rajiv Ranjan Maurya, then posted at Police Station Dhanapur District Chandauli, Dr. A.K. Srivastava Medical Officer, S.S.P.G. Hospital Kabirchaura Varanasi and Dr.S.K. Srivastava Medical Officer, S.S.P.G. Hospital Kabirchaura, Varanasi.

7. That in the first information report it has been said tht both deceased namely Mohan @ Manmohan and Bodha Devi were done to death by causing fire arm injury but surprising enough there were no fire arm injury on the body of deceased.

8. That in the circumstances testimony of Sri Rajiv Ranjan Maurya, then posted at police Station Dhanapur District Chandauli who was Investigating officer, Dr. A.K. Srivastava Medical Officer, S.S.P.G. Hospital Kabirchaura Varanasi who conducted postmortem on the body of deceased Mohan as well as testimony of Dr. S.K. Srivastava Medical Officer SSPG Hospital, Kabirchaura, Varanasi who conducted postmortem on the body of deceased Bodha Devi was necessary but they could not be examined during trial.

9. That in this view of the matter availability of evidence by these three

witnesses are necessary for proper adjudication of case.”

(26). The courts are not supposed to sit as a mute and silent spectator. The role of a Judge in dispensation of justice after ascertaining the true facts, no doubt is a very difficult one. In the pious process of unrevealing the truth as to achieve the ultimate goal of dispensing the justice between the parties, the Judge cannot keep himself unconcerned and oblivious to the various happenings taking place during the progress of trial of any case. No doubt, he has to remain very vigilant, cautious, fair and impartial and not to give a slightest impression that he is a bias or prejudice due to own personal conventions or views in favour of one or other party. This however would not mean that a Judge will simply shut his own eyes and be a mute spectator. Acting like a robot or a recording machine to just deliver what stands feeded by the parties. (Munna Pandey vs. State of Bihar, Criminal Appeal no.1271-1272 of 2018) dated 04th September, 2023.

(27). Taking strength from the above observation of Hon’ble Apex Court, we feel proper and justified while deciding the application u/s 391 Cr.P.C. moved by the appellant Rajesh Kumar @ Pappu. Before deciding the matter on merits, it is imperative to spell out the provisions of Section 391 Cr.P.C., which reads thus :

“391. Appellate Court may take further evidence or direct it to be taken.

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it

to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.”

(28). The intention of legislation in enacting this section is to empower the appellate court to see that the justice is done between the prosecutor and the person prosecuted, and if the appellate court finds that certain evidence is necessary in order to enable it to give a correct finding, it would be justified in taking action under this section. The primary object of Section 391 Cr.P.C. is the prevention of guiltyman’s escape through some careless or ignorance proceeding before the court or vindication of an innocent person who has been wrongfully made accused. Where the appellate court thought, some carelessness or ignorance have omitted to record the circumstances essential to elucidation of truth, the exercise of power u/s 391 is desirable. If the appellate court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to the cases where has been merely some formal defect. The matter is of discretion of the appellate court. The High court can exercise the power suo-mottu in exercise of power 391 Cr.P.C. in the interest of justice, where the defence counsel has given up to

cross-examine the prosecution witnesses admitting the genuineness of the prosecution documents blindly. This indeed was to the detriment to the interest of accused persons. It would amount to sending the accused-appellants to gallows without any fault on their part. The appellate court may summon the witnesses exercising the power u/s 391 Cr.P.C. to discover the truth in the prosecution story especially when there is glaring latches which could be perceived by naked eyes.

(29). In the celebrated judgment in the case of **Sessions Judge, Nellore vs. Intha Ramana Reddy, 1972 CrLJ 1485**, which reads follows :

“Every criminal trial is a voyage of its discovery in which the truth is quest. It is a duty of presiding judge to explore every avenue open to him in order to discover the truth and to advantage the cause of justice for that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put question to the witnesses. Indeed the right given to the judge is so wide that he may ask any question he pleases, in any form, at any time, of any witness, of the parties about any fact, relevant or irrelevant. Section 172 (2) Cr.P.C. enables the court to send the police diary to use them to aid in a trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial.”

(30). Learned counsel for the appellants Shri V.P. Srivastava has relied upon yet another judgment of Hon’ble Apex Court **Brigadier Sukhjit Singh (Retd) MVC vs. State of U.P. and others, 2019 (16) SCC 172**, where the Hon’ble Apex Court has observed thus :

“23. The key words in Section 391(1) are “if it thinks additional evidence to be necessary”. The word “necessary” used in Section 391(1) is to mean necessary for deciding the appeal. The appeal has been filed by the accused, who have been convicted. The powers of Appellate Court are contained in Section 386. In an appeal from a conviction, an Appellate Court can exercise power under Section 386(b), which is to the following effect:-

“386 (b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;”

24. Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the Appellate Court to secure ends of justice. The scope and ambit of Section 391 Cr.P.C. has come up for consideration before this Court in **Rajeswar Prasad Misra Vs. State of West Bengal and Another, AIR 1965 SC 1887**. Justice Hidayatullah, speaking for the Bench held that a wide discretion is conferred on the Appellate Courts and the additional evidence may be necessary for a variety of reasons. He held that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. Following guidelines were laid down in Paragraph Nos. 8 and 9:-

“8.

.....Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.

9. Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it

unless the requirements of justice dictate otherwise”

25. This Court again in Rambhau and Another Vs. State of Maharashtra, (2001) 4 SCC 759 had noted the power under Section 391 Cr.P.C. of the Appellate Court. Following was stated in Paragraph Nos. 1 and 2:-

“1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of Section 391 of the Code of Criminal Procedure. A plain look at the statutory provisions (Section 391) would reveal the same.....

2. A word of caution however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in the case of **Rajeswar Prasad Misra Vs. State of West Bengal** in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard.”

26. From the law laid down by this Court as noted above, it is clear that there are no fetters on the power under Section 391 Cr.P.C. of the Appellate Court. All powers are conferred on the Court to secure ends of justice. The ultimate object of judicial administration is to secure ends of justice. Court exists for rendering justice to the people.”

(31). In **Zahira Habibullah H. Sheikh and another vs. State of Gujrat, AIR 2004 (SC) 3114**, the Hon'ble Apex Court has made the following observations :

“50. Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, specially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances

essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

52. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court. As re-iterated supra the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.”

(32). In the latest judgment of **Munna Pandey vs. State of Bihar in Criminal Appeal No.1271-1272 of 2018 decided on 4th September, 2023**, the Hon'ble Apex Court has made the following observations :

“64. All fair trials are necessarily legally valid, but is the reverse necessarily true? What then is the genesis of the concept of a fair trial? The concept of a fair trial has a very impressive ancestry, is rooted in history, enshrined in the Constitution, sanctified by religious philosophy and juristic doctrines and embodied in the statute intended to regulate the course of a criminal trial. Its broad features and ingredients have, in course of time, been concretised into well recognised

principles, even though there are grey areas, which call for further legal thought and research.

65. Truth is the cherished principle and is the guiding star of the Indian criminal justice system. For justice to be done truth must prevail. Truth is the soul of justice. The sole idea of criminal justice system is to see that justice is done.

Justice will be said to be done when no innocent person is punished and the guilty person is not allowed to go scot free.

66. For the dispensation of criminal justice, India follows the accusatorial or adversarial system of common law. In the accusatorial or adversarial system the accused is presumed to be innocent; prosecution and defence each put their case; judge acts as an impartial umpire and while acting as a neutral umpire sees whether the prosecution has been able to prove its case beyond reasonable doubt or not.

67. Free and fair trial is sine-qua-non of Article 21 of the Constitution of India. If the criminal trial is not free and fair, then the confidence of the public in the judicial fairness of a judge and the justice delivery system would be shaken. Denial to fair trial is as much injustice to the accused as to the victim and the society.

No trial can be treated as a fair trial unless there is an impartial judge conducting the trial, an honest, able and fair defence counsel and equally honest, able and fair public prosecutor. A fair trial necessarily includes fair and proper opportunity to the prosecutor to prove the guilt of the accused and opportunity to the accused to prove his innocence.

69. Malimath Committee on Judicial Reforms discussed the paramount duty of Courts to search for truth. The

relevant observations of the Committee are as under:-

(a) *The Indian ethos accords the highest importance to truth.*

The motto “Satyameva Jayate” (Truth alone succeeds) is inscribed in our National Emblem “Ashoka Sthambha”. Our epics extol the virtue of truth.

(b) *For the common man truth and justice are synonymous.*

So when truth fails, justice fails. Those who know that the acquitted accused was in fact the offender, lose faith in the system.

(c) *In practice however we find that the Judge, in his anxiety to demonstrate his neutrality opts to remain passive and truth often becomes a casualty.*

(d) *Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Justice System. For justice to be done truth must prevail. It is truth that must protect the innocent and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice. Therefore, truth should become the ideal to inspire the courts to pursue.*

(e) *Many countries which have Inquisitorial model have inscribed in their Parliamentary Acts a duty to find the truth in the case. In Germany Section 139 of the so called ‘Majna Charta’, a breach of the Judges’ duty to actively discover truth would promulgate a procedural error which may provide grounds for an appeal.*

(f) *For Courts of justice there cannot be any better or higher ideal than quest for truth.*

70. This Court has condemned the passive role played by the Judges and emphasized the importance and legal duty of a Judge to take an active role in the proceedings in order to find the truth to administer justice and to prevent the truth

from becoming a casualty. A Judge is also duty bound to act with impartiality and before he gives an opinion or sits to decide the issues between the parties, he should be sure that there is no bias against or for either of the parties to the lis. For a judge to properly discharge this duty the concept of independence of judiciary is in existence and it includes ability and duty of a Judge to decide each case according to an objective evaluation and application of the law, without the influence of outside factors.

71. If the Courts are to impart justice in a free, fair and effective manner, then the presiding judge cannot afford to remain a mute spectator totally oblivious to the various happenings taking place around him, more particularly, concerning a particular case being tried by him. The fair trial is possible only when the court takes active interest and elicit all relevant information and material necessary so as to find out the truth for achieving the ultimate goal of dispensing justice with all fairness and impartiality to both the parties.

(33). Per contra, Shri P.K. Singh, learned counsel for the informant have relied upon a judgment of Hon'ble Apex Court in the case of **Akhtar and others vs. State of Uttaranchal, Criminal Appeal No.1590 of 2007 decided on 9th April, 2009** and its paragraph 16 is quoted herein below :

“16. It has been argued that non-examination of the concerned medical officers is fatal for the prosecution. However, there is no denial of the fact that the defence admitted the genuineness of the injury reports and the post mortem examination reports before the trial court. So the genuineness and authenticity of the

documents stands proved and shall be treated as valid evidence under Section 294 of the CrPC. It is settled position of law that if the genuineness of any document filed by a party is not disputed by the opposite party it can be read as substantive evidence under sub-Section (3) of Section 294 CrPC. Accordingly, the post-mortem report, if its genuineness is not disputed by the opposite party, the said post-mortem report can be read as substantive evidence to prove the correctness of its contents without the doctor concerned being examined.”

(34). Shri Singh, learned counsel for the informant has further relied upon yet another judgment **State of Rajasthan vs. Asharam @ Anshumal, 2023 SCC Online SC 423**, paragraph 16 & 17 of which is quoted herein below :

“16. Both Sections 311 and 391 of the Cr.P.C. relate to power of the court to take additional evidence; the former at the stage of trial and before the judgment is pronounced; and the latter at the appellate stage after judgment by the trial court has been pronounced. It may not be totally correct to state that the same considerations would apply to both situations as there is a difference in the stages. Section 311 of the Cr.P.C. consists of two parts; the first gives power to the court to summon any witness at any stage of inquiry, trial or other proceedings, whether the person is listed as a witness, or is in attendance though not summoned as a witness. Secondly, the trial court has the power to recall and re-examine any person already examined if his evidence appears to be essential to the just decision of the case. On the other hand, the discretion under Section 391 of the Cr.P.C. should be read as somewhat more restricted in comparison to

Section 311 of the Cr.P.C., as the appellate court is dealing with an appeal, after the trial court has come to the conclusion with regard to the guilt or otherwise of the person being prosecuted. The appellate court can examine the evidence in depth and in detail, yet it does not possess all the powers of the trial court as it deals with cases wherein the decision has already been pronounced.

*17. **State (NCT of Delhi) v. Shiv Kumar Yadav and Another** emphasises that Recall is certainly permitted if essential for the just decision and for which there should be a tangible reason that fair trial would suffer without it. The discretion is to be exercised judiciously to prevent failure of justice, and must not be exercised arbitrarily. In our opinion, the appellate court must be equally, if not more cautious, of the desire to delay the hearing of the appeal, or the attempt to lead additional evidence to explore a chance of contradictory evidence. While the prayer for leading additional evidence should be permitted to correct a bona fide error or otherwise, and a party may be entitled to further opportunity without any fault on the part of the opposite party, the request for recall should be bona fide and is to be balanced carefully with relevant considerations, including hardship to the witness and delay of the proceedings. Right to speedy trial, including speedy disposal of an appeal, is not the exclusive right of an accused, but an obligation of the court towards the society in general, and the victim in particular. Balance between the rights of an accused and the interests and rights of an individual victim and the society, without compromising the right of the accused to a fair trial, has been highlighted by this Court in *Girish Kumar Suneja v. Central Bureau of Investigation*¹⁶, *P. Ponnusamy v. State of Tamil Nadu*¹⁷*

*and State of West Bengal v. Amiya Kumar Biswas*¹⁸. Every criminal case, it is stated, is a *15 (2016) 2 SCC 402. 16 (2017) 14 SCC 809. 17 2022 SCC Online SC 1543. 18 (2004) 13 SCC 671. 8 voyage of discovery in which the truth is the quest.*¹⁹ *The process of ascertaining the truth requires compliance of procedures and rules of evidence. In a well-designed system, judicial findings of formal legal truth should coincide with substantive truth. This happens when the facts contested are skillfully explored in accordance with the procedure prescribed by law. Further, in a criminal trial, burden of proof to establish the fact, which has to be proven beyond reasonable doubt, is on the prosecution. The power to take additional evidence in an appeal is to be exercised to prevent injustice and failure of justice, and thus, must be exercised for good and valid reasons necessitating the acceptance of the prayer.”*

(35). Thus taking into account the ratio laid down by Hon'ble Apex Court in the case of *Munna Pandey vs. State of Bihar*, by which the role of a Judge was emphasized while holding a fair trial. Article 21 of the Constitution of India envisages that there shall be a speedy trial but at the same time the Judge should act to explore the truth of the case. In the name of speedy trial the merit of the case should not be butchered. We are running against the time keeping in view the piling of the cases, in this rat race we are disposing of the cases instead of deciding them on merit. In this connection the earlier quotation occupies significance that “Justice has nothing to do what goes on in the courtroom, Justice is what come out from the courtroom.” The cherished principle and the guiding star of the Indian Criminal Justice System that justice must be done

and truth must prevail. The truth is the soul of justice. The litmus test provided that no innocent person is sent to gallows and the guilty person is not allowed to go scot-free. If the criminal trial is not free and fair, then the confidence of public in judicial fairness of a Judge and the justice delivery system would be shaken. No trial can be treated as fair trial, unless there is impartial Judge conducting the trial an honest, able and fair defence counsel and equally honest able and fair public prosecutor. A fair trial necessarily includes a fair and proper opportunity to the prosecutor to prove the guilt of the accused and opportunity to accused to prove his innocence.

(36). On the other hand, Shri P.K. Singh, who cited the judgment of *State of Rajasthan vs. Asharam @ Ashumal* (supra), the Hon'ble Apex Court without mincing any words have distinguished the powers of 311 and 391 Cr.P.C., though in both the sections the court is empowered to take additional evidence, but in the former it is at the stage of trial and before the judgment, whereas in the latter at appellate stage after judgment by the trial court has been pronounced. It may not be totally correct to state that same consideration would apply in both the situation as there is difference in the stages. Section 311 Cr.P.C. consists of two parts, first gives the power to the court to summon any witness at any stage of inquiry or trial or other proceeding, whether the person is listed as a witness or is in attendance through or is in attendance though not summoned as a witness and secondly the trial court has power to recall or re-examine to any person already examined, if his evidence appears to be essential to the just decision of the case. ON THE OTHER HAND Section 391 Cr.P.C. should be read in somewhat more restricted in comparison to Section 311

Cr.P.C. As appellate court is dealing with appeal, after the trial court has come to the conclusion with regard to the guilt or otherwise of the person being prosecuted. The appellate court can examine the evidence in depth and in detail, yet it does not possess all the power of the trial court as it deals with cases wherein the decision has already been pronounced. Recall is certainly permitted if it essential for the just decision, for which there should be a tangible reason that fair trial would suffer without it. This discretion has to be exercised judiciously to prevent the failure of justice and must not exercise arbitrarily or whimsically. As mentioned above, right to speedy trial including speedy disposal of an appeal is not an exclusive right of an accused but an obligation of the court towards the society in general and victim in particular. A perfect balance between the rights of an accused and the interest and the rights of the individual victim and the society, without compromising the right of accused to a fair trial are supplementing factors of each other and they are not on crossroad or objective.

(37). In this backdrop of the case the Court have to assess the impugned judgment of the learned Special Judge SC/ST Act for a limited purpose as to whether the alleged acceptance of the genuineness of prosecution document, which were later on exhibited by the court and relied upon during the trial, has caused a serious prejudice to the appellants or not? In this regard we have already mentioned the application u/s 391 Cr.P.C. by the appellant pending the present appeal. Let's examine the judgment impugned whereby the appellants were convicted for life u/s 302, 201 IPC and Section 3(2)(5) of SC/ST Act for limited purpose i.e. the acceptance of the genuineness of the prosecution

documents has caused any serious prejudice to the accused-appellants or not?

(38). The court has gone through the entire judgment under judicial scrutiny and *prima facie* we are of the considered opinion that on account of immense professional incompetence by the counsel for defence whereby he has accepted the genuineness of every document by a single stroke has caused a serious miscarriage of justice qua the appellants. For this reason this Court wants to highlight those portion of the judgment which are irking and bothering this Court.

(39). Let's examine those portion of judgment one by one. It is made clear that the Court is deliberately shunning away from giving a detailed finding on the issue. It is a conscious attempt by the Court not to examine the judgment critically and leaving it up to the trial court to summon the prosecution witnesses to establish the genuineness of those documents which were already admitted as genuine one by the erstwhile counsel for the defence for the reasons best known to him. Not only this, the learned trial Judge have rejected the Application Nos. 29ख, 30ख and 31ख u/s 311 Cr.P.C. It means it goes to show that even DGC (CrI) was conscious enough that this is an extraordinary and strange step taken by the counsel for defence, detrimental to the interest of the accused-appellants.

(40). In the judgment itself the learned Trial Judge while dealing with this aspect of the issue that the genuineness of the prosecution documents were already admitted, what would be its impact. From the discussion in the judgment, from the FIR till the charge sheet including the site plan, inquest report, the recovery memo of the various articles, SBBL gun allegedly used in commission of offence,

recovery of pallets, *tikli* and empty and live cartridges from the place of occurrence, the post-mortem reports, FLS reports, their genuineness was accepted and admitted by the counsel for the defence on behalf of accused-appellants. The author of these documents were not summoned to prove its contents on the ground that the counsel for the defence has accepted its genuineness. It does not mean that the defence counsel have accepted and admitted its contents also. Both of them are in two different and distinct spheres to operate.

(41). It is contended by learned counsel for appellants it is the prosecution has to establish his case beyond any reasonable of doubt and stand on his own foot. In this regard Shri Srivastava contends that from the FIR it is a positive case of the prosecution that the parent of informant in the pitch dark around 01.00 in the night were brutally assassinated by named accused persons on account of some previous animosity. In the FIR it is clearly mentioned that :

“रात लगभग एक बजे एक राय होकर गोली मारकर हत्या कर दिये। गोली की आवाज सुनकर हम तथा हमारे गाँव के राम दुलार पुत्र बुद्ध हरिजन दशमी पुत्र किशुन हरिजन वहीं ट्यूबवेल के सामने कमला सिंह के ही खेत में उजाली रात होने के कारण हम लोग कटिया कर रहे थे। हम लोग ट्यूबवेल की तरफ आये ट्यूबवेल पर बल्ब जल रहा था। काफी रोशनी थी उसी रोशनी में हम लोगो ने देखा कि राधे श्याम लाल अपनी हाथ में बन्दुक लिए थे तथा प्रताप कुम्हार अपने हाथ में कट्टा लिए हुए थे। जगन्नाथ व पप्पू दोनो लोग मिलकर मेरे पिता व माँ को घसीटकर कुँए में फेंक दिये।”

(42). From the aforesaid, it is a positive case that the deceased has been done to death by firearm and thereafter their body was dragged and thrown into nearby well/tubewell. Not only this, the police has recovered one empty cartridges, two live cartridges, *tikli*, pallets from the place of occurrence. In addition to this, the police has also recovered blood from the place of

occurrence, suggestive of the fact that there was use of firearm at the place of occurrence. But the post-mortem reports belie the prosecution case to the core that there was no firearm injury over the person of both the deceased and the cause of death of both the deceased is on account of serious damage in spinal cord and fracture of vertebra. But while deciding this issue the learned trial Judge has conveniently changed the texture of the case by giving a positive finding that the accused-appellants have assaulted the deceased by lathi and butt of the gun. There is a mark deviation in the prosecution case and the finding recorded by the learned trial Judge.

(43). Moreover there is positive case of the prosecution that at the time of incident around 01.00 in the night they have seen the accused persons in the moonlight and the bulb was giving a sufficient light so as to identify the assailants. In this regard, Shri Srivastava, learned counsel for appellants has shown Hindi Calender (Panchang) that on 21/22.4.1998 on the fateful night, it was Dashmi, Krishna Paksha, Chaitra and on that day the "*Chandrodaya*" (moonrise) was at 02.46 a.m. and "*Chandrast*" (moon set) was at 2.35 p.m. Thus, there was no moonlight on the date and time of incident. So far as electricity bulb is concerned, since the counsel for the defence has already accepted the genuineness, it can't be said with certainty that at the relevant point of time there was uninterrupted power supply.

(44). Shri Srivastava, learned counsel for appellants has drawn attention of the court to yet another strange feature of the case that the dead body of both the deceased were found absolutely in a naked condition. The lady was wearing only one

blouse, except this both of them are completely naked and the learned trial Judge has given a very innocent reasoning that in the rural areas the villagers often untie their clothes while sleeping. This reasoning by itself seems to be an unswallowable moreover there is no recovery of their clothes in nearby.

(45). Similarly, the motive attributed for commission of crime is that there is an old animosity between them on account of some landed property and two days prior Pratap was taking out the nut bolts from the trolley belonging to one Panna Lal. So far as the dispute with regard to land is concerned, this issue was duly addressed and S.D.M. Sakaldiha Varanasi vide order dated 18th October, 1998 the dispute was duly resolved after identifying the land and resolving the dispute between them, permitting Radhey Shyam Srivastava to carry out boring over his land. Neither Panna Lal nor Dashmi the alleged eye-witness was ever produced as prosecution witness.

(46). As mentioned above, the Court does not want to scrutinise the impugned judgment and order of conviction in-depth on merits as we are of the confirmed opinion that the interest of accused-appellants was literally butchered by the hand of their counsel who have strangely admitted the genuineness of the documents produced by the prosecution. Neither its author was examined to establish its contents nor the circumstances in which that document was authored. Unless and until the genuineness of any document is not put under the crucible and thoroughly examined by the counsel for defence so as to elucidate and establish its authenticity, a concession given by the counsel for defence would certainly come into the

purview of gross injustice to the accused-appellants. It is the binding duty of the presiding officer to observe that there is a level play ground for both the parties and no one should be at advantageous position. In fact this is the undercurrent of Section 391 Cr.P.C. which empowers the appellate Court to examine the entire gamut of facts and circumstances of the case and reach to a conclusion as to whether the counsel for either of the parties are assisting the court in a fair and judicious way and manner. As soon as the appellants have admitted the genuineness of documents, immediately the eyebrows of the presiding Judge ought to have been raised and he should try to lift the veil so as to unearth the truth of the case by summoning the various witnesses on its own.

Admission of any document without additional evidence to support is nothing but empty vessel of no use. Admission is not a confession as confession is made by a person who is indicted in the offence i.e. accused, unlike admission.

The opinion of famous law stalwart Mr. Fredrick Douglas seems befitting on the prevailing situation where he categorically opined that ".....where ignorance prevails and where any one class is made to feel that society is an organised conspiracy to oppress, rob and degrades them, neither persons nor property, will be safe"

(47). For all foregoing reasons, the appeals are partly allowed. We are left with no other alternative but to set aside the impugned judgment dated 15/16.7.2019 passed by the Special Judge, SC/ST Act, Varanasi while deciding S.S.T. No.212 of 1999 and remit and remand the matter back in exercise of power u/s 391/386(b)(i) of

Cr.P.C. in the manner the sessions trial ought to have been decided, more particularly keeping in view the serious lapses on the part of defence, whose professional incompetence is absolutely glaring and could be felt by naked eyes. The matter shall be re-tried from the stage of the testimony of P.W.-2 onwards by the court of competent jurisdiction (Special Judge, SC/ST Act), Varanasi. The authors of the 'exhibited documents' who shall establish the authenticity with regard to its contents, shall be cross-examined by the counsel for the defence. This exercise shall go on day to day basis and shall conclude on or before 31st May, 2024 positively.

(48). Since the appellants are in jail, pursuant to aforesaid impugned judgment and order, but in the fitness of circumstances, this Court is of the considered opinion, that keeping in view the aforesaid facts and circumstances when we have directed to have re-trial of accused-appellants, it would be unjust and improper to keep them behind the bars for another 7-8 months. The appellants ***Rajesh Kumar @ Pappu, Radhey Shyam Lal, Pratap and Jagannath***, shall be released on bail in aforementioned sessions trial by furnishing a personal bond and two heavy sureties each of the like amount to the satisfaction of the court concerned. After the release they shall give a personal affidavit to the court concerned that they would remain present on every date or as and when required by the court. The fine amount imposed by the trial court under the impugned judgment shall remain stayed during this period and shall be subject to final verdict to be pronounced by the trial court till 31.5.2024.

(49). Let a copy of this order be transmitted to the trial court concerned

which have passed the impugned judgment of conviction, through the Registrar (Compliance) forthwith.

(2023) 11 ILRA 69
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2023
BEFORE

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

Criminal Misc. Writ Petition No. 12630 of 2023

Smt. Gunja & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Suneet Nath Pandey

Counsel for the Respondents:
 G.A., Sri Indradeo

A. Criminal Law - Constitution of India, 1950- Article 226-Indian Penal Code, 1860-Section 363- Juvenile Justice (Care and Protection of Children) Act, 2015- Section 94- The issue involved in this petition is primarily as to whether the victim is minor or not-the birth certificate from the school where the victim obtained education, it is clear that an ossification test, even if ordered by the court is not liable to be taken into account -Since there exists the educational record of the victim regarding her age, it is not necessary to open the sealed ossification test report as also the statement of the victim under section 161 and 164 Cr.P.C. because the same is not required to be looked into in view of section 94 of the Act of 2015-Held that prima facie, the allegation in the first information report that the victim is minor, is correct.(Para 1 to 17)

B. Sub-section 2 of Section 94 quoted above is relevant and its perusal will show that age to be determined, on the basis of date of birth certificate from the school, or matriculation or equivalent certificate. In the absence of the

above, it is to be determined on the basis of a birth certificate issued by a corporation or municipal authority or panchayat, It is only when the documents noted above are not in existence can an ossification test is to be resorted to, for determining the age of a person.(Para 9)

The writ petition is dismissed. (E-6)

(Delivered by Hon'ble Anjani Kumar
 Mishra, J.
 &
 Hon'ble Shiv Shanker Prasad, J.)

1. Heard learned counsel for the petitioners, learned counsel for the first informant and learned A.G.A. for the State.

2. The instant writ petition seeks quashing of the FIR dated 14.11.2022 giving rise to Case Crime No.0486 of 2023, under Section 363 I.P.C., Police Station-Phoolpur, District- Varanasi.

3. It transpires from the record that this petition came up for admission on 10.08.2023, when an order was passed for production of the alleged victim before the CMO, Varanasi for determination of her age on the basis of ossification test. The statements under section 161 and 164 Cr.P.C. were also directed to be recorded.

This was so ordered as it was submitted that the victim is illiterate and never received education from any institution and therefore there is no documentary proof regarding her age.

The ossification test report as also the statements recorded under section 161 and 164 Cr.P.C. are available on record in sealed condition.

A counter affidavit has been filed on behalf of the first informant annexing thereto, a certificate of the Headmaster of

Primary School, Katrao, Block Badagaon, District Varanasi, which states that the victim obtained education from Class 1 to Class 5th in the said Institution and in the records maintained her date of birth is recorded as 15.11.2006.

Her Class 8th Mark-sheet issued from Shri Suraj Prasad Intermediate College, Varanasi has also been annexed. In this mark-sheet also her Date of Birth is recorded as 15.11.2006.

The issue involved in this writ petition is primarily as to whether the victim is minor or not. .

With regard to the above, the Juvenile Justice (Care and Protection of Children) Act, 2015 comes into play and Section 94 of the said Act is being extracted below:-

"(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."

A perusal of Sub-section 2 of Section 94 quoted above is relevant and its perusal will show that age to be determined, on the basis of date of birth certificate from the school, or matriculation or equivalent certificate. In the absence of the above, it is to be determined on the basis of a birth certificate issued by a corporation or municipal authority or panchayat,. It is only when the documents noted above are not in existence can an ossification test is to be resorted to, for determining the age of a person.

Since, in the case at hand, there exists and has been brought on record, the birth certificate from the school where the victim obtained education, it is clear that an ossification test, even if ordered by the court is not liable to be taken into account. The ossification test itself was ordered by this court on the submission no date of birth certificate or educational certificate existed since the victim was illiterate and had obtained no education, at all, whatsoever. This assertion which is recorded in the order dated 10.08.2023 is manifestly false. The allegations in the counter affidavit have not been controverted by the petitioners.

Even learned AGA has seconded the submissions that have been made by learned counsel for the first informant and the assertions made in the counter affidavit on record.

Under the circumstances, this court is constrained to hold that prima facie, the allegation in the first information report that the victim is minor, is correct.

Since there exists the educational record of the victim regarding her age, this court does not consider it necessary to open the sealed ossification test report as also the statement of the victim under section 161 and 164 Cr.P.C. because the same is not required to be looked into in view of section 94 of the Act of 2015.

In any case, these documents have been brought on record on the basis of a prima facie false statement made on behalf of the victim.

Since it has been held herein-above that the allegation in the first information report that the victim is minor, stands established from the material on record, the allegations in the first information report contain the ingredients of a cognizable offence. The FIR under the circumstances cannot be quashed.

As the issue involved in the petition is whether the victim is minor or her statement under section 161 and 164 Cr.P.C. is also of no consequence because no person can depose, on the basis of the personal knowledge about his or her own age or date of birth.

The writ petition is accordingly dismissed with costs of Rs. 5000/- upon the petitioners for having made a false assertion both in the petition and before the Court.

(2023) 11 ILRA 71
ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 21.09.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE VIVEK KUMAR SINGH, J.

Criminal Misc. Writ Petition No. 14042 of 2023

Deepu Yadav @ Deep Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Dileep Singh Yadav

Counsel for the Respondents:
 G.A.

Criminal Law - U.P. Control of Goondas Act, 1970 - Section 3(1) - A notice issued to the petitioner under Section 3(1) of U.P. Control of Goondas Act- challenge to a notice is not tenable- existence of an alternative remedy before the District Magistrate-have every opportunity of replying to the impugned show-cause notice issued -and to contest the proceedings.

W.P. dismissed. (E-9)

Cases cited:

1. Kareem Vs St. of U.P. through Principal Secretary- Misc. Bench No. 24256 of 2020

(Delivered by Hon'ble Anjani Kumar
 Mishra, J.
 &
 Hon'ble Vivek Kumar Singh, J.)

1. Heard learned counsel for the petitioner, learned A.G.A. for the State and perused the record.

2. The writ petition has been filed seeking following relief:

"Issue a writ, order or direction in the nature of writ of certiorari quashing the impugned notice issued by District Magistrate, Auraiya/respondent no. 2 in Case No. D-202303050000546, under Section 3(1) of U.P. Control of Goondas Act, Police Station- Arvakatra, District-Auraiya."

3. Challenge in the writ petition is to a notice issued to the petitioner under Section 3(1) of U.P. Control of Goondas Act. In our considered opinion, challenge to a notice is not tenable. The petitioner still have every opportunity of replying to the impugned show-cause notice issued to him and to contest the proceedings, if any, that may be drawn on its basis.

4. Counsel for the petitioner has relied upon the judgment and order dated 10.08.2023 passed by a Co-ordinate Bench of this Court in Criminal Misc. Writ Petition No. 12619 of 2023 (Govardhan vs. State of U.P.). Therein the notice was on the basis of a solitary case.

5. However, in **Kareem vs. State of U.P. through Principal Secretary**, Misc. Bench No. 24256 of 2020, vide order dated 04.01.2021, a co-ordinate Bench has refused to interfere in similar circumstances on the ground of existence of an alternative remedy of showing cause before the District Magistrate. This judgment is earlier in time and is based also on pronouncements of the Apex Court, but has not been considered in the judgment cited. In Kareem (supra) also, challenge to the notice was on the ground that it had been issued on the basis of a single criminal case judgment is extracted below:

"Now, coming to the definition of 'Goonda' the Court finds that Goonda means a person who is covered by (i) of Section 2(b) or

Clause (ii) or Clause (iii) or Clause (iv) or Clause (v) of the said Section. All the clauses are disjunctive as is evident from the use of the word 'or'.

*Clause (iv) of Section 2(b) makes it very clear that a person can be categorized as Goonda if he is generally reputed to be a person who is desperate and dangerous to the community. This provision has not been considered in Suresh Tiwari' case (supra), though, Section 2(b) has been quoted in the said judgment. As regards the decision in Imran alias Abdul Qudus Khan the said case also considers meaning of the words 'habitual criminal' and does not delve upon other clauses of Section 2(b). The decision of the Supreme Court rendered in the case of **Vijay Narain Singh Vs. State of Bihar and Ors. reported in (1984) 3 SCC 14** as referred in the judgement in Suresh Tiwari's case (supra) deals with Section 2(b) of Bihar Control of Crimes Act, 1981 and it was not a case of challenge to a notice.*

*Be that as it may, the specific issue as to maintainability of writ petition under Article 226 of the Constitution of India against a notice issued under Section 3(1) of U.P. Control of Goondas Act, 1970 came up for consideration before a Division Bench of this Court in case of **Ballabh Chaubey Vs. Additional District Magistrate (Finance), Mathura and Anr; Criminal Misc. Writ Petition No. 2954 of 1996** decided on 22.01.1997 reported in **1997 A. Cr. R. 387 (1997 ALJ 1630)**. A Division of this Court specifically considered this issue and after referring to various decisions of this Court and that of the Hon'ble Supreme Court opined not to entertain the writ petition at the stage of notice and gave cogent and detailed reasons in support of its conclusion. Relevant extract of the said decision is quoted hereinbelow:-*

"8. The detention laws like National Security Act, or Conservation of Foreign Exchange and Prevention of

*Smuggling Activities Act make serious inroad in the liberty of a person. Under these laws a person is detained without any prior notice and that too on the subjective satisfaction of the detaining authority which satisfaction cannot be challenged on merits. The person detained gets only a right to make representation against his detention but that too after he has been detained and he has been deprived of his liberty. The decision of the representation naturally takes time. The principle that the machinery provided by the Act should not be permitted to be by-passed by taking recourse to proceedings under Article 226 of the Constitution prior to execution of the detention order was reiterated even in such cases. In **Additional Secretary to Government of India v. Smt. Alka Subhash Gadia, JT 1991 (1) SC 549**, the submission on behalf of the detaining authority is noticed in para 25 of the Report which is as under :*

"It was contended by Sri Sibbal, learned Additional Solicitor General, on behalf of the appellants that since the detention law is constitutionally valid, the order passed under it can be challenged only in accordance with the provisions of, and the procedure laid down, by it. In this respect there is no distinction between the orders passed under the detention laws and those passed under other laws. Hence, the High Court under Article 226 of this Court under Article 32 of the Constitution should not exercise its extraordinary jurisdiction in a manner which will enable a party to by-pass the machinery provided by the law."

The Court after considering the submissions of the parties held as follows in para 30 :

"..... The power under Article 226 and 32 are wide, and are untrammelled by any external restrictions

and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraint for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to evoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available"

*This decision has been subsequently followed in **N. K. Bapan v. Union of India, JT 1992 (4) 49**; **State of Tamil Nadu v. P. K. Shamsuddin, JT 1992 (4) 179** and **Subhash Mujimal Gandhi v. L. Miningliana, 1994 (6) SCC 14**. The provisions of detention laws are far more stringent than the Control of Goondas Act as here order is passed after notice and trial and the person against whom order is passed does not lose his liberty. He is merely deprived of his right to live in a particular area from where he is externed but is free to reside anywhere else in the country. There is no reason why the same principle should not apply in the present case as well. The law being well-settled that where a Statute provides a machinery of its own, the aggrieved person should*

first exhaust the remedies provided under the Statutes before approaching the High Court under Article 226 of the Constitution and the High Court would not normally entertain a petition straightway, the present petition challenging the notice is liable to be rejected on the ground of alternative remedy.

9. In **Raja Sukhnandan v. State**, AIR 1972 All 498, the writ petition was filed at the stage of notice. The Division Bench examined the contention based upon the constitutional validity of U. P. Control of Goondas Act but refused to consider the submission regarding illegality of the notice on the ground that the same could be agitated before the District Magistrate and if the decision went against the petitioner, in appeal before the Commissioner. In **Kabir Chawla v. State of U.P.**, 1994 SCC (Cri) 577, the validity of the notice under Section 3 of the Act was assailed but the Supreme Court declined to go into this question on the ground that the petitioner could satisfy the District Magistrate who was seized of the matter. It may be mentioned here that in all the cases where validity of notice issued under similar Statute relating to externment of Goondas was assailed before the Supreme Court, the matter had been taken in appeal against final orders of externment see **Gurucharan Singh v. State of Bombay**, AIR 1952 SC 221; **Hari Khemu Gawli v. Dy. Commissioner of Police**, AIR 1956 SC 559; **Bhagubhaj v. District Magistrate**, AIR 1956 SC 585 and **State of Gujarat v. Mehboob Khan**, AIR 1968 SC 1468.

10. There is another reason for not entertaining the writ petition at the stage of notice. As the preamble of the Act shows, it has been enacted to make special provisions for the Control and Suppression of Goondas with a view to the maintenance of Public Order. The provisions of the Act

are intended to prevent further mischief by a Goonda and not to secure his conviction in a pending case. If a person is permitted to challenge the notice at the initial stage and seek stay of the proceedings, the very purpose for which notice is issued and the law under which it is issued will be frustrated as the externment order remains in operation only for a limited period.

11. Learned counsel has next submitted that in **Ramji Pandey v. State of U.P.**, 1981 Cri LJ 1083, writ petition had been filed challenging the notice under Section 3 of the Act and the writ petition was allowed by a Full Bench of this Court and, therefore, the present petition also deserves to be entertained. The judgment of the Full Bench shows that the question whether a writ petition should be entertained against a notice was not at all considered. The only question which was canvassed and was considered by the Bench was whether the notice was in accordance with the requirement of Section 3 of the Act. No such argument that a writ petition under Article 226 of the Constitution should not be entertained at the stage of notice seems to have been canvassed and therefore no decision has been given on this point. It is well-settled that a decision is an authority for when it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in it. See **M/s. Orient Paper and Industries Ltd. v. State of Orissa**, AIR 1991 SC 672 para 19. Doctrine of precedent is limited to the decision itself and as to what is necessarily involved in it. Judicial authority belongs not to the exact words used in this or that judgment, nor even to all reasons given, but only to the principle accepted and applied as necessary grounds of decision see

Krishna Kumar v. Union of India, AIR 1990 SC 1782 pages 18 and 19. The Full Bench having not considered the question of maintainability of the writ petition at the stage of notice, the decision rendered by it cannot be held to be an authority or binding precedent for holding the writ petition to be maintainable.

12. In view of the reasons discussed above the writ petitions are dismissed on the ground of alternative remedy."

6. Under the circumstances, no interference is called for at this stage.

7. Accordingly, this petition fails and is **dismissed**.

(2023) 11 ILRA 75
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.11.2023
BEFORE

**THE HON'BLE UMESH CHANDRA SHARMA,
J.**

Criminal Revision No. 325 of 1997

Chabi Nath **...Revisionist**
Versus
State of U.P. **...Opposite Party**

Counsel for the Revisionist:

Sri K.N. Pandey, Sri Santosh Kumar Yadav

Counsel for the Opposite Party:

Govt. Advocate

Criminal Code, 1860-Sections 325 & 326--- Criminal revision against the judgment and order of conviction and sentencing under Section 326 I.P.C and was sentenced to three years rigorous imprisonment--- The accused gnawed the nose of the informant with his teeth--- The teeth of human being cannot be considered as deadly

weapon as per the description of deadly weapon enumerated under Section 326 I.P.C.---The alleged injury caused by the revisionist to the informant would fall under Section 325 I.P.C which is meant for the punishment for voluntarily causing grievous hurt--- Conviction under Section 326 I.P.C is converted into Section 325 IPC.

Revision partly allowed. .(E-15)

List of the cases referred-:

1. Shakeel Ahmed Vs State (Nct of Delhi) 2001 0 (Supreme) SC 911
2. Jamil Hassan Vs St. of U.P. 1974 CrI.J. 867
3. Chaurasi Manjhi Vs St. of Bihar, A.I.R 1970 Patna 322
4. Gopal Bhai Chhagan Lal Soni Vs St. of Gujrat, (1972) 13 Guj L.R 448
5. Jagat Singh & anr. Vs St. of Delhi 1984 SCC Online Delhi 93

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

1. Heard Sri K.N. Pandey, and Santosh Kumar Yadav, learned counsel for the revisionist, learned A.G.A for the State and perused the record.

2. This criminal revision has been preferred by the convicted accused-revisionist against the judgment and order of conviction and sentencing dated 28.08.1992 passed by Judicial Magistrate-I, Bareilly in Criminal Case No. 884 of 1992 – State Vs. Chhabi Nath & Ors., by which the accused-revisionist was convicted under Section 326 I.P.C and was sentenced to three years rigorous imprisonment without awarding any amount of fine and also against the judgment and order passed by Additional District & Sessions Judge-

IX, Bareilly in Criminal Appeal No. 86 of 1992–Chhabi Nath Vs. State of U.P., by which the learned A.S.J. has affirmed the conviction of the convicted revisionist but reduced the sentence from 3 years to 1 ½ years rigorous imprisonment and Rs. 1,000/- fine with default stipulation to undergo three months additional incarceration in case of non deposition of fine.

3. In revision the convict-revisionist has taken ground that the lower court and the lower appellate court have not considered the statements of the complainant and the witnesses which were contradictory against the first information report. The learned trial court has acquitted the co-accused on the basis of doubtful statements of complainant and the witnesses, but the same benefit has not been given to the revisionist. The conviction of the revisionist is against the weight of evidence on record, which is bad in law. The sentence is too severe, hence the revision be allowed and the order of conviction, sentencing and fine as well be set aside.

4. In brief, facts of the case are that on 31.07.1988 at the time of incident, the victim Tilak Ram was caught hold by both the convicted accused Chhabi Nath and Dharam Pal. The accused Chhabi Nath gnawed the nose of Tilak Ram with his teeth. Another accused Dharam Pal was exonerated and was acquitted from the charge. No cross appeal had been preferred by the State against his acquittal.

5. During the course of trial following witnesses were examined.

(I). P.W 1 – Tilak Ram, victim (informant) has proved the F.I.R version (Ex.Ka-1) beyond any reasonable doubt.

(ii) P.W 2 – Ram Murti Lal and P.W. 3 Har Prasad, independent witnesses have deposed in favour of prosecution and have also proved the prosecution version.

(iii) P.W 4 – Dr. S.V. Ahmed, who had examined the injured had proved his injury report (Ex.Ka-2), and has opined that the injuries of the informant was grievous in nature and the nose of the informant has permanently been disfigured.

(iv) P.W 5 – Aichal Singh, has proved the Chik F.I.R (Ex.Ka-3), Case Kaymi G.D (Ex.Ka-4), Site Plan (Ex.Ka- 5) and charge-sheet (Ex.Ka-6).

6. After closure of the evidence, statements of the accused persons were recorded under Section 313 Cr.P.C, in which they denied the prosecution versions, charge and evidences adduced by the prosecution, but they refused to produce any evidence in defence. The appellate court as well as the trial court had given concurrent finding regarding the facts of the case and have concluded that the convict-revisionist – Chhabi Nath bit the nose of the informant – Tilak Ram by his teeth and caused grievous injury to him, which disfigured his nose and face, which is covered under Section 326 I.P.C. Though, no defence evidence was produced by the convict-revisionist, but it was argued from the defence side that the alleged injury would have been caused by falling on broken piece of glasses and scattered bamboo, which was not accepted by both the courts below.

7. During the course of argument only one point has been argued by the learned counsel for the revisionist that in several cases the Hon'ble Apex Court and High Courts have held that since the teeth of a human being is not a deadly weapon as defined under Section 326 I.P.C, hence, if

any injury by teeth biting occurs, the same would not attract Section 326 I.P.C.

8. In this regard, the learned counsel for the revisionist relied upon the judgment in ***Shakeel Ahmed Vs. State (Nct of Delhi) 2001 0 (Supreme) SC 911***, in which the assailant had bitten the index finger and had caused the injury. It was observed by the Hon'ble Apex Court that the teeth of a human being cannot be considered as deadly weapons as per the description of deadly weapons enumerated under Section 326 I.P.C, and the offence cannot escalate to Section 326 I.P.C, hence the case best remains only under Section 325 I.P.C. Therefore, the conviction was converted into Section 325 read with Section 34 of the I.P.C and only rigorous imprisonment for a period of six months besides fine of Rs.1,000/- was awarded and the sentence was accordingly modified.

9. Contrary to that the learned A.G.A for the State relied on the judgement in ***Jamil Hassan Vs. State of U.P. 1974 Crl.J. 867*** in which it has been held by this Court that the tooth is an instrument for cutting.

10. In ***Chaurasi Manjhi Vs. State of Bihar, A.I.R 1970 Patna 322*** Mr. Justice Untwalia held that the tooth is instrument for cutting and serves as weapons of offence and defence. Injury by tooth bite is offence under Sections 324 or 326 I.P.C depending upon whether injury is simple or grievous.

11. In ***Gopal Bhai Chhagan Lal Soni Vs. State of Gujrat, (1972) 13 Guj L.R 848*** contrary view has been expressed.

12. In ***Jagat Singh and another Vs. State of Delhi 1984 SCC Online Delhi 93***, the Division Bench held that "We are of the

view that tooth is an instrument for cutting within the meaning of Section 324 of the I.P.C. P.W-10, Dr. Bajaj has described the injury on the ear to be a grievous injury. The Doctor opined the injury to be grievous because it has caused dis-fignation of the face of Lal Chand. We are of the view that the offence committed by Suresh would fall under Section 326 of the I.P.C. Suresh is a young man aged about 22. We feel that it would serve no useful purpose to send Suresh Appellant to jail. We, therefore, direct that in lieu of unexpired period of the sentence of imprisonment imposed on him he shall pay a fine of Rs.2,000/- This fine shall be in addition to the fine of Rs.250/- imposed on him by the trial judge..... The fine of Rs. 2,000/- , if realized, shall be paid to Lal Chand.

13. All the aforesaid pronouncements referred by the prosecution are pronounced by the different High Courts. The judgment *Sakeel Ahmed (supra)* is pronounced by the Apex Court, in which the Apex Court has clearly concluded that the teeth of human being cannot be considered as deadly weapon as per the description of deadly weapon enumerated under Section 326 I.P.C. In such a situation, the alleged injury caused by the revisionist Chhabi Nath to the informant Tilak Ram would fall under Section 325 I.P.C which is meant for the punishment for voluntarily causing grievous hurt under which if a person is found guilty, may be punished for seven years imprisonment and fine also.

14. This is the case of the year 1988. Since then more than 35 years have been elapsed. As per records earlier, during the course of the trial and appeal, the convict revisionist has been in jail for two months and thereafter since 04.01.2023, he is continuously in jail till date. According to

this Court, considering the long time pendency of the case and no any other criminal antecedent to the credit of the revisionist, a lenient view with regard to the sentencing under Section 325 IPC would be better and would also meet the ends of justice. According to this Court one year's simple imprisonment and Rs.1,000/- fine would be sufficient. Thus, the revision is liable to be decided accordingly.

ORDER

15. The revision is partly allowed. The conviction under Section 326 IPC is converted into Section 325 IPC. The convicted-revisionist Chhabi Nath is awarded one year's simple imprisonment and Rs.1,000/- fine which has to be deposited within a month. If the fine is not deposited, he shall serve one month's additional incarceration in lieu of non-deposition of fine.

16. A copy of this order be sent immediately to the Judicial Magistrate Ist Bareilly, for compliance.

(2023) 11 ILRA 78
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.11.2023
BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Revision No. 715 of 2023

Rajina **...Revisionist**
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:

Sri Sanjeev Kumar Shukla, Sri Dinesh Kumar Rai

Counsel for the Opposite Parties:
 G.A.

Criminal Law-The Code of Criminal Procedure, 1973-Section 156(3)--- Criminal Revision against the impugned order whereby learned court below has rejected the application filed by the revisionist under Section 156(3) Cr.P.C--- The Magistrate has discretion in directing the police to investigate or proceeding with the case as a complaint case. But this discretion cannot be exercised arbitrarily and must be guided by judicial reasoning---Where not only does the Magistrate find the commission of a cognizable offence alleged on a prima facie reading of the complaint but also such facts are brought to the Magistrate's notice which clearly indicate the need for police investigation, the discretion granted in Section 156(3) Cr.P.C. can only be read as it being the Magistrate's duty to order the police to investigate. In cases wherein, there is alleged to be documentary or other evidence in the physical possession of the accused or other individuals which the police would be best placed to investigate and retrieve using its powers under the Cr.P.C., the matter ought to be sent to the police for investigation--- Cases alleging sexual harassment, sexual assault or any similar criminal allegation wherein the victim has possibly already been traumatized, the Courts should not further burden the complainant and should press upon the police to investigate. Due regard had to the fact that it is not possible for the complainant to retrieve important evidence regarding her complaint--- Matter remanded to concerned Judge to decide application under Section 156(3) afresh.

Revision Allowed. (E-15)

List of the cases referred:-

1. Lalita Kumari Vs Government of U.P., reported in 2014 (2) SCC 1.
2. Priyanka Srivastava Vs St. of U.P. reported in 2015 (6) SCC 287
3. XYZ Vs St. of M.P. & ors. reported in 2022 SCC OnLine SC 1002

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

1. Heard Sri Sanjeev Kumar Shukla, learned counsel for the revisionist and learned A.G.A. for the State and perused the records.

Challenge to the criminal revision

2. This criminal revision has been filed for setting aside the impugned judgment and order dated 05.11.2022 passed by learned Additional Sessions Judge/ Special Judge (POCSO Act), Bulandshahar in Criminal Misc. Case No. 717 of 2022 (Rajina Vs. Nishar and others), under Section 156(3) Cr.P.C., Police Station Jahangirabad, District Bulandshahar, whereby learned court below has rejected the application filed by the revisionist under Section 156(3) Cr.P.C.

3. The Case of the Revisionist

In respect of an incident dated 15.9.2022 the revisionist filed an application under Section 156(3) Cr.P.C. stating therein that opposite party no.2, namely Nisar used to harass the minor daughter of the revisionist by molesting her and forcing her to make videos and share them with him by taking her away from her house. On 15.09.2022, when the revisionist had gone to market, Nisar entered into her house and started removing her minor daughter's pajamas with the intention of raping her on which she raised an alarm. When the revisionist returned to her house, the victim narrated her entire story. At 8:30 P.M. in the night Nisar alongwith his wife Nafeesha, sister-in-laws Anisha and Shabana and two unknown male persons, while abusing and threatening to kill her, entered into the victim's house and tried to drag the victim to their house by grabbing her hair and also beaten her brutally by iron rods and sticks. On hearing the scream and

alarm of the revisionist and the victim, Jamaluddin and Gajju of the locality came and saved her. The injured victim was admitted to Government Hospital, Jahangirabad in critical condition. Taking advantage of the opportunity at 11:30 P.M. on the same night, Nisar and his nephew Sarukh entered into the house of the revisionist after breaking the door and there they broke the things kept in her house and stole nine thousand rupees, silver anklets and a pair of earrings kept in the box.

4. When the police reached her house after calling of the revisionist on Dial 112, the accused ran away leaving their Bullet Motorcycle on the spot, which was taken into custody by the Police and was parked at the police station. The police took the complaint of the revisionist and was pressurizing her to compromise, on refusal to do so, she was scolded and sent away. Hence the revisionist had no other option but to move an application under Section 156 (3) Cr.P.C., which has been rejected by the court below while passing the impugned order.

5. Under the impugned order, it has been recorded by the court below that the allegation made in the complaint by the revisionist that opposite party no.2 Nisar tried to remove the pajamas of the victim with the intention of raping her and he abused her and threatened to kill her and also the allegation that they assaulted her with iron rods and sticks etc. due to which she sustained injuries are concocted on the ground that in the medical examination report of the victim, which was enclosed along with the complaint, only a scratch injury was mentioned, as such the entire story appears to be suspicious. The victim is minor girl. It has further been recorded that as per the report of the concerned

Police Station, there is a dispute between both the parties regarding children and in order to humiliate the family of opposite party no.2, this application under Section 156 (3) Cr.P.C. has been filed. Due to the dispute between both the parties, the Police has also initiated proceedings under Sections 107 and 116 Cr.P.C. against both the parties. On the strength of aforesaid findings, learned Additional Sessions Judge/ Special Judge (POCSO Act), Bulandshahar rejected the application under Section 156(3) filed by revisionist vide order dated 05.11.2022.

6. Submission on behalf of the learned counsel for the revisionist

(i) The revisionist is a poor lady and after the incident she called the Police through Dial 112 after which the police came and admitted the victim in Government Hospital and when the revisionist was busy in the treatment of the victim, opposite party no.2 along with co-accused entered into her house forcefully and stole cash and other precious items kept in her house of which the revisionist made written complaint to the concerned Police Station on the next day of the incident but the Police in collusion of opposite party no.2, made pressure upon her to compromise. Resultantly, the revisionist moved an application under Section 154 Cr.P.C. before the Senior Superintendent of Police on 28.9.2022, which is still not considered. Hence she moved the application under Section 156 (3) Cr.P.C.

(ii) The victim is aged about 16 years and the offence committed upon her comes within the definition of the provisions of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the “POCSO

Act”) and when the revisionist tried to make complaint against the opposite party no.2 and other co-accused, the concerned Station House Officer, Jhangirabad instead of lodging F.I.R. against the accused persons, misbehaved with the revisionist.

(iii) The victim sustained grievous injuries caused by the opposite party no.2 and other co-accused and the medical examination of the victim was also conducted in the Government Hospital. Opposite party no.2 has no fear of law and he is also making mockery of law. He is also threatening the revisionist to face dire consequences. He is moving freely and used to threatened the revisionist for compromise.

(iv) The revisionist filed an application under Section 156 (3) Cr.P.C. before Additional Sessions Judge/ Special Judge (POCSO Act), Bulandshahar, which was rejected without considering the facts and circumstances of the case.

(v) The application made by the revisionist under section 156(3) Cr.P.C. discloses a cognizable offence, which has been committed by the accused persons including opposite party no.2 but the concerned Judge has committed manifest error of jurisdiction apparent on the face of record by rejecting the same under the order impugned.

(vi) The duty of police is to register First Information Report in cognizable offence and other aspects such as to whether information is falsely given, whether information is genuine and whether information is credible etc. are irrelevant. At the stage of registration of First Information Report the aspects to be considered is merely whether information given ex-facie discloses commissioning of cognizable offence. It is after investigation information is found to be false and for that there is always an option to prosecute

complainant for filing false first information report.

(vii) As per the provisions of 156(3) Cr.P.C. it is now well settled that if any application comes before a Magistrate in which it appears that the cognizable offence has been committed then under the scope of 156(3) Cr.P.C. it is obligatory upon the Magistrate to direct the concerned police to register the First Information Report of the revisionist and investigate into the matter and even though heinous offence has been committed upon the victim as per the allegations made in the complaint under Section 156 (3), the court below rejected has the same, which is per se illegal.

(viii) Section 156(3) of the Code of Criminal Procedure, 1973 provides that any Magistrate may treat the application under Section 156(3) as a complaint case. It is the duty of the Magistrate to see that police follows the mandate of law. It is a reminder to police to perform his duty. First Information Report of all cognizable offences must be registered.

7. Learned counsel for revisionist then contends that the issue regarding scope of jurisdiction of Magistrate while dealing with an application under Section 156 (3) Cr.P.C. has now been settled by a Constitution Bench of Supreme Court in **Lalita Kumari Vs. Government of Uttar Pradesh**, reported in 2014 (2) SCC 1. He has relied upon paragraphs-120 to 120.8 of aforesaid judgement which read as under:-

"120. In view of the aforesaid discussion, we hold:

120.1. The registration of F.I.R. is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the F.I.R. must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the F.I.R. if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all

conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/ Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of F.I.R. or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

8. In continuation of his challenge to the impugned order, learned counsel for the revisionist also contends that observations made by Apex Court in **Priyanka Srivastava Vs. State of U.P.** reported in 2015 (6) SCC 287 do not dilute the ratio laid down in Constitution Bench judgement of the Apex Court in the case of *Lalita Kumari (Supra)*. Observations made in aforesaid judgement are only guidelines to ensure that no rightful person is dragged in criminal prosecution. For better appreciation, it shall be prudent to reproduce paragraphs- 26, 27 and 28 of aforesaid judgement which are relevant for the controversy in issue. Same are reproduced herein under:-

"26. At this stage, we may usefully refer to what the Constitution Bench has to say in *Lalita Kumari v. Govt. of U.P.* in this regard. The larger Bench had posed the following two questions:-

"(i) Whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and

(ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused."

Answering the questions posed, the larger Bench opined thus:

"49. Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

72. It is thus unequivocally clear that registration of FIR is mandatory and also that it is to be recorded in the FIR book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the superior police officers as well as by the competent court to which copies of each FIR are required to be sent.

111. The Code gives power to the police to close a matter both before and

after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The section itself states that a police officer can start investigation when he has "reason to suspect the commission of an offence". Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint."

After so stating the constitution Bench proceeded to state that where a preliminary enquiry is necessary, it is not for the purpose for verification or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence. After laying down so, the larger Bench proceeded to state:-

"120.6. As to what type and in which cases preliminary inquiry is to be

conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry."

We have referred to the aforesaid pronouncement for the purpose that on certain circumstances the police is also required to hold a preliminary enquiry whether any cognizable offence is made out or not.

27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the bank. We are absolutely conscious that the position does not matter, for nobody is above law.

But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) Cr.P.C. and also there is a separate procedure under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.

28. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in the society and also reflects the erroneous approach of the learned Magistrate. It also encourages the unscrupulous and unprincipled litigants, like the respondent no.3, namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, he had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of the appellant No.1, who is presently occupying the position of Vice-President, neither the loan was taken, nor the default was made, nor any action under the SARFAESI Act was taken. However, the action under the SARFAESI Act was taken on the second time at the instance of the present appellant No.1. We are only stating about the devilish design of the respondent No.3 to harass the appellants with the sole intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have

noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156(3) Cr.P.C. is a simple application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance of Section 154(3), indicating it has been sent to the Superintendent of police concerned."

On the cumulative strength of the aforesaid, learned counsel for the revisionist submits that the impugned order has been passed by the concerned Judge in a routine and mechanical manner. Thus the concerned Judge may be directed by this Court to exercise his discretionary power and decide the application under Section 156(3) moved by the revisionist afresh.

9. The learned A.G.A. for the State has fairly conceded that interest of substantial justice has not been served in passing of the impugned order, as the Special Judge has rejected the application of the revisionist in a routine and mechanical manner. He further submits that the Special Court in an appropriate case before taking cognizance can pass an order under Section 156 (3) Cr.P.C. for registration of an F.I.R. and its investigation and may also take cognizance on the complaint and may enter into the procedure provided under Chapter-XV of the Code of Criminal Procedure and in this regard the discretion is always of the Special Court or Magistrate to adopt an appropriate course, thus, illegality has been committed by the Special Court in passing the impugned order.

On the cumulative strength of the aforesaid, learned A.G.A. submits that in a case wherein conviction of proposed accused is possible, it is completely failure

on the part of the Special Court/Magistrate in not allowing the application under Section 156 (3) Cr.P.C. by directing the registration of F.I.R. As such the order impugned is liable to be set aside.

10. This Court has considered the submissions made by the learned counsel for the parties and gone through the records of the present criminal revision specifically the order impugned.

11. It is important for this Court to refer the provisions of Section 156 (3) Cr.P.C., under which the revisionist has filed her complaint against the opposite party no.2 and other accused persons, which is extracted herein-below:

“156. Police officer' s power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.”

12. It is evident that the law with regard to the manner in which the application moved under Section 156 (3) Cr.P.C are to be treated is now no more res integra and the same has been settled by various pronouncement of the Hon'ble

Supreme Court as well as by Division Benches of this Court.

13. At this juncture, it would be apposite to mention that the word “may” occurring in Section 156(3) CrPC is of utmost significance. It gives the Magistrate a discretionary power to order or not for an investigation into the cognizable offence disclosed in the application. This discretionary power has been given to Magistrate to enable them to deal adequately with both types of the applications (i) the genuine application containing truthful allegations about the commission of cognizable offence, and (ii) the applications having baseless or false allegation, It is the duty of the Magistrate to make it a point that no applicant of later category may succeed in his wicked game. His application need to be dismissed with firmness and boldness. At the same time it is the poise duty of the Magistrate to ensure that no case of the former category may go uninvestigated. The Magistrates are thus saddled with a greate responsibility to keep such balance.

14. While dealing with a similar issue wherein application under Section 156 (3) Cr.P.C. with the allegation of sexual harassment of a victim, has been rejected by a Magistrate, the Apex Court in the case of **XYZ Vs. State of Madhya Pradesh & Ors.** reported in 2022 SCC OnLine SC 1002 has opined that the Magistrate has discretion in directing the police to investigate or proceeding with the case as a complaint case. But this discretion cannot be exercised arbitrarily and must be guided by judicial reasoning. The Apex Court has further opined that where not only does the Magistrate find the commission of a cognizable offence alleged on a prima facie reading of the complaint but also such facts

are brought to the Magistrate's notice which clearly indicate the need for police investigation, the discretion granted in Section 156(3) Cr.P.C. can only be read as it being the Magistrate's duty to order the police to investigate. In cases wherein, there is alleged to be documentary or other evidence in the physical possession of the accused or other individuals which the police would be best placed to investigate and retrieve using its powers under the Cr.P.C., the matter ought to be sent to the police for investigation. The Apex Court has also opined that in cases alleging sexual harassment, sexual assault or any similar criminal allegation wherein the victim has possibly already been traumatized, the Courts should not further burden the complainant and should press upon the police to investigate. Due regard had to the fact that it is not possible for the complainant to retrieve important evidence regarding her complaint. The relevant paragraphs of the judgment of the Apex Court in the case of **XYZ (Supra)** read as follows:

“20. A division bench of this Court in Sakiri Vasu v. State of U.P.6 expounded upon the Magistrate's powers under Section 156(3) of the CrPC. In this decision, the Court noted:

11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 CrPC, then he can approach the Superintendent of Police under Section 154(3) CrPC 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) CrPC 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.

...

13. The same view was taken by this Court in Dilawar Singh v. State of Delhi3 (JT vide para 17). We would further clarify that 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) CrPC, and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order(s) as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156(3) CrPC.

...

15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. 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.

...

17. In our opinion Section 156(3) CrPC 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 FIR 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) CrPC, 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.

...

26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section 154(3) CrPC or other police officer referred to in Section 36 CrPC. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156(3) CrPC instead of rushing to the High Court by way of a writ petition or a petition under Section 482 CrPC. Moreover, he has a further remedy of filing a criminal complaint under Section 200 CrPC. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?"

(emphasis supplied)

21. It is clear from the above extract that the Magistrate has wide powers under Section 156(3) which ought to be exercised towards meeting the ends of justice. A two-judge Bench of this Court in *Srinivas Gundluri v. SEPCO Electric Power Construction Corpn.*,⁷ further clarified the powers of a Magistrate and held that whenever a cognizable offence is made out on the bare reading of complaint, the Magistrate may direct police to investigate:

"23. To make it clear and in respect of doubt raised by Mr. Singhvi to proceed under Section 156(3) of the Code, what is required is a bare reading of the

complaint and if it discloses a cognizable offence, then the Magistrate instead of applying his mind to the complaint for deciding whether or not there is sufficient ground for proceeding, may direct the police for investigation. In the case on hand, the learned Single Judge and the Division Bench of the High Court rightly pointed out that the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding and, therefore, we are of the view that the Magistrate has not committed any illegality in directing the police for investigation. In the facts and circumstances, it cannot be said that while directing the police to register FIR, the Magistrate has committed any illegality. As a matter of fact, even after receipt of such report, the Magistrate under Section 190(1)(b) may or may not take cognizance of offence. In other words, he is not bound to take cognizance upon submission of the police report by the investigating officer; hence, by directing the police to file charge-sheet or final report and to hold investigation with a particular result cannot be construed that the Magistrate has exceeded his power as provided in sub-section (3) of Section 156.

22. In the present case, the narration of facts makes it clear that upon the invocation of the jurisdiction of the Magistrate under Section 156(3) of CrPC, the JMFC came to the conclusion that serious allegations had been levelled against the accused by the appellant and, that, from a perusal of the documents in this regard, the statements of the complainant were satisfactory. After taking note of the fact that the police had at an earlier stage reported that the occurrence of an incident or offence was not found, the JMFC opined that, from the facts which were set out by the complainant in the

complaint, prima facie, the occurrence of an offence was shown.

23. *It is true that the use of the word “may” implies that the Magistrate has discretion in directing the police to investigate or proceeding with the case as a complaint case. But this discretion cannot be exercised arbitrarily and must be guided by judicial reasoning. An important fact to take note of, which ought to have been, but has not been considered by either the Trial Court or the High Court, is that the appellant had sought the production of DVRs containing the audio-video recording of the CCTV footage of the then Vice-Chancellor's (i.e., the second respondent) chamber. As a matter of fact, the Institute itself had addressed communications to the second respondent directing the production of the recordings, noting that these recordings had been handed over on his oral direction by the then Registrar of the Institute as he was the Vice-Chancellor. Due to the lack of response despite multiple attempts, the Institute had even filed a complaint with PS Gole Ka Mandir on 29 October 2021 for registering an FIR against the second respondent for theft of the DVRs.*

24. *Therefore, in such cases, where not only does the Magistrate find the commission of a cognizable offence alleged on a prima facie reading of the complaint but also such facts are brought to the Magistrate's notice which clearly indicate the need for police investigation, the discretion granted in Section 156(3) can only be read as it being the Magistrate's duty to order the police to investigate. In cases such as the present, wherein, there is alleged to be documentary or other evidence in the physical possession of the accused or other individuals which the police would be best placed to investigate and retrieve using its powers under the*

CrPC, the matter ought to be sent to the police for investigation.

25. *Especially in cases alleging sexual harassment, sexual assault or any similar criminal allegation wherein the victim has possibly already been traumatized, the Courts should not further burden the complainant and should press upon the police to investigate. Due regard must be had to the fact that it is not possible for the complainant to retrieve important evidence regarding her complaint. It may not be possible to arrive at the truth of the matter in the absence of such evidence. The complainant would then be required to prove her case without being able to bring relevant evidence (which is potentially of great probative value) on record, which would be unjust.*

26. *In this backdrop, we are clearly of the view that the JMFC ought to have exercised jurisdiction under Section 156(3) of CrPC to direct the police to investigate.*

27. *At this stage, the Court is not called upon to decide upon the veracity of the allegations in the complaint, save and except to underscore the importance of an investigation by the police in a matter where the CCTV footage (or other evidence) is not under the possession or control of the appellant, but to be inquired into in the course of an investigation by the police. The discretion which has been conferred upon the Magistrate by Section 156(3) CrPC, must be exercised in a judicious manner.*

28. *In the facts of the present case and bearing in mind the position of law which has been laid down by this Court, recourse to the jurisdiction under Section 156(3) CrPC was warranted.*

29. *For the above reasons, we are inclined to set aside the impugned judgment of the High Court and to direct*

that the JMFC Gwalior shall, in terms of the observations contained above, order an investigation by the police under Section 156(3) CrPC. Having regard to all the facts and circumstances, including the need for a fair investigation, we direct that the investigation shall be supervised by a woman officer not below the rank of Superintendent of Police to be nominated by the DIG of the zone concerned. The judgment of the High Court dated 6 January 2022 shall accordingly stand set aside. The directions which have been issued by the JMFC to the effect that the complaint could be treated as a complaint case shall accordingly, to that extent, stand set aside and be substituted in terms of the directions which have been issued above.

*30. Finally, we wish to once again reiterate the importance of courts dealing with complainants of sexual harassment and sexual assault in a sensitive manner. It is important for all courts to remain cognizant of the fact that the legal process tends to be even more onerous for complainants who are potentially dealing with trauma and societal shame due to the unwarranted stigma attached to victims of sexual harassment and assault. At this juncture, especially in cases where the police fails to address the grievance of such complainants, the Courts have an important responsibility. As the Delhi High Court held in *Virender v. State of NCT of Delhi*,⁸ courts have to remain alive to both treating the victim sensitively while also discharging the onerous task of ensuring that the complete truth is brought on record so as to facilitate adjudication and answering the basic question regarding the complicity of the accused in the commission of the offence. In that case, the High Court held that:*

22. It is to be noted that the embarrassment, and reservations of those concerned with the proceedings including the prosecutrix, witnesses, counsel may result in a camouflage of the trauma of the victim's experience. The judge has to be conscious of these factors and rise above any such reservations to ensure that they do not cloud the real facts and the actions which are attributable to the accused persons. The trial courts must be alive to the onerous responsibility which rests on their shoulders and be sensitive in cases involving sexual abuse.

(emphasis supplied)

31. While the Delhi High Court made these observations while dealing with a case of rape, courts must remain alive to their duty to treat victims sensitively in cases alleging all forms of sexual harassment and sexual assault. The Courts must try to ensure that the process of attempting to bring alleged perpetrators to justice is not onerous for the victims. Aggrieved persons should not have to run from pillar to post for the mere registration of a complaint and initiation of investigation especially when a cognizable offence is prima facie made out in their complaint.

*32. In *Aparna Bhat v. State of Madhya Pradesh*,⁹ a two-judge Bench of this Court took note of the “entrenched paternalistic and misogynistic attitudes that are regrettably reflected at times in judicial orders and judgments.” In that case, Justice S. Ravindra Bhat observed and we reiterate:*

31. The role of all courts is to make sure that the survivor can rely on their impartiality and neutrality, at every stage in a criminal proceeding, where she is the survivor and an aggrieved party. Even an indirect undermining of this responsibility cast upon the court, by

permitting discursive formations on behalf of the accused, that seek to diminish his agency, or underplay his role as an active participant (or perpetrator) of the crime, could in many cases, shake the confidence of the rape survivor (or accuser of the crime) in the impartiality of the court. The current attitude regarding crimes against women typically is that “grave” offences like rape are not tolerable and offenders must be punished. This, however, only takes into consideration rape and other serious forms of gender-based physical violence. The challenges Indian women face are formidable : they include a misogynistic society with entrenched cultural values and beliefs, bias (often sub-conscious) about the stereotypical role of women, social and political structures that are heavily male-centric, most often legal enforcement structures that either cannot cope with, or are unwilling to take strict and timely measures. Therefore, reinforcement of this stereotype, in court utterances or orders, through considerations which are extraneous to the case, would impact fairness.

...

43. The instances spelt out in the present judgment are only illustrations; the idea is that the greatest extent of sensitivity is to be displayed in the judicial approach, language and reasoning adopted by the judge. Even a solitary instance of such order or utterance in court, reflects adversely on the entire judicial system of the country, undermining the guarantee to fair justice to all, and especially to victims of sexual violence (of any kind from the most aggravated to the so-called minor offences).

33. The legislature has, at places, moulded criminal procedure to enable victims of sexual crimes to seek justice. This has been done in recognition of the

gravity of sexual crimes and the need to handle such cases in an appropriately sensitive manner. For instance, Section 327 CrPC provides for in camera trials to be conducted with respect to offences punishable under Sections 376, 376A, 376B, 376C or 376D of the Penal Code, 1860.

34. This Court, too, has had its role to play in ensuring that justice does not remain inaccessible. In *State of Maharashtra v. Bandu @ Daulat*,¹⁰ this Court directed that special centres be set up in each state in order to facilitate depositions by vulnerable witnesses, including victims of sexual offences. In *Smruti Tukaram Badade v. State of Maharashtra*,¹¹ a two judge bench of this Court (of which one of us, Dr. DY Chandrachud, J. was a part) supplemented the directions issued in *Bandu @ Daulat* (supra) with respect to setting up such special centres.

35. It is the duty and responsibility of trial courts to deal with the aggrieved persons before them in an appropriate manner, by:

a. Allowing proceedings to be conducted in camera, where appropriate, either under Section 327 CrPC or when the case otherwise involves the aggrieved person (or other witness) testifying as to their experience of sexual harassment/violence;

b. Allowing the installation of a screen to ensure that the aggrieved woman does not have to see the accused while testifying or in the alternative, directing the accused to leave the room while the aggrieved woman's testimony is being recorded;

c. Ensuring that the counsel for the accused conducts the cross-examination of the aggrieved woman in a respectful fashion and without asking inappropriate

questions, especially regarding the sexual history of the aggrieved woman. Cross-examination may also be conducted such that the counsel for the accused submits her questions to the court, who then poses them to the aggrieved woman;

d. Completing cross-examination in one sitting, as far as possible.

36. Before closing, it is necessary to clarify that this Court has not expressed any opinion on the allegations which have been levelled in the complaint. It is for the investigating officer to investigate those allegations in accordance with law.”

15. Considering the facts of this case and nature of allegations levelled by the applicant, this Court finds substance in the submissions made by the learned counsel for the revisionist and the case laws referred by him therefore, this Court is of the view that proper investigation is needed in the case in hand, therefore impugned order is not sustainable.

16. In view of discussion made above, present criminal revision succeeds and is liable to be allowed.

17. It is accordingly allowed.

18. The impugned judgment and order dated 05.11.2022 passed by learned Additional Sessions Judge/ Special Judge (POCSO Act), Bulandshahar in Criminal Misc. Case No. 717 of 2022 (Rajina Vs. Nishar and others), under Section 156(3) Cr.P.C., Police Station Jahangirabad, District Bulandshahar is hereby quashed. The matter is remanded to concerned Judge to decide application under Section 156(3) afresh in the light of observations made herein above within a period of two months from the date of production of a certified copy/computer generated copy of this order

which shall be filed by the revisionist before court below by means of an affidavit.

(2023) 11 ILRA 91

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 02.11.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Revision No. 4600 of 2023

Shiv Shanker Soni ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:

Sri Bipin Kumar Tripathi

Counsel for the Opposite Parties:

G.A., Sri Manoj Kumar

Criminal Law - Indian Penal Code, 1860 - Sections 323, 504, 376 & 313 - Against framing of charge - Code of Criminal Procedure, 1973 - Sections 161, 164 & 227 - Indian Evidence Act, 1872 - Section 65 (B) (4) - In 2018, revisionist became acquainted with opposite party no.2/married lady and while she was waiting at Railway Station, he was working as Ticket Collector, took her to Retiring Room, raped her and repeatedly raped her under pretext of marriage and by blackmail, also forcing her to abort her pregnancy - After registration of FIR, Investigating Officer collected evidence, filed charge sheet - Magistrate took cognizance, summoned him - Case was committed to Sessions Court, which framed charges - Impugned order - Once charges are framed, question of discharge becomes redundant, Court can either convict or acquit - In instant case, charges framed on 05.12.2022, Court cannot examine veracity of that order whereby discharge plea not considered - Examining charge-framing order in light of Section 228 Cr.P.C. and Apex Court's ruling in

Bhawna Bai v. Ghanshyam (infra), offences under aforesaid Sections of IPC cannot be ruled out against revisionist. (Para 5, 6, 17, 21)

Revision dismissed. (E-13)

List of Cases cited:

1. Ravindra Singh @ Kakku Vs St. of Punj. reported in (2022) (live law (SC) 461
2. Dr. Dhruvaram Murlidhar Sonar Vs St. of Mah. reported in 2019 (1) JIC-784 (SC)
3. Tilakraj Vs St. of H.P. reported in (2016) 2 SCC (Crl.) 247
4. Maheshwar Tigga Vs St. of Jharkhand reported in 2020 (0) Supreme (SC) 561
5. Shambhu Kharwar Vs St. of U.P. & ors. reported in MANU/SC/1011/2022
6. Naim Ahmad Vs St. of NCT of Delhi reported in 2023 (Live Law) SC 66
7. Yogesh Joshi Vs St. of Mah. reported in AIR 2008 Supreme Court 2971, (Paras 13 to 15)
8. Tarun Jit Tejpal Vs St. of Goa & anr., reported in 2019 SCC Online SC 1053, (Paras 27 to 32)
9. Bhawna Bai Vs Ghanshyam & ors., reported in 2020 (2) SCC, 217, (Paras 15, 16)
10. Ratilal Bhanji Mithani Vs St. of Mah. & ors. reported in (1979) 2 SCC 179, (Para 28) (Followed)
11. Bharat Parikh Vs C.B.I. & anr. reported in (2008) 10 SCC 109, (Para 16)
12. State through C.B.I. New Delhi Vs Jitendra Kumar Singh reported in (2014) 11 SCC, 724, (Para 40)
13. Hardeep Singh Vs St. of Punj., reported in (2014) 3 SCC, 92, (Para 31)

14. St. of Guj. Vs Dilipsinh Kishorsinh Rao reported in 2023 SCC OnLine SC 1294, (Paras 7 to 18)

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

1. This criminal revision under Section 397/401 Cr.P.C. has been filed by the revisionist with a prayer to quash the judgment and order dated 5th December, 2022 passed by the Additional Sessions Judge/F.T.C.-I (Crime Against Women), Gorakhpur in Special Case No. 2133 of 2022 (State of U.P. Vs. Shiv Shankar Soni), arising out of Case Crime No. 410 of 2022, 323, 504, 376 and 313 I.P.C., Police Station-Cantt. District-Gorakhpur, whereby the charges under Sections 376, 313, 323 and 504 I.P.C. have been framed against the accused-revisionist and also the prayer made on behalf of the revisionist before the trial judge for discharge has not been considered.

2. I have heard Mr. Bipin Kumar Tripathi, learned counsel for the revisionist, Mr. Manoj Kumar, learned counsel for opposite party no.2 and Mr. Ratnesh Kumar Singh, learned A.G.A. for the State.

Case of the Revisionist

3. Victim/informant/opposite party no.2 is a married lady and has developed physical relationship with the revisionist for a long period of four years with her own free will and without any pressure. The marriage of the victim/ informant was solemnized on 27.5.2015 with one Jay Singh and from the aforesaid wedlock, two children; (1) Ansh Singh (2) Shreyansh Singh were born, as is evident from the statements of Ramdaras Singh (real uncle of informant) and Smt. Babita devi (real

sister of the victim informant) recorded under Section 161 Cr.P.C. As per the own statement of the informant/victim recorded under section 164 Cr.P.C., after one year of her marriage, her husband Jay Singh used to quarrel with her in intoxicating state due to which the relation between the wife and husband i.e. informant and her husband became strained and incompatible. However it transpires from the statement of the informant/victim recorded under Section 161 Cr.P.C. that after two years of marriage, her husband Jay Singh went Abroad (OMAN) and thereafter the victim/informant without divorcing her husband legally, had established physical relationship with the accused-revisionist on her own free will. Admittedly, the victim/informant had remained in a consensual physical relationship with the revisionist for about 4 years without getting herself divorced with her husband Jay Singh and as such she had well within her knowledge that she could not marry the revisionist without divorce, as such the allegation made by the informant/victim against the revisionist that he had established physical relationship with her on the promise to marry her has no legs to stand. Such relationship comes within the definition of extra-marital relationship with the consent of both the parties and not within the ambit of offence under Section 376 I.P.C. Further allegation of the victim against the revisionist that from the physical relationship of the victim with the revisionist, a boy, namely, Shreyansh was born, also does not arise, as from the birth certificate issued by C.H.C. Kaptanganj the date of birth of Shreyansh Singh is 10.11.2019 showing parentage/father's name as Jay Singh, as such the said allegation has only been made to launch malicious criminal prosecution against the revisionist and just to blackmail and

exploit him as he is a railway government servant having unmarried status.

4. So far as the allegation made by the victim in the F.I.R. that on 22.4.2022 the revisionist assaulted in the stomach of the victim which caused miscarriage of her unborn child is concerned, it is the case of the revisionist that the USG and Ultrasonography reports of the victim dated 17th April, 2022 and 1st April, 2022 disclose that there was no any kind of miscarriage of unborn child. In case the revisionist has persuaded to abort the unborn child of the victim, then there should have been any kind of prompt complaint against him before registration of the FIR. From the evidence collected by the Investigating Officer through the statements of Ramdaras Singh and Smt. Babita Devi (real sister of the victim) recorded under Section 161 Cr.P.C. there was dispute of money transaction between the victim and the revisionist and for such payment of money an altercation and quarrel took place between them which resulted in strained relations between them also and consequently, the malicious criminal prosecution has been launched by the victim/ informant. The real fact is that since the husband of the victim/ informant was residing abroad (OMAN) and from the aforesaid wedlock two boys, namely, Shreyansh and Ansh were born and after departing of her husband to abroad, she has established extra marital relationship with the revisionist on her own free will and due to family and society pressure, she herself decided to abort the pregnancy conceived by her and now she is developing the things just to make out the case and she often used to come to the rental accommodation of the revisionist with undue demand of huge amount to settle the matter.

The case of the victim/informant

5. In the year 2018 the revisionist acquainted with the opposite party no.2 and on 29.01.2019 when opposite party no.2 was waiting for train at the Gorakhpur Railway Station, revisionist, who was working as Ticket Collector met her and took her to Retiring Room of the Station, where he committed rape upon her forcefully and thereafter on the promise to marry her as also on blackmailing, he committed rape upon her time and again and he also forced her to abort her pregnancy.

6. After registration of the first information report against the revisionist, the Investigating Officer proceeded with the investigation and after collecting the relevant evidence and materials, submitted the charge sheet under Section 323, 504, 376, 313 I.P.C. against the revisionist on 11.09.2022 upon which concerned Magistrate took cognizance of offence and summoned the revisionist for facing the trial vide order dated 23.09.2022. Thereafter the case has been committed to the Court of Sessions, where the charges have been framed against the revisionist under Section 323, 504, 376, 313 I.P.C. vide order impugned dated 05.12.2022. It is against this order that the present criminal revision has been filed by the revisionist.

7. Submission of the learned counsel for the revisionist

(I) From the perusal of entire material available in the case diary, no offence under 323, 504, 376, 313 I.P.C., is made out against the revisionist.

(II) The trial court in a very routine and casual manner framed the

charges against the revisionist while passing the impugned order without evaluating the material collected by the Investigating Officer during the course of investigation.

(III) The revisionist was arrested on 26.7.2022 pursuant to the present criminal case during his custody the Investigating Officer concluded the investigation by filing charge-sheet dated 11.9.2022 and the learned Magistrate has taken cognizance vide order dated 23.9.2022 and further the trial court framed the charges on 5.12.2022 and the revisionist was through out remained in custody and he was granted bail pursuant to order dated 14.12.2022 and therefore at no point of time, he has been provided any opportunity of seeking legal remedy against the cognizance order as well as the order of framing charge and as such the entire criminal prosecution is bad in the eye of law.

(IV) The victim/informant herself was a married and grown-up lady and without divorcing her husband Jay Singh as per the law, claimed to have established extra-marital relationship with the revisionist on her own free will and now for want of money from the revisionist, she has initiated the present malicious criminal prosecution in the shape of denial of promise to marry and therefore the entire prosecution story appears to be malafide and prima-facie no offence against the revisionist is made out.

(V) So far as the screen shot of communication on Whatsapp between the victim and the revisionist, which is part of the case diary is concerned, it is submitted by the learned counsel for the revisionist that such electronic evidence cannot be admissible as per Section 65 (B) (4) Indian

Evidence Act as also in view of the latest judgment of the Hon'ble Supreme court in the case of **Ravindra Singh alias Kakku Versus State of Punjab** reported in (2022) (live law (SC) 461.

(VI) In the totality of facts and circumstances, it is a case of consensual physical relation with the revisionist of a married lady who already had two children born from the wedlock of her marriage with Jai Singh and belatedly after 4 to 5 years the victim/ informant came with the malicious criminal prosecution just to blackmail and exploit the revisionist, who is a public servant. The victim/ informant at every stage of her statements i.e. Statements recorded under Sections 161 and 164 Cr.P.C., she has taken contradictory stand, whereas in her second statement recorded under Section 161 Cr.P.C., she has admitted the factum of dispute between applicant and her in respect of money transaction.

(VII) In the totality of facts and circumstances, in absence of legal divorce being taken from her earlier husband, the alleged promise of revisionist to marry her does not arise. Since it is a case of extra-marital relationship between two adult and mature parties, no offence under Section 376 I.P.C. is made out against the revisionist. Maximum, on the face value of allegation, it is a case of live-in consensual relation between married lady and the revisionist and therefore no offence under Sections-323, 504, 376, 313 I.P.C., is made out against the revisionist. The court below / learned Magistrate as well as trial court has arbitrarily taken the cognizance and framed the charges against the revisionist while passing the impugned order without affording opportunity of hearing to the revisionist for seeking his discharge.

(VIII) Since the revisionist is a public servant posted as Assistant

Supervisor in I.R.C.T.C. Railways CPSE, Central Government, the criminal prosecution against public servant is barred by Section 197 Cr.P.C.

In support of his case qua the consensual physical relations on the pretext of promise to marry, learned counsel for the revisionist has referred to the following judgments of the Apex Court:

(a) **Dr. Dhruvaram Murlidhar Sonar Vs. State of Maharashtra** reported in 2019 (1) JIC-784 (SC);

(b) **Tilakraj Vs. State of Himanchal Pradesh** reported in (2016) 2 SCC (Crl.) 247;

(c) **Maheshwar Tigga Vs. State of Jharkhand** reported in 2020 (0) Supreme (SC) 561;

(d) **Shambhu Kharwar Vs. State of U.P. & Others** reported in MANU/SC/1011/2022; and

(e) **Naim Ahmad Vs. State of NCT of Delhi** reported in 2023 (Live Law) SC 66.

On the cumulative strength of the aforesaid submissions, learned counsel for the revisionist submits that the impugned order is arbitrary, illegal and bad in the eye of law and as such liable to be set aside in the facts and circumstances of the present case in the interest of justice.

8. On the other-hand, the learned counsel for opposite party no.2 and the learned A.G.A. for the State have disputed the submissions made by the learned counsel for the revisionist by contending that there is no illegality or infirmity in the order passed by the trial judge framing charges against the revisionist.

9. Learned A.G.A. and the learned counsel for opposite party no.2 then submits that the material/evidence on record against the revisionist was found to

be more than prima facie to show that the revisionist indulged actively in the commission of alleged offence. The trial judge, while passing the impugned order, has taken all the precautions and did not hurriedly frame the charges against the revisionist. While framing charges against the revisionist the trial Judge has followed all the precautions and guidelines as framed by the Apex Court in its various judgments.

10. The learned A.G.A. and the learned counsel for opposite party no.2 contend that there is ample material on record collected during the investigation against the revisionist which goes to show that he was actively involved in the commission of the alleged offence i.e. rape of the victim etc. The trial Judge has rightly considered the entire material collected during the course of investigation and thereafter has recorded its finding that there was more than prima facie case against the revisionist for framing of charges against him.

11. Apart from the above, learned counsel for opposite party no.2 has submitted as follows:

(i) It is an admitted position that vide order dated 05.12.2022, charges have been framed against revisionist and once charges have been framed, plea of discharge becomes infructuous. Discharge can be claimed only prior to the framing of charge. Once charges have been framed, Court has no jurisdiction to discharge an accused. After framing of charge, Court can either convict or acquit an accused, but cannot discharge him/her.

(ii) Under the order impugned, on the basis of grave suspicion as also on the basis of sufficient material/evidence on record.

(iii) The present case arises out of proceedings of Sessions Trial and consequently, the discharge could be claimed by revisionist under Section 227 Cr.P.C. Section 227 Cr.P.C. contemplates that court shall discharge an accused provided there is no sufficient ground for proceeding against the accused. The term "sufficient ground" has been explained by Hon'ble Supreme Court in case of **Yogesh Joshi Vs. State of Maharastra** reported in *AIR 2008 Supreme Court 2971*.

(iv). Subsequently, the ambit and scope of Section 227 Cr.P.C. as well as parameters regarding exercise of jurisdiction under Section 227 Cr.P.C. came to be considered by a three Judges Bench of Supreme Court in **Tarun Jit Tejpal Vs. State of Goa and Another**, reported in *2019 SCC Online SC 1053*. In a Sessions Trial, charges are framed under Section 228 Cr.P.C. Parameters regarding exercise of jurisdiction under Section 228 Cr. P. C. has now been considered by a three Judges Bench of Hon'ble Apex Court in **Bhawna Bai Vs. Ghanshyam and others**, reported in *2020 (2) SCC, 217*.

(v) On the basis of aforesaid laws as settled by the Apex Court, it is submitted that regarding exercise of jurisdiction under Section 227 Cr.P.C., this Hon'ble Court examine as to whether after charges have been framed the issue relating to discharge of an accused can be considered by court or not. This issue is no longer res-integra and stands concluded by the judgment of Hon'ble Supreme Court in case of **Ratilal Bhanji Mithani Vs. State of Maharastra and others** reported in *(1979) 2 SCC 179*, which has been followed in the cases of **Bharat Parikh Vs. C.B.I. and another** reported in *(2008) 10 SCC 109*; **State through C.B.I. New Delhi Vs. Jitendra**

Kumar Singh reported in (2014) 11 SCC, 724 and **Hardeep Singh Vs. State of Punjab**, reported in (2014) 3 SCC, 92.

On the cumulative strength of the aforesaid, learned counsel for opposite party no.2 submits that considering the facts and circumstances of the case stated above, it is expedient in the interest of justice that this Hon'ble Court may graciously be pleased to reject/dismiss the present Criminal Revision in exercise of powers under Under Section 397/401 of Cr.P.C..

12. This Court has considered the submissions made by the learned counsel for the parties and gone through the records of the present criminal revision specifically the order impugned.

13. It is no doubt true that the discharge can be claimed under Section 227 Cr.P.C., which reads as follows:

"227. Discharge.--If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

14. The term "sufficient ground" has been explained by the Apex Court in the case of **Yogesh Joshi (Supra)**. For ready reference relevant paragraph nos. 13, 14 and 15 are being extracted herein-below:

"13. Before advertng to the rival submissions, we may briefly notice the scope and ambit of powers of the Trial Judge under Section 227 of the Code.

14. Chapter XVIII of the Code lays down the procedure for trial before the Court of Sessions, pursuant to an order of commitment under Section 209 of the Code. Section 227 contemplates the circumstances whereunder there could be a discharge of an accused at a stage anterior in point of time to framing of charge under Section 228. It provides that upon consideration of the record of the case, the documents submitted with the police report and after hearing the accused and the prosecution, the Court is expected, nay bound to decide whether there is "sufficient ground" to proceed against the accused and as a consequence thereof either discharge the accused or proceed to frame charge against him.

15. It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the Section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, makes a conviction reasonably possible. [See: State of Bihar

Vs. Ramesh Singh and Prafulla Kumar Samal (supra)]"

15. The scope and ambit of Section 227 Cr.P.C. has been considered by the Apex Court in the case of **Tarun Jit Tejpal (Supra)**, relevant paragraph nos. 27, 28, 29, 30, 31, 32 whereof are being extracted here-under:

" 27. Now, so far as the prayer of the appellant to discharge him and the submissions made by Shri Vikas Singh, learned Senior Advocate on merits are concerned, the law on the scope at the stage of Section 227/228 CrPC is required to be considered.

28. In the case of N. Suresh Rajan (Supra) this Court had an occasion to consider in detail the scope of the proceedings at the stage of framing of the charge under Section 227/228 CrPC. After considering earlier decisions of this Court on the point thereafter in paragraph 29 to 31 this Court has observed and held as under:

"29. We have bestowed our consideration to the rival submissions and the submissions made by Mr Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the

ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.

30. Reference in this connection can be made to a recent decision of this Court in Sheoraj Singh Ahlawat v. State of U.P. [(2013) 11 SCC 476 : (2012) 4 SCC (Cri) 21 : AIR 2013 SC 52] , in which, after analysing various decisions on the point, this Court endorsed the following view taken in Onkar Nath Mishra v. State (NCT of Delhi) [(2008) 2 SCC 561 : (2008) 1 SCC (Cri) 507] : (Sheoraj Singh Ahlawat case [(2013) 11 SCC 476 : (2012) 4 SCC (Cri) 21 : AIR 2013 SC 52] , SCC p. 482, para 15)

"15. '11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that

stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.' (Onkar Nath case [(2008) 2 SCC 561 : (2008) 1 SCC (Cri) 507] , SCC p. 565, para 11)" (emphasis in original)

31. Now reverting to the decisions of this Court in Sajjan Kumar [Sajjan Kumar v. CBI, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] and Dilawar Balu Kurane [Dilawar Balu Kurane v. State of Maharashtra, (2002) 2 SCC 135 : 2002 SCC (Cri) 310] , relied on by the respondents, we are of the opinion that they do not advance their case. The aforesaid decisions consider the provision of Section 227 of the Code and make it clear that at the stage of discharge the court cannot make a roving enquiry into the pros and cons of the matter and weigh the evidence as if it was conducting a trial. It is worth mentioning that the Code contemplates discharge of the accused by the Court of Session under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on a police report are dealt with in Section 245. From a reading of the aforesaid sections it is evident that they contain somewhat different provisions with regard to discharge of an accused:

31.1. Under Section 227 of the Code, the trial court is required to discharge the accused if it "considers that there is not sufficient ground for proceeding against the accused". However, discharge under Section 239 can be ordered when "the Magistrate considers the charge against the accused to be groundless". The power to discharge is

exercisable under Section 245(1) when, "the Magistrate considers, for reasons to be recorded that no case against the accused has been made out which, if unrebutted, would warrant his conviction".

31.2. Section 227 and 239 provide for discharge before the recording of evidence on the basis of the police report, the documents sent along with it and examination of the accused after giving an opportunity to the parties to be heard. However, the stage of discharge under Section 245, on the other hand, is reached only after the evidence referred in Section 244 has been taken.

31.3. Thus, there is difference in the language employed in these provisions. But, in our opinion, notwithstanding these differences, and whichever provision may be applicable, the court is required at this stage to see that there is a prima facie case for proceeding against the accused. Reference in this connection can be made to a judgment of this Court in R.S. Nayak v. A.R. Antulay [(1986) 2 SCC 716 : 1986 SCC (Cri) 256] . The same reads as follows: (SCC pp. 755 56, para 43)

"43. ... Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of 'prima facie' case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial court is satisfied that a prima facie case is made out, charge has to be framed."

29. In the subsequent decision in the case of S. Selvi (Supra) this Court has summarised the principles while framing of the charge at the stage of Section 227/228 of the CrPC. This Court has observed and held in paragraph 6 and 7 as under:

"6. It is well settled by this Court in a catena of judgments including *Union of India v. Prafulla Kumar Samal* [*Union of India v. Prafulla Kumar Samal*, (1979) 3 SCC 4 : 1979 SCC (Cri) 609] , *Dilawar Balu Kurane v. State of Maharashtra* [*Dilawar Balu Kurane v. State of Maharashtra*, (2002) 2 SCC 135 : 2002 SCC (Cri) 310] , *Sajjan Kumar v. CBI* [*Sajjan Kumar v. CBI*, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] , *State v. A. Arun Kumar* [*State v. A. Arun Kumar*, (2015) 2 SCC 417 : (2015) 2 SCC (Cri) 96 : (2015) 1 SCC (L&S) 505] , *Sonu Gupta v. Deepak Gupta* [*Sonu Gupta v. Deepak Gupta*, (2015) 3 SCC 424 : (2015) 2 SCC (Cri) 265] , *State of Orissa v. Debendra Nath Padhi* [*State of Orissa v. Debendra Nath Padhi*, (2003) 2 SCC 711 : 2003 SCC (Cri) 688] , *Niranjana Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijaya* [*Niranjana Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijaya*, (1990) 4 SCC 76 : 1991 SCC (Cri) 47] and *Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja* [*Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja*, (1979) 4 SCC 274 : 1979 SCC (Cri) 1038] that the Judge while considering the question of framing charge under Section 227 of the Code in sessions cases (which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, **the court will be fully justified in framing the charge**; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he

will be fully within his rights to discharge the accused. The Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the statements and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the materials as if he was conducting a trial.

7. In *Sajjan Kumar v. CBI* [*Sajjan Kumar v. CBI*, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] , this Court on consideration of the various decisions about the scope of Sections 227 and 228 of the Code, laid down the following principles: (SCC pp. 376, 77, para 21)

"(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) *If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence*

(v) *At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.*

(vi) *At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.*

(vii) *If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."*

30. *In the case of Mauvin Godinho (Supra) this Court had an occasion to consider how to determine prima facie case while framing the charge under Section 227/228 of the CrPC. In the same decision this Court observed and held that while considering the prima facie case at the stage of framing of the charge under Section 227 of the CrPC there cannot be a roving enquiry into the pros and cons of the*

matter and weigh the evidence as if he was conducting a trial.

31. *At this stage the decision of this Court in the case of Stree Atyachar Virodhi Parishad (Supra) is also required to be referred to. In that aforesaid decision this Court had an occasion to consider the scope of enquiry at the stage of deciding the matter under Section 227/228 of the CrPC. In paragraphs 11 to 14 observations of this Court in the aforesaid decision are as under :*

"11. Section 227 of the Code of Criminal Procedure having bearing on the contentions urged for the parties, provides:

"227. Discharge.--If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

12. *Section 228 requires the Judge to frame charge if he considers that there is ground for presuming that the accused has committed the offence. The interaction of these two sections has already been the subject matter of consideration by this Court. In State of Biharv. Ramesh Singh [(1977) 4 SCC 39 : 1977 SCC (Cri) 533 : (1978) 1 SCR 257] , Untwalia, J., while explaining the scope of the said sections observed: [SCR p. 259 : SCC pp. 41 42 : SCC (Cri) pp. 535 36, para 4]*

Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously Judged. Nor is any weight to be attached to the probable

defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused.

13. *In Union of India v. Prafulla Kumar Samal [(1979) 3 SCC 4 : 1979 SCC (Cri) 609 : (1979) 2 SCR 229] , Fazal Ali, J., summarised some of the principles: [SCR pp. 234 35 : SCC p. 9 : SCC (Cri) pp. 613 14, para 10]"*

(1) *That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused had been made out.*

(2) *Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial.*

(3) *The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.*

(4) *That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."*

14. *These two decisions do not lay down different principles. Prafulla Kumar case [(1979) 3 SCC 4 : 1979 SCC (Cri) 609 : (1979) 2 SCR 229] has only reiterated what has been stated in Ramesh Singh case [(1977) 4 SCC 39 : 1977 SCC (Cri) 533 : (1978) 1 SCR 257] . In fact, Section 227 itself contains enough guidelines as to the scope of enquiry for the purpose of discharging an accused. It provides that "the Judge shall discharge when he considers that there is no sufficient ground for proceeding against the accused". The "ground" in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not undertake an elaborate*

enquiry in sifting and weighing the material. Nor is it necessary to delve deep into various aspects. All that the court has to consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into."

32. Applying the law laid down by this Court in the aforesaid decisions and considering the scope of enquiry at the stage of framing of the charge under Section 227/228 of the CrPC, we are of the opinion that the submissions made by the learned Counsel appearing on behalf of the appellant on merits, at this stage, are not required to be considered. Whatever submissions are made by the learned Counsel appearing on behalf of the appellant are on merits are required to be dealt with and considered at an appropriate stage during the course of the trial. Some of the submissions may be considered to be the defence of the accused. Some of the submissions made by the learned Counsel appearing on behalf of the appellant on the conduct of the victim/prosecutrix are required to be dealt with and considered at an appropriate stage during the trial. The same are not required to be considered at this stage of framing of the charge. On considering the material on record, we are of the opinion that there is more than a prima facie case against the accused for which he is required to be tried. There is sufficient ample material against the accused and therefore the learned Trial Court has rightly framed the charge against the accused and the same is rightly confirmed by the High Court. No interference of this Court is called for."

16. Having noted the law regarding exercise of jurisdiction under Section 227 Cr.P.C., this Court is further required to examine as to whether after charges have

been framed the issue relating to discharge of an accused can be considered by court or not. Aforesaid issue is no longer res-integra and stands concluded by the judgement of Supreme Court in **Ratilal Bhanji Mithani Vs. State of Maharastra and others** reported in (1979) 2 SCC 179, paragraph 28, which has been followed in **Bharat Parikh Vs. C.B.I. and another** reported in (2008) 10 SCC 109, paragraph 16, **State through C.B.I. New Delhi Vs. Jitendra Kumar Singh** reported in (2014) 11 SCC, 724, paragraph 40, **Hardeep Singh Vs. State of Punjab**, reported in (2014) 3 SCC, 92, paragraph 31.

17. It is thus apparent that once charges have been framed, the issue of discharge becomes redundant, as Courts have no jurisdiction to allow discharge after charges having been framed. After charges have been framed, Court can either convict or acquit an accused. Admittedly, in the present case, charges have been framed, vide order dated 5th December, 2022. Resultantly, this Court now cannot examine the veracity of order dated 5th December, 2022, whereby discharge of the revisionist made by his counsel before the court below has not been considered.

18. This leads to the last question to be considered by this Court i.e. the veracity of the order dated 5th December, 2022, whereby charges have been framed against applicant/revisionist.

19. In a Sessions Trial, charges are framed under Section 228 Cr. P. C. Parameters regarding exercise of jurisdiction under Section 228 Cr. P. C. has now been considered by a three Judges

Bench of Apex Court in *Bhawna Bai Vs. Ghanshyam and others*, reported in 2020 (2) SCC, 217, wherein Court has held as follows in paragraphs 15 and 16.

"15. Considering the scope of Sections 227 and 228 CrI.P.C., in *Amit Kapoor v. Ramesh Chander and another* (2012) 9 SCC 460, the Supreme Court held as under:-

"17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the "record of the case" and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the section exists, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a *sine qua non* for exercise of such jurisdiction. It may even be weaker than a *prima facie* case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

.....

19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well-settled law laid down by this Court in *State of Bihar v. Ramesh Singh* (1977) 4 SCC 39: (SCC pp. 41-42, para 4) "4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If 'the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing', as enjoined by Section 227. If, on the other hand, 'the Judge is of opinion that there is ground for presuming that the accused has committed an offence which -- ... (b) is exclusively triable by the court, he shall frame in writing a charge against the accused', as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable

defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction.

Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible

nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

16. After referring to Amit Kapoor, in Dinesh Tiwari v. State of Uttar Pradesh and another (2014) 13 SCC 137, the Supreme Court held that for framing charge under Section 228 CrI.P.C., the judge is not required to record detailed reasons as to why such charge is framed. On perusal of record and hearing of parties, if the judge is of the opinion that there is sufficient ground for presuming that the accused has committed the offence triable by the Court of Session, he shall frame the charge against the accused for such offence."

20. Admittedly, discharge claimed by applicant/revisionist has been refused by Court below, vide order dated 5th December, 2022. Criminal Revision preferred by applicant/revisionist cannot be considered now as charges have already been framed. Thus by necessary implication, this Court now cannot examine the veracity of the framing of charge order dated 5th December, 2022.

21. Apart from above, when framing of charge order is examined in the light of ambit and scope of Section 228 Cr. P. C. as defined by Apex Court in aforementioned judgement, this Court is of considered opinion that at this stage, it cannot be said

that no offence under Sections 323, 504, 376 and 313 I.P.C. is made out against applicant/revisionist.

22. All the submissions made by the learned counsel for the revisionist that (a) after framing of charge, his prayer for discharge can be considered by the trial court, (b) the prima facie case for the offence under Sections 323, 504, 376 and 313 is not made out against the revisionist on the ground that the victim/opposite party no.2, who is a married lady having two children, without getting herself divorced from her husband has established physical relationship with the revisionist on her own free will for a long period, (c) the revisionist has not been afforded any opportunity to lead any evidence in support of his case and (d) electronic evidence like screen shot of Whatsapp communication between the revisionist and the victim is not admissible as per Section 65 (B) (4) of the Indian Evidence Act as also in view of the judgment of the Apex Court in the case of **Ravindra Singh @ Kakku (Supra)** have been discussed by the Apex Court in its latest judgment in the case of **State of Gujarat VS. Dilipsinh Kishorsinh Rao** reported in 2023 SCC OnLine SC 1294 and the Apex Court in following paragraphs has opined that such submissions cannot be considered by the High Court either in revisional jurisdiction under Section 397 Cr.P.C. or in extraordinary jurisdiction under Section 482 Cr.P.C.:

“7.It is trite law that application of judicial mind being necessary to determine whether a case has been made out by the prosecution for proceeding with trial and it would not be necessary to dwell into the pros and cons of the matter by examining the defence of the accused when an application for discharge is filed. At that

stage, the trial judge has to merely examine the evidence placed by the prosecution in order to determine whether or not the grounds are sufficient to proceed against the accused on basis of charge sheet material.

The nature of the evidence recorded or collected by the investigating agency or the documents produced in which prima facie it reveals that there are suspicious circumstances against the accused, so as to frame a charge would suffice and such material would be taken into account for the purposes of framing the charge. If there is no sufficient ground for proceeding against the accused necessarily, the accused would be discharged, but if the court is of the opinion, after such consideration of the material there are grounds for presuming that accused has committed the offence which is triable, then necessarily charge has to be framed.

8. At the time of framing of the charge and taking cognizance the accused has no right to produce any material and call upon the court to examine the same. No provision in the Code grants any right to the accused to file any material or document at the stage of framing of charge. The trial court has to apply its judicial mind to the facts of the case as may be necessary to determine whether a case has been made out by the prosecution for trial on the basis of charge-sheet material only.

9. If the accused is able to demonstrate from the chargesheet material at the stage of framing the charge which might drastically affect the very sustainability of the case, it is unfair to suggest that such material should not be considered or ignored by the court at that stage. The main intention of granting a chance to the accused of making submissions as envisaged under Section

227 of the Cr.P.C. is to assist the court to determine whether it is required to proceed to conduct the trial. Nothing in the Code limits the ambit of such hearing, to oral hearing and oral arguments only and therefore, the trial court can consider the material produced by the accused before the I.O.

10. It is settled principle of law that at the stage of considering an application for discharge the court must proceed on an assumption that the material which has been brought on record by the prosecution is true and evaluate said material in order to determine whether the facts emerging from the material taken on its face value, disclose the existence of the ingredients necessary of the offence alleged. This Court in *State of Tamil Nadu Vs. N. Suresh Rajan And Others* (2014) 11 SCC 709 adverting to the earlier propositions of law laid down on this subject has held:

"29. We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge.

It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the

materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction.

In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

11. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged. The expression "the record of the case" used in Section 227 Cr.P.C. is to be understood as the documents and articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. The submission of the accused is to be confined to the material produced by the investigating agency.

12. The primary consideration at the stage of framing of charge is the test of existence of a prima-facie case, and at this stage, the probative value of materials on record need not be gone into. This Court by referring to its earlier decisions in the *State of Maharashtra Vs. Som Nath Thapa* (1996) 4 SCC 659 and the *State of MP Vs. Mohan Lal Soni* (2000) 6 SCC 338 has held the nature of evaluation to be made by the court at the stage of framing of the charge is to test the existence of prima-facie case.

It is also held at the stage of framing of charge, the court has to form a presumptive opinion to the existence of

factual ingredients constituting the offence alleged and it is not expected to go deep into probative value of the material on record and to check whether the material on record would certainly lead to conviction at the conclusion of trial.

13. The power and jurisdiction of Higher Court under Section 397 Cr.P.C. which vests the court with the power to call for and examine records of an inferior court is for the purposes of satisfying itself as to the legality and regularities of any proceeding or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law or the perversity which has crept in such proceedings. It would be apposite to refer to the judgment of this court in *Amit Kapoor Vs. Ramesh Chandra* (2012) 9 SCC 460 where scope of Section 397 has been considered and succinctly explained as under:

"12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law.

If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely

indicative. Each case would have to be determined on its own merits.

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice *ex facie*.

Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforesaid. Even framing of charge is a much advanced stage in the proceedings under the CrPC."

14. This Court in the aforesaid judgement has also laid down principles to be considered for exercise of jurisdiction under Section 397 particularly in the context of prayer for quashing of charge framed under Section 228 Cr.P.C. is sought for as under:

"27. Having discussed the scope of jurisdiction under these two provisions i.e. Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles.

At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in

exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.1. *Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.*

27.2. *The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.*

27.3. *The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.*

27.9. *Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.*

27.13. *Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even*

broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie."

15. *The revisional court cannot sit as an appellate court and start appreciating the evidence by finding out inconsistency in the statement of witnesses and it is not legally permissible. The High Courts ought to be cognizant of the fact that trial court was dealing with an application for discharge.*

16. *In the teeth of the above analysis of law when the impugned order of the High Court is perused, it would not detain us for too long to brush aside the contentions raised by the respondent-accused for reasons more than one.*

Firstly, the charge-sheet has been filed after taking into consideration the written submissions filed by the accused before the Investigating Authority which included the documentary evidences tendered by the respondent accused.

Secondly, the statement of friends and acquaintances from whom loans of large amounts had been borrowed by the accused which had been relied upon by the accused to stave off the prosecution in his written submissions filed before the Investigating Authority and which material had persuaded the High Court to accept the same on its evaluation to be true, is nothing but short of accepting the same as defence evidence and examining the truthfulness of its contents even before trial could be commenced or held.

Thirdly, the High Court has proceeded to examine the pros and cons of defense by weighing the defence-evidence and probabilities of the conclusion that

may ultimately be arrived at, as the basis for exercising the revisional jurisdiction which was impermissible.

Fourthly, the purported loans said to have been obtained by the respondent accused from his mother, brother and father are all question of facts which requires adjudication and this could be done only during trial and the explanation relating to borrowing of large sums raises a reasonable suspicion, which has been termed by the Investigating Agency as strong material to file the charge sheet and based on such material the sanctioning authority also recorded its satisfaction under sanction order dated: 05.03.2015 to prosecute the respondent-accused. Hence, raising reasonable suspicion cannot be held or construed at the primary stage for discharging the accused.

17. The plea or the defence when requiring to be proved during course of trial is itself sufficient for framing the charge. In the instant case, the learned Trial Judge has noticed that explanation provided by the respondent accused pertaining to purchase of shop No.7 of Suman City Complex of plot No.19, Sector-11 from the loan borrowed and paid by the respondent was outside the check period and hence the explanation provided by respondent is a mere eye wash.

This is an issue which has to be thrashed out during the course of the trial and at the stage of framing the charge mini trial cannot be held. That apart the explanation offered by the respondent accused with regard to buying of Maruti Wagon-R car, Activa scooter, purchase of house etc., according to the prosecution are all the subject matter of trial or it is in the nature of defence which will have to be evaluated after trial.

18. In the afore-stated circumstances we are of the considered view that High Court had committed a serious error in interfering with the well-reasoned order passed by the trial court. Hence, the impugned judgment dated 11.01.2018 passed in Criminal Revision Application No.387 of 2016 setting aside the trial court order dated 13.04.2016 requires to be set aside and accordingly it is set aside and appeal is allowed.”

23. On the evaluation and deeper scrutiny of the submissions made by the learned counsel for the parties, the case laws cited and quoted above as also the records of the present criminal revision, this Court does not find any good ground to interfere with the order impugned.

24. As a result, the present Criminal Revision filed by applicant/revisionist are liable to be dismissed.

25. It is, accordingly, **dismissed**.

26. There shall be no orders as to cost.

(2023) 11 ILRA 110

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 02.11.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Revision No. 4777 of 2023

Ram Kumar Mishra ...Revisionist

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:

Sri Ashutosh Tiwari

Counsel for the Opposite Parties:

G.A., Sri M. Asif

Criminal Law - Protection of Women from Domestic Violence Act, 2005 – Sections 2(f), 2(s), 12, 23 & 29 – Code of Criminal Procedure, 1973 – Sections 125, 397 & 401 – Maintenance – Interim Maintenance – Shared Household – Criminal Revision – Maintainability – Compromise in Prior Proceedings

The revisionist challenged the orders dated 08.04.2022 and 27.07.2023 passed by the Civil Judge (Junior Division)/F.T.C./W.P./Judicial Magistrate, Pilibhit, and the Additional Sessions Judge, Court No. 3, Pilibhit, respectively, directing him to pay interim maintenance of Rs. 3,000/- per month to Opposite Party No. 2 (his wife) under Section 23 of the Protection of Women from Domestic Violence Act, 2005 (D.VS Act). The revisionist argued that a prior compromise in 2009 under Section 125 Cr.P.C., where Opposite Party No. 2 received Rs. 1,50,000/- as permanent alimony and agreed to end litigation, barred her from seeking further maintenance, especially since she lived separately since 2009 and did not reside in a shared household. He further contended that the courts below failed to apply judicial mind, ignored the compromise, and passed orders based on insufficient evidence. Opposite Party No. 2 and the St. argued that the revision was maintainable under Sections 397/401 Cr.P.C., as per the Full Bench decision in Dinesh Kumar Yadav Vs St. of U.P., and that no legal bar prevented maintenance under the D.VS Act despite the prior compromise, as the revisionist remained her husband, and she was unable to maintain herself. Held: (1) The criminal revision was dismissed, upholding the orders of the courts below. (2) The revision was maintainable under Sections 397/401 Cr.P.C. against the appellate order under Section 29 of the D.VS Act, as clarified by Dinesh Kumar Yadav Vs St. of U.P.. (3) The prior compromise under Section 125 Cr.P.C. did not bar Opposite Party No. 2 from seeking maintenance under the D.VS Act, as the remedies under different statutes (Cr.P.C., D.VS Act, Hindu Marriage Act) are independent and not mutually exclusive, as held in Nagendra Natikar Vs Neelamma and Rajnesh Vs Neha. (4) The definition of "shared household" under Section 2(s) of the D.VS Act includes a household where the aggrieved person lived at any stage, and physical presence

at the time of filing is not mandatory, as clarified in Juveria Abdul Majid Patni Vs Atif Iqbal Mansoori and Vandhana Vs T. Srikanth. (5) Opposite Party No. 2, as the legally wedded wife living separately since 2009, was entitled to seek relief under the D.VS Act, as prior cohabitation satisfied the domestic relationship requirement. (6) The courts below correctly assessed the evidence, including Opposite Party No. 2's inability to maintain herself after her father's death, and no illegality or perversity was found in the impugned orders. (7) No costs were awarded.

Case Law Cited:

1. Dinesh Kumar Yadav Vs St. of U.P., Criminal Revision No. 582 of 2016, decided on 27.10.2016 (All. HC, Lucknow)
2. Nagendra Natikar Vs Neelamma, (2013) 0 Supreme (SC) 253
3. Sunil Sachdeva Vs Rashmi & anr., (2023) 1 Crimes (HC) 7
4. Chandrabhushan Vs Smt. Savita Bai, FAM No. 03 of 2017, decided on 11.11.2021 (Chhattisgarh HC)
5. Rajnesh Vs Neha & anr., (2021) 2 SCC 324
6. Ramchandra Laxman Kamble Vs Shobha Ramchandra Kamble & anr., 2018 SCC OnLine Bom 7039
7. Shahnaz Bano Vs Babbu Khan, 1985 Mh.L.J. 853
8. Rameshwar Vs St. of Maharashtra, 2018 (4) Mh.L.J. (Cri.)
9. Tejaswini Vs Chandrakant Kisanrao Shirsat, 2005 (3) Mh.L.J. 137
10. Mahesh Chandra Dwivedi Vs St. of U.P. & anr., (All. HC)
11. Rajesh R. Nair Vs Meera Babu, (Kerala HC)

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

1. This criminal revision under Section 397/401 Cr.P.C. has been filed by the revisionist with a prayer to quash the judgment and order dated 8th April, 2022 passed by the Civil Judge (Junior Division)/F.T.C./W.P./Judicial Magistrate, Pilibhit in Complaint Case No. 2256 of 2017 (Smt. Mamta Devi Vs. Raj Kumar Mishra & Others) and the judgment and order passed by the Additional Sessions Judge, Court No.3, Pilibhit dated 27th July, 2023 in Criminal Appeal No. 61 of 2022 (Ram Kumar Mishra Vs. Smt. Mamta & Another), whereby the appeal filed by the revisionist against the judgment and order dated 8th April, 2022 has been dismissed.

2. I have heard Mr. Ashutosh Tiwari, learned counsel for the revisionist, Mr. M. Ashif, learned counsel for opposite party no.2 and Mr. Ratnesh Kumar Singh, learned A.G.A. for the State.

Case of the Revisionist

3. Opposite Party No. 2 was married with the revisionist in year 2001 according to Hindu Rites and Rituals without any fulfilment of dowry. After sometime of the marriage due to misguidance of parents of Opposite Party No. 2, the relationship between the husband and wife became strained and incompatible and opposite party no.2 refused to joins the company of the revisionist and started matrimonial litigation. The Opposite Party No. 2 filed a case under Section 125 Cr.P.C in the Court of Judicial Magistrate, Pilibhit for maintenance which was registered as Maintenance Suit no.650 of 2009 (Smt. Mamta Devi Versus. Ram Kumar Mishra). Thereafter the court below has recorded the statement of P.W.1 Mamta Devi in which she has stated that she has received total maintenance amount in one time as

Rs.1,50,000/- and she did not want to proceed this case against the revisionist any further. After that the statement of D.W.1 Ram Kumar has been recorded in which he has stated that he has paid Rs.1,50,000/- to his wife and now he had no concern with her in any manner. The Judicial Magistrate, Pilibhit after consideration of the aforesaid fact had rejected the application of the Opposite Party No. 2 vide impugned judgment and order dated 28.7.2009. Thereafter in the aforesaid case compromise has been arrived at between the both the parties on 28.7.2009 in the presence of some respected person of the society in which the opposite party no.2 has stated that she has received all the maintenance amount from the revisionist and no dues upon the revisionist was left.

4. Thereafter the opposite party no.2 also filed a case under Section 23 of Protection of Women From Domestic Violence Act (for short "D.V.Act) in the year 2017 which was registered as Complaint Case No.3356 of 2017 (Smt. Mamta Devi Versus Ramkumar Mishra and others). The Civil Judge (Junior. Division)/F.T.C./W.P/ Judicial District-Pilibhit without considering the facts and circumstances of the case allowed the complaint case under Section 23 of D.V. Act with the direction upon the revisionist to pay Rs.3,000/- per month as maintenance allowance on every 10 day of the the calender month vide order dated 8.4.2022. Being aggrieved by the order dated 8.4.2022 passed by Civil Judge (Jr. Div.)/F.T.C./W.P/ Judicial Magistrate, District-Pilibhit, revisionist filed Criminal Appeal before the court of Additional District Judge-III Pilibhit which was registered as Criminal Appeal No.61 of 2022 (Ram Kumar Mishra Vs. Smt. Mamta and others). The Additional District Judge-

III Pilibhit without considering the proper facts and circumstances of the case rejected the appeal of the revisionist and confirmed the order dated 8.4.2022 passed by Civil Judge Jr. Div.)/F.T.C./W.P/ Judicial Magistrate, District-Pilibhit vide order dated 27.7.2023. Both the orders passed by the courts below dated 8.4.2022 and 27.7.2023 are against the evidence on record. Both the courts below did not apply the judicial mind and disbelieved the objection of the revisionist and also believed the version of Opposite Party No. 2.

5. Submissions of the learned counsel for the revisionist

(I) The concerned Court below has not applied his judicial mind and wholly on the basis of surmises and conjectures believed the affidavit of Opposite Party No. 2 and his witnesses and have not examined to prove the authenticity of the affidavit and witnesses.

(II) In the proceedings under Section 125 Cr.P.C., the concerned court below has recorded the statement of P.W.1 Mamta Devi in which statement she has stated that she has received total maintenance amount in one time as Rs.1,50,000/-and she does not want to continue with the proceedings under Section 125 Cr.P.C. any further, and opposite party no. 2 is residing separately after taking permanent alimony since 28.07.2009, when on the other hand she has filed complaint seeking relief under D.V. Act in the year 2017 under Section 23 of Women Domestic Violence which was registered as Complaint Case No.3356 of 2017 (Smt. Mamta Devi Versus. Ramkumar Mishra and others) i.e. after long period of 8 years, for which no plausible explanation of said delay has

been given in the said complaint despite the fact that a compromise has been entered into between both the parties on 28.7.2009 in the presence of some respected person of the society in which the opposite party no.2 has stated that she has received all the maintenance amount from the revisionist and no dues was left upon the revisionist any further.

(III) The concerned Judicial Magistrate, Pilibhit after consideration of the aforesaid fact has rejected the application of the Opposite Party No. 2 vide impugned judgment and order dated 28.7.2009.

(IV) The Civil Judge (Jr. Div.)/F.T.C./W.P/ Judicial Magistrate, District-Pilibhit without considering the facts and circumstances of the case has allowed the complaint case under Section 23 of Domestic Violence of Women with the direction to the revisionist to pay Rs. 3,000/- per month as Maintenance amount on every 10th day of the calender month vide order dated 8.4.2022. Feeling aggrieved with the order dated 8.4.2022 the revisionist filed Criminal Appeal before the court of Additional District Judge-III Pilibhit which was registered as Crl. Appeal No.61 of 2022 (Ram Kumar Mishra Vs. Smt. Mamta and others) and the said appeal has been dismissed by the concerned Sessions Judge confirming the order of the concerned Magistrate dated 8th April, 2022, which is per se illegal.

(V) Both the courts below i.e. Civil Judge (Jr. Div.)/F.T.C./W.P/ Judicial Magistrate, District-Pilibhit and Addl. Sessions Judge Court No.3, Pilibhit did not apply their judicial mind and disbelieved the objection of the revisionist and also believed the version of the Opposite Party No. 2 while passing the impugned orders. Both the courts below have recorded perverse finding, which is based on no

evidence and from the findings recorded by both the courts below it is not clear as on what circumstances and on what evidence, the affidavits of Opposite Party No. 2 and her witnesses have been taken into consideration and affidavit of Revisionist has been discarded.

6. On the preliminary objection raised on behalf of opposite party no.2 that the present criminal revision under Section 397/401 Cr.P.C. is not maintainable against the impugned order awarding interim maintenance under the D.V. Act in favour of a wife (opposite party no.2 herein) as the same is an interlocutory order, learned counsel for the revisionist has placed reliance upon the reference answered by a Full Bench of the Lucknow Bench of this Court dated 27th October, 2016 passed in **Criminal Revision No. 582 of 2016 (Dinesh Kumar Yadav Vs. State of U.P. & Others)**, wherein it has been answered as follows:

"23. Under Section 397 of Cr P C "the High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court...". That the Court of Sessions is as an inferior Court to the High Court, cannot be disputed. Thus, the Court of Sessions before which an appeal has been prescribed under Section 29 of the Act, 2005 is a Criminal Court inferior to the High Court and, therefore, a revision against its order passed under Section 29 will lie to the High Court under Section 397 Cr P C. Section 401 Cr P C is supplementary to Section 397 Cr P C.

23.1 Section 4 (2) Cr P C does not have any application to the present case. Since the Act, 2005 does not prescribe any special form of procedure either for the proceedings under Sections 12, 18, 19, 20,

21, 22 and 23 or for an appeal under Section 29, therefore, Section 5 is also not attracted.

23.2 In view of the above, as the remedy of an appeal had been provided under Section 29 of the Act, 2005 before a Court of Sessions, which means a Court of Sessions referred under Section 6 read with Sections 7 and 9 of the Cr P C, without saying anything more as regards the procedure to be followed in such appeal, and there being nothing to the contrary in the Act of 2005 which may be indicative of exclusion of the application of the provisions of Cr P C to such an appeal, the normal remedies available against a judgment and order passed by a Court of Sessions by way of appeals and revisions prescribed under the Cr P C before the High Court, are available against an order passed in appeal under Section 29 of the Act, 2005.

24. The Single Judge Benches of this Court in the case of Nishant Krishan Yadav (supra) and Mrs. Manju Sree Robinson (supra) have erred in holding that such a criminal revision is not maintainable before the High Court. The judgment in Chiranjeev Kumar Arya (supra) against which the Special Leave Petition has been dismissed by the Supreme Court on 12.08.2016 and the judgment in Prabhunath Tiwari (supra) lay down the law correctly.

25. In the result, we answer the first question in the affirmative holding that the decisions in Nishant Krishna Yadav (supra) and Manju Shree Robinson (supra) do not lay down the law correctly. In other words, we hold that a revision under Section 397/401 of Cr P C against a judgment and order passed by the Court of Sessions under Section 29 of the Act, 2005 is maintainable and that the decisions in Nishant Krishna Yadav (supra) and Manju

Shree Robinson (supra) do not lay down the law correctly.

Reference is answered, accordingly.”

7. To the submission made by the learned counsel for opposite party no.2 during the course of argument that after final settlement between the husband and wife, the husband is entitled to pay maintenance allowance to wife unless she gets married with some other persons or decree of divorce was passed as per the Apex Court in case of **Nagendrappa Natikar Vs. Neelamma** reported in 2013 0 Supreme (SC) 253 as well as judgment passed by Hon'ble Panjab & Haryana High Court in Case of **Sunil Sachdeva Vs. Rashmi and Another** reported in 2023 1 Crimes. (HC) 7, learned counsel for the revisionist submits that both the judgments are related to section 125 Cr. P. C. but present case is related to Domestic Violence Act which is a special act and has been formed to provide effective protection of the rights of the women guaranteed under the Constitution of India who are victims of violence of any kind occurring within the family. In support of the said submission, learned counsel for the revisionist has referred to the definition of Domestic Violence which has been given in Section 3 of the D.V. Act.

8. Learned counsel for the revisionist further submits that the aforesaid provision clarifies that for the purposes of committing offence it is necessary that aggrieved person should reside in shared household while it is admitted fact that opposite party no. 2 is residing separately from the revisionist since 28.07.2009 after making final settlement on the condition to take permanent of alimony

of Rs. 1,50,000/- as such, opposite party no. 2 has no right to seek relief under the Act therefore the impugned orders are unreasoned and illegal and the same are liable to be set aside on the sole ground.

9. On the cumulative strength of the aforesaid, learned counsel for the revisionist submits that both the Courts below have committed manifest error of law and facts and committed procedural illegality, as without examining the entire facts and circumstances, have passed the impugned order dated 8.4.2022 and order dated 27.7.2023, which have no legs to stand in the eye of law. Both the impugned orders dated 8.4.2022 and order dated 27.7.2023 are highly, unjust, improper as well as against the correct provisions of law and such orders are liable to be quashed by this Court while exercising revisional jurisdiction under Section 397/401 Cr.P.C. It is further prayed that in case no suitable order or direction is by this Court, the Revisionist will suffer loss and injury, which cannot be compensated in any terms of way.

Submissions advanced on behalf of the State and the opposite party no. 2

10. At the time of final hearing, learned counsel for opposite party no.2 and the learned A.G.A. for the State have fairly conceded that in view of the Full Bench Judgment of the Lucknow Bench of this Court in the case of **Dinesh Kumar Yadav (Supra)**, against the orders impugned the present criminal revision is maintainable., therefore, no question arise for the maintainability of the present criminal revision as this Court also agrees with the

answer given by the Full Bench referred to above.

12. However, on merits, in reply to the submissions made by the learned counsel for the revisionist, learned counsel for opposite party no.2 and the learned A.G.A. for the State submit that there is no illegality or infirmity in the impugned orders passed by both the courts below so as to warrant any interference by this Revisional Court in exercise of its powers under Sections 397/401 Cr.P.C. As such the present criminal revision is liable to be dismissed.

13. Apart from the above, learned counsel for opposite party no.2 submits that neither any divorce petition has been filed by both the parties nor any decree of divorce has been passed by Family Court, meaning thereby that till now opposite party no.2 is legally wedded wife of the revisionist. It is further submitted that it is no doubt true that opposite party no.2 had obtained earlier Rs. 1,50,000/- from her husband i.e. the revisionist herein but in the earlier proceedings initiated under the provisions of Section 125 Cr.P.C., which is a different Code. When opposite party no.2 was unable to maintain herself because her father was expired, she has filed an application under Section 23 of D.V. Act before the concerned Magistrate and in the said proceedings the impugned order of maintenance has been passed in favour of opposite party no.2.

14. Learned counsel for opposite party no.2 further submits that there is no bar to file maintenance case in different provisions of law after the compromise. In support of such submissions, learned counsel for the opposite party no.2 has placed reliance upon paragraph nos. 10

and 11 of the judgment of the Apex Court in the case of **Nagendra Natikar Vs. Neelamma** reported in *2013 0 Supreme (SC) 253*. Learned counsel for opposite party no.2 has further relied upon the Division Bench Judgement of the Chhattishgarh High Court **dated 11th November, 2021 passed in FAM No. 03 of 2017 (Chandrabhushan Vs. Smt. Savita Bai)**, wherein in paragraph nos. 55 and 56 it has been held that any maintenance awarded to a woman under the provisions of D.V. Act would not be bar to seek further maintenance under Section 125 Cr.P.C. or under Section 24 of the Hindu Marriage Act. He has also referred to the judgment of the Punjab and Haryana High Court in the case of **Sunil Sachdeva Vs. Rashmi & Another** reported in *2023 1 Crimes (HC) 7*, wherein it has been observed that compromise cannot forfeit the right of a wife to claim maintenance from husband.

15. Learned counsel for opposite party no.2 then submits that the father of opposite party no.2 has expired and she is dependent upon her brother and she cannot maintain herself and since the revisionist is her husband, he is liable to pay maintenance allowance to opposite party no.2 as opposite party no.2 has legal right to obtain maintenance allowance for maintaining herself from the revisionist and there is no bar to file an application for maintenance allowance under the D.V. Act after compromise in any other proceedings initiated earlier.

16. Learned counsel for opposite party no.2 again submits that since opposite party no.2 is living with her brother and old age mother and she is legally wedded wife of the revisionist, he is duty bound to maintain his wife i.e. revisionist herein.

17. On the cumulative strength of the aforesaid, learned counsel for opposite party no.2 submits that since the courts below have passed just and legal orders while directing the revisionist to pay the interim maintenance of Rs. 3,000/- to his wife i.e. opposite party no.2, the present criminal revision filed by the revisionist has no legal ground and is liable to be dismissed.

18. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present criminal revision especially the impugned orders passed by the courts below.

19. It is important for this Court to first come to the findings recorded by the Civil Judge (Junior Division) F.T.C./D.P./J.M., Pilibhit dated 8th April, 2022 under the provisions of D.V. Act directing the revisionist to pay Rs. 3,000/- to opposite party no.2 per month towards interim maintenance. For ready reference, the findings are being quoted herein below:

“पत्रावली के अवलोकन से विदित है कि परिवादिनी द्वारा अपने प्रार्थना पत्र के माध्यम से दौरान वाद वाद पैरवी करने एवं अपने दैनिक खर्चों हेतु अन्तरिम भरण -पोषण दिलाये जाने की याचना की गयी है। परिवादिनी द्वारा यह भी कथन किया गया है कि वह वर्ष 2008 से अपने मायके में रही रही है परिवादिनी के पिता की मृत्यु हो चुकी है। ऐसी स्थिति में परिवादिनी को वाद व्यय वहन करने एवं अपनी दैनिक आवश्यकताओं की पूर्ति हेतु दौरान वाद अन्तरिम भरण -पोषण दिलाये जाना विधिक एवं न्यायोचित प्रतीत होता है। अतः प्रार्थिनी का प्रार्थना पत्र आंशिक रूप से स्वीकार किये जाने योग्य है।”

20. Now this Court comes to the findings recorded by the appellate court while dismissing the appeal filed by the revisionist against the order dated 8th April, 2022 by the judgement and order dated

27th July, 2023. For ready reference, the findings are extracted herein below:

10. "अपीलार्थी की ओर से विद्वान अधिवक्ता द्वारा यह तर्क भी प्रस्तुत किया गया है कि उसकी पत्नी वर्ष 2008 से मायके में रह है एवं उसके द्वारा प्रार्थनापत्र में उसके सभी परिवार वालों यानि 6 लोगों पक्षकार बनाया गया है, और झूठा प्रार्थनापत्र दिया गया है एवं न ही पत्नी के साथ किसी प्रकार की घरेलू हिंसा की गयी है। अपीलार्थी द्वारा प्रस्तुत उक्त तर्क उभयपक्षों का साक्ष्य लिये जाने के पश्चात वाद के अंतिम निस्तारण के समय विचारणीय है, इस स्तर पर मात्र अंतरिम भरण-पोषण हेतु धारा 23 घ घरेलू हिंसा से महिलाओं के संरक्षण अधिनियम के निस्तारण में विद्वान अवर न्यायालय द्वारा पारित आलोच्य आदेश, जो कि मात्र दौरान विचारण अन्तरिम भरण-पोषण व वाद व्यय से सम्बन्धित है, के गुणावगुण पर अपीलीय न्यायालय द्वारा विचार किया जाना है। धारा 23 (1) घरेलू हिंसा से महिलाओं के संरक्षण अधिनियम के अन्तर्गत विद्वान मजिस्ट्रेट को अन्तरिम और एकपक्षीय आदेश देने की शक्ति प्रदान की गयी है तथा इसमें यह प्रावधानित है कि "मजिस्ट्रेट इस अधिनियम के अधीन उसके समक्ष किसी कार्यवाही में, ऐसा अन्तरिम आदेश, जो उचित और न्यायोचित हो, पारित कर सकेगा।" किन्तु प्रस्तुत प्रकरण में विपक्षी की उपस्थिति के पश्चात एवं सुनवायी का पूर्ण अवसर दिये जाने के पश्चात उसकी अनुपस्थिति में उक्त प्रावधान के अन्तर्गत विद्वान अवर न्यायालय द्वारा प्रार्थिनी / प्रत्यर्थी के प्रार्थनापत्र को एकपक्षीय रूप से स्वीकार करते हुए दौरान वाद 3000 /- रुपये प्रतिमाह, विपक्षी / अपीलार्थी द्वारा प्रार्थिनी को प्रदान किये जाने हेतु आलोच्य आदेश द्वारा आदेशित किया गया है, जो कि पूर्णतः तथ्यात्मक विधिक एवं क्षेत्राधिकार के अन्तर्गत है।

11. प्रकरण के तथ्य एवं परिस्थितियों व विद्वान अवर न्यायालय द्वारा आलोच्य आदेश में किये गये उपरोक्त संप्रेक्षणों को दृष्टिगत रखते हुए यह न्यायालय इस निष्कर्ष पर पहुंचती है कि विद्वान अवर न्यायालय द्वारा पारित आलोच्य आदेश दिनांकित 08.04.2022 में कोई अवैधानिकता व अनियमितता दर्शित नहीं होती है तथा विद्वान अवर न्यायालय द्वारा पारित आदेश समुचित तथा विधिपूर्ण है। अतः विद्वान अवर न्यायालय द्वारा पारित आलोच्य आदेश में हस्तक्षेप किये जाने का कोई आधार नहीं बनता है। तदनुसार अपीलार्थी की ओर से प्रस्तुत अपील आधारहीन होने के कारण निरस्त किये जाने योग्य है।"

21. It is also required for this Court to refer to the relevant paragraphs of the judgments of the Apex Court in the case of

Nagendra Natikar, (Supra) which has heavily been relied upon by the learned counsel for opposite party no.2

22. Paragraph nos. 10 and 11 of the case of **Nagendra Natikar (Supra)** read as follows:

“10. Section 125 Cr.P.C. is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for a full and final determination of the status and personal rights of parties, which is in the nature of a civil proceeding, though are governed by the provisions of the Cr.P.C. and the order made under Section 125 Cr.P.C. is tentative and is subject to final determination of the rights in a civil court.

11. Section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a Court of Law and such an agreement is void, since the object is unlawful. Proceeding under Section 125 Cr.P.C. is summary in nature and intended to provide a speedy remedy to the wife and any order passed under Section 125 Cr.P.C. by compromise or otherwise cannot foreclose the remedy available to a wife under Section 18 (2) of the Act.”

23. In the case of **Rajnesh Vs. Neha & Another** reported in (2021) 2 SCC 324, the Apex Court has opined that there is no inconsistency between Cr.P.C. and the Hindu Adoptions and Maintenance Act, 1956 (HAMA) and both can stand together. Though there are different enhancements providing for maintenance, each enactment provides an independent and distinct remedy framed with a specific object and purpose. It has been further opined that the

provisions of maintenance in secular laws like the Special Marriage Act, 1954 (SMA), Section 125 Cr.P.C. and the Protection of Women from Domestic Violence Act, 2005 (the DV Act) are irrespective of religious community to which they belong and apart from other remedies provided in personal laws like dissolution of marriage or restitution of conjugal rights etc. The relevant portion whereof reads as follows:

“....In Nanak Chand v Chandra Kishore Aggarwal & Ors., the Supreme Court held that there was no inconsistency between the Cr.P.C. and HAMA. Section 4(b) of HAMA would not repeal or affect the provisions of Section 488 of the old Cr.P.C. It was held that :

“4. Both can stand together. The Maintenance Act is an act to amend and codify the law relating to adoptions and maintenance among Hindus. The law was substantially similar before and nobody ever suggested that Hindu Law, as in force immediately before the commencement of this Act, insofar as it dealt with the maintenance of children, was in any way inconsistent with Section 488, Cr.P.C. The scope of the two laws is different. Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. ...”

24. In the case of **Ramchandra Laxman Kamble vs Shobha Ramchandra Kamble And Another** reported in 2018 SCC OnLine Bom 7039, the Bombay High Court has observed as follows:

“13. There are several rulings, which take the view that an agreement, in which the wife gives up or relinquishes her right to claim maintenance at any time in

the future, is opposed to public policy and, therefore, such an agreement, even if voluntarily entered, is not enforceable. The two courts in the present case have basically relied upon such rulings and held that even if it is assumed that the parties had voluntarily agreed to give up their time to claim maintenance from each other, such agreement is opposed to public policy and, therefore, the same is not enforceable, or the same does not bar the maintainability of an application under Section 125 of Cr.P.C. There is no jurisdictional error in the view taken by these two courts so as to warrant interference under Article 227 of the Constitution of India.

14. In Shahnaz Bano d/o Aslam Khan (Smt.) vs. Babbu Khan s/o Nanhekhani Pathan & Another 1, learned Single Judge of this Court has held, considering the trend of decisions of different courts in India and the Supreme Court, that he was firmly of the view that even in a case covered by Clause (c) of Section 127 (3) of Cr.P.C., where the wife has surrendered her rights voluntarily, in a given case, if after waiving her rights to maintenance, she becomes vagrant and destitute and is unable to maintain herself, then irrespective of her personal law, she would be entitled to avail statutory remedy for maintenance under Section 125 of Cr.P.C.

15. In Rameshwar s/o Sandu Kachkure VS. State of Maharashtra & Another, learned Single Judge of this Court has taken a view that an agreement, by which the wife relinquishes her right to receive maintenance any time in future, is contrary to public policy and consequently unenforceable.

16. In Tejaswini d/o Anandrao Tayade And Anr. vs. Chandrakant Kisanrao Shirsat And Anr.3, another Single Judge of this 1 1985 Mh.L.J. 853 2 2018(4)

Mh.L.J.(Cri.) 3 2005(3) Mh.L.J. 137, Court refused to reject an application under Section 125 Cr.P.C. on the ground that wife in the customary divorce deed and consent deed executed by her relinquished her claim for past and future maintenance. To the same effect are the observations of a learned Single Judge of Allahabad High Court in Mahesh Chandra Dwivedi Vs. State of U.P. & Another.

17. In Rajesh R. Nair vs. Meera Babu 5, Division Bench of Kerala High Court has held that an agreement, by which the wife waived her right to claim maintenance, would be a void agreement as against public policy. Such an agreement would amount to ousting of jurisdiction of Magistrate and Family Court to entertain maintenance claim, which cannot be permitted by law. Therefore, the claim for maintenance cannot be rejected on the basis of such agreement of waiver of right to maintenance.”

25. On overall evaluation and deeper scrutiny of the records of the present criminal revision, submissions made by the learned counsel for the parties and also the case laws referred to herein above, this Court finds substance in the submissions made by the learned counsel for opposite party no.2 that no provisions of law like Hindu Marriage Act or Protection of Women from Domestic Violence Act restrict any wife to file an application seeking maintenance allowance from her husband on the ground that she has already obtained permanent alimony on the basis of a compromise in a proceedings initiated by her under the provisions of Section 125 of Code of Criminal Procedure.

26. So far as the submission made by the learned counsel for the revisionist that since the opposite party no.2 is residing

separately from the revisionist since 28th July, 2009 after final settlement between the parties, no offence under the provisions of D.V. Act is made out against the revisionist, is concerned, this Court may refer to the provisions of Section 2 (s) of D.V. Act in which definition of shared household has been given. For ready reference, Section 2 (s) reads as follows:

“2. Definitions.--

.....

(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.”

27. From the perusal of the aforesaid definition of Shared Household it is apparently clear that The use of the expression **“at any stage has lived”** immediately after words “person aggrieved lives” has been used to protect the women from denying any on the ground that on the date when application is filed, she was excluded from possession of the house or temporarily absent. The shared household is contemplated to be the household, which is a **dwelling place of aggrieved person in present time**. The shared household referred to in Sec 2(s) is the shared household of the aggrieved person where

she was living at the time when the application was filed or in the recent past had been excluded from the use or she is temporarily absent.

28. In the case of **Juveria Abdul Majid Patni vs. Atif Iqbal Mansoori and Another** reported in *[(2014) 10 SCC 736]*, the Hon’ble Supreme Court while interpreting the definition of aggrieved person under Section 2(a) of the D.V. Act has held that apart from the woman who is in a domestic relationship, any woman who has been in a domestic relationship with the respondent, if alleged to have been subjected to any act of domestic violence by the respondent comes within the meaning of aggrieved person.

29. Further, after analysing the relevant provisions of the D.V. Act, the Hon’ble Supreme Court in the case of **Juveria Abdul Majid Patni (Supra)** while referring to the earlier judgment of the Apex Court in the case of **V.D. Bhanot vs. Savita Bhanot** reported in *[(2012) 3 SCC 183]*, held that the conduct of the parties even prior to coming into force of the D.V. Act could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. The wife who had shared a household in the past but was no longer residing with her husband can file a petition under section 12 if subjected to domestic violence. It was further observed that where an act of domestic violence is once committed, then a subsequent decree of divorce will not absolve the liability of the respondent from the offence committed or to deny the benefit to which the aggrieved person is entitled to.

30. The High Court of Madras in the case of **Vandhana Vs. T. Srikanth and Krishnamachari** reported in *2007 SCC*

OnLine Mad 553 has held that it is not necessary for any woman to establish her physical act of living in “Shared Household” either at time of institution of proceedings or in the past. It has been further opined that her her bodily presence or absence from “shared household” cannot belittle her relationship on anything other than “domestic relationship”. Relevant paragraph 20 of the judgement of the Madras High Court is being extracted herein-below:

“20. In a society like ours, there are very many situations, in which a woman may not enter into her matrimonial home immediately after marriage. A couple leaving for honeymoon immediately after the marriage and whose relationship gets strained even during honeymoon, resulting in the wife returning to her parental home straight away, may not stand the test of the definition of domestic relationship under Section 2(f) of the Act, if it is strictly construed. A woman in such a case, may not live or at any point of time lived either singly or together with the husband in the “shared household”, despite a legally valid marriage followed even by its consummation. It is not uncommon in our society, for a woman in marriage to be sent to her parental home even before consummation of marriage, on account of certain traditional beliefs, say for example, the intervention of the month of Aadi. If such a woman is held to be not entitled to the benefit of Section 17 of the Act, on account of a strict interpretation to Section 2(f) of the Act that she did not either live or at any point of time lived together in the shared household, such a woman will be left remediless despite a valid marriage. One can think of innumerable instances of the same aforesaid nature, where the woman might not live at the time of

institution of the proceedings or might not have lived together with the husband even for a single day in the shared household. A narrow interpretation to Sections 2(f), 2(s) and 17 of the Act, would leave many a woman in distress, without a remedy. Therefore, in my considered view a healthy and correct interpretation to Sections 2(f) and 2(s) would be that the words “live” or “have at any point of time lived” would include within their purview “the right to live”. In other words, it is not necessary for a woman to establish her physical act of living in the shared household, either at the time of institution of the proceedings or as a thing of the past. If there is a relationship which has legal sanction, a woman in that relationship gets a right to live in the shared household. Therefore, she would be entitled to protection under Section 17 of the Act, even if she did not live in the shared household at the time of institution of the proceedings or had never lived in the shared household at any point of time in the past. Her right to protection under Section 17 of the Act, co-exists with her right to live in the shared household and it does not depend upon whether she had marked her physical presence in the shared household or not. A marriage which is valid and subsisting on the relevant date, automatically confers a right upon the wife to live in the shared household as an equal partner in the joint venture of running a family. If she has a right to live in the shared household, on account of a valid and subsisting marriage, she is definitely in “domestic relationship” within the meaning of Section 2(f) of the Act and her bodily presence or absence from the shared household cannot belittle her relationship as anything other than a domestic relationship. Therefore, irrespective of the fact whether the applicant/plaintiff in this case ever lived in the house of the first

respondent/first defendant after 7.2.2007 or not, her marriage to the first respondent/first defendant on 7.2.2007 has conferred a right upon her to live in the shared household. Therefore, the question as to whether the applicant/plaintiff ever lived in the shared household at any point of time during the period from 7.2.2007 to 13.6.2007 or not, is of little significance.”

31. In the present case, it is an admitted position that the aggrieved person i.e. opposite party no.2 lived with the revisionist earlier, therefore, offence under the provisions of D.V. Act will make out against the revisionist and the opposite party no.2 has every right to seek relief under the provisions of D.V. Act at any stage. As such, this Court has not found any substance in the submissions made by the learned counsel for the revisionist that since she is living separately from the revisionist, she is not entitled to any relief under the provisions of D.V. Act.

32. Resultantly, this Court finds no illegality or infirmity in the orders passed by the Courts below so as to warrant any interference by this Court under Sections 397/401 Cr.P.C.

33. The present criminal revision lacks merit and is accordingly dismissed.

34. There shall be no orders as to costs.

(2023) 11 ILRA 122
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.11.2023
BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Criminal Revision No. 5458 of 2023

Avanish @ Kallu **...Revisionist**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Revisionist:
Sri Rajeev Kumar, Sri Prashant Yadav

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Section 319 – Indian Penal Code, 1860 – Sections 147, 148, 149, 302, 307, 452, 504 – Summoning of Additional Accused – Revisional Jurisdiction – Evidence in Trial – Prima Facie Case –

The revisionist, Avansh @ Kallu, challenged the order dated 20.07.2023 passed by the Additional Sessions Judge, Court No. 2, Kasganj, summoning him as an additional accused under Section 319 Cr.P.C. in Sessions Trial No. 316 of 2022, arising from Case Crime No. 291 of 2021, under Sections 147, 148, 307/149, 302/34, 452, 504 I.P.C. The FIR, lodged by complainant Ramanpal Singh, alleged that six accused, including the revisionist, armed with firearms, entered his house, abused his family, and fired shots, resulting in the death of his son Yashveer and injury to Pushpendra, motivated by enmity from a prior election. The Investigating Officer's final report under Section 173(2) Cr.P.C. excluded the revisionist, declaring him innocent, but during the trial, prosecution witnesses (P.W.-1 Ramanpal Singh, P.W.-2 Pushpendra, and P.W.-3 Jaspal) implicated him, leading to his summoning under Section 319 Cr.P.C. The revisionist argued that the initial telephonic information to the police did not name him, the Investigating Officer found him innocent, and the trial court exceeded its jurisdiction. The St. contended that the trial court's order was based on credible witness testimonies establishing the revisionist's involvement. Held: (1) The criminal revision was dismissed, upholding the trial court's order. (2) Section 319 Cr.P.C. empowers the trial court to summon additional accused if evidence during trial suggests their involvement, requiring a standard stronger than a prima facie case for framing charges but short of conviction certainty, as per Hardeep Singh Vs St. of

Punjab. (3) The complainant's FIR and the St.ments of P.W.-2 Pushpendra under Section 161 Cr.P.C. specifically named the revisionist, and trial testimonies of three witnesses, subjected to cross-examination, prima facie established his involvement. (4) The omission of the revisionist's name in the initial telephonic information was immaterial, as his alias "Kallu" phonetically resembled "Fallu" mentioned therein, and the FIR explicitly included him. (5) The revisionist's plea of alibi, based on call detail records, was insufficient to negate his involvement, as the onus to prove alibi lies on the accused. (6) The trial court's order was based on careful appreciation of evidence and did not suffer from illegality or impropriety, warranting no interference under revisional jurisdiction.

Case Law Cited:

1. Hardeep Singh Vs St. of Punjab & ors., 2014 (1) R.C.R. (Criminal) 623

2. Labhuji Amratji Thakor & ors. Vs St. of Guj. & anr., (2019) 12 SCC 644

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Avanish @ Kallu-Petitioner has filed this criminal revision to challenge the order dated 20.7.2023 passed by Additional Sessions Judge, Court No.2, Kasgganj, whereby he has been summoned as an additional accused under Section 319 Code of Criminal Procedure in Sessions Trial No. 316 of 2022, titled *State Vs. Dharmendra and others*, arising out of Case Crime No. 291 of 2021, under Sections 147, 148, 307/149, 302/34, 452, 504 I.P.C., Police Station Amapur, District Kasganj.

2. The above F.I.R. was registered on the basis of a written complaint given by complainant-Ramanpal Singh, wherein it is alleged that his son namely, Ram Kumar is the Sarpanch of Gram Panchayat, who had defeated Vinod S/o

Revati in elections, and for this, the said candidate was nurturing a grudge against the complainant's son. Dharmendra S/o Munna had lodged a false case under Section 307 I.P.C., whereupon on 4.12.2021, the police had taken the complainant's son in custody. On the same day, the co-villagers of complainant, namely, Dharmendra, Satendra both sons of Munna, Kuldeep S/o Vinod, Pushpendra S/o Jugendra, Vinod S/o Revati, Avanish @ Kallu S/o Yuvraj residents of Gadedepur Sarset armed with fire-arm weapons entered his house and started abusing complainant and others. When Yashveer asked them not to do so, then Dharmendra, Kuldeep, Pushpendra, Vinod, Satendra and Avanish @ Kallu started firing upon Yashveer with an intention to kill him and the gun shot fired by Dharmendra hit on the chest of Yashveer. When Pushpendra @ Kare S/o Rajendra Singh, Jaspal Singh S/o Chandrapal Singh came on the spot to rescue the complainant's son, then Dharmendra and others fired at them, who saved themselves by taking shelter behind a pillar, however, gun shot fired by Kuldeep hit Pushpendra. At the time of occurrence, the complainant was not at home and in respect of the incident the villagers had already given the information to the police. On these broad allegations, the above F.I.R. was registered against six accused persons, for the alleged commission of offences punishable under Sections 147, 148, 149, 452, 307, 302, 504 I.P.C.

3. After registration of the above F.I.R., the investigation was carried out and upon completion of the same, a final report under Section 173(2) Cr.P.C. was submitted before the concerned Magistrate and as per the said report, only five accused

persons were sent to face trial, whereas accused Avani @ Kallu was declared innocent.

4. After commencement of trial, the prosecution examined three witnesses namely, P.W.-1 Ramanpal Singh, P.W.-2 Pushpendra and P.W.-3 Jaspal and thereafter, the prosecution moved an application under Section 319 Cr.P.C. for summoning the petitioner as an additional accused.

5. The trial court after considering the evidence recorded during trial proceeded to accept the application vide order dated 20.7.2023 and summoned the petitioner as an additional accused. Hence, this criminal revision petition.

6. Learned counsel for the petitioner submits that the petitioner has been erroneously summoned by the trial court, because the final report submitted by the Investigating Officer clearly establishes that the petitioner was not present at the spot. He further submits that the first version in respect of the occurrence was conveyed to the police telephonically at number 112, wherein, only four names i.e. Vinod, Fallu, Kuldeep and Dharmendra are mentioned and the petitioner is not named in the said information. He submits that trial court has exceeded its jurisdiction in exercising the powers under Section 319 Cr.P.C., therefore, interference is warranted by this Court in exercise of revisional jurisdiction.

7. Sri Yogendra Singh, learned A.G.A. for the State has argued that the trial court has examined the material on record carefully and the evidence of eye witnesses has clearly suggested the involvement of petitioner in the alleged occurrence.

According to him, the impugned order is based upon proper appreciation of material on record, therefore, he prays that the revision petition be dismissed.

8. Learned counsel for the parties have been heard and with their assistance case file has been perused.

9. Before advertng to the merits of the case, this Court deems it appropriate to analyze Section 319 Cr.P.C. and the same reads as under:-

319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when

the Court took cognizance of the offence upon which the inquiry or trial was commenced.

10. A careful reading of the above shows that an extraordinary power has been vested with the trial court to summon any person as an additional accused, during the pendency of the trial, if the evidence on record suggests the involvement of such person, who was not sent to face the trial. The above provision has been analyzed on number of occasions by Hon'ble Apex Court, and here it will be useful to refer to the decision of "Hardeep Singh Vs. State of Punjab and others" 2014 (1) R.C.R. (Criminal) 623, wherein the following observations were made:-

99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C In Section 319 Cr.P.C the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted.' There is, therefore, no scope for the Court acting under Section 319 Cr.P.C to form any opinion as to the guilt of the accused."

11. The above said judgment was again followed in **"Labhuji Amratji Thakor and others Vs. State of Gujarat and another, (2019) 12 SCC 644,"** wherein following observations were made:-

"The High Court does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie case of offence against the appellants. The mere fact that Court has power under Section 319 Cr.P.C to proceed against any person who is not named in the FIR or in the charge sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under Section 319 Cr.P.C. The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in Hardeep Singh (supra) has to apply the test, i.e. "more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction."

12. Now, while reverting to the facts of the case in hand and considering the material on record, this Court finds that the alleged occurrence took place in the house of complainant-Ramanpal Singh, wherein, his son Yashveer died of gun shot injury and Pushpendra was injured, and the case of the prosecution is based upon the evidence of eye witnesses. While examining the first argument raised by learned counsel for petitioner that in the initial information delivered to police telephonically on number 112 only four names i.e. Vinod, Fallu, Kuldeep, Dharmendra were mentioned, wherein the name of the petitioner is missing, therefore,

it would clearly show that the petitioner was not involved in the alleged occurrence, is without any merit. According to the F.I.R., six accused persons were involved in the crime and a perusal of it shows that the name of the petitioner is specifically mentioned by the complainant. Further, during the course of hearing, it is also not disputed by learned counsel for the petitioner that in the statement of injured Pushpendra recorded under Section 161 Cr.P.C., the petitioner's name is also mentioned. Concededly, neither there is any accused by the name of "Fallu" nor any such person was associated during investigation. Admittedly, petitioner is also known as "Kallu" and his name sounds phonetically similar, therefore, the said telephonic information cannot be taken as a convincing material to hold that the petitioner was not involved in the crime. According to the complainant, the petitioner being armed with fire arm weapon, also participated in the alleged crime.

13. Besides, during the trial proceedings, the material witnesses stand examined before the court, who have been cross-examined at length also, and a perusal of their depositions prima facie indicates the involvement of the petitioner in the alleged occurrence. Apart from this, the stand of the petitioner that he was not present at the place of occurrence is based upon the call details records, but the same may not be enough to extend clean chit to the petitioner, because to prove the plea of 'alibi', the onus would lie upon the accused. Therefore, the second argument raised by learned counsel for the petitioner is also without any merit.

14. Resultantly, in view of above discussion, this Court has no hesitation in

holding that the evidence recorded during trial strongly suggests the involvement of petitioner in the alleged commission of offences, and the trial court has also carefully examined the material on record while passing the impugned order. The impugned order does not suffer from any illegality or impropriety, therefore, no interference is warranted in the revisional jurisdiction.

15. The criminal revision is dismissed.

(2023) 11 ILRA 126

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 19.10.2023

BEFORE

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

First Appeal From Order No. 535 of 2001

Ram Dulari

...Appellant

Versus

Smt. Saroj Devi & Anr.

...Respondents

Counsel for the Appellant:

Santosh Tripathi, Amit Kumar Singh, Ram Singh

Counsel for the Respondents:

Arun Kumar Shukla

A.Civil Law - Motor Vehicles Act, 1988-Section 173- The claimant's husband died leaving behind a family of three dependents, The deceased was a government servant He was in receipt of a gross salary of Rs.4578/- per month-The factum of accident involving the offending truck is admitted to parties-it was incumbent upon the owner to have produced the driver in the witness-box and explained the accident consistent with absence of any negligence on his part-The owner never called her driver to the witness-box and in the absence of an eye-witness account, the Tribunal, as if it

were a Civil Court, has declined to accept a case of negligence, sans ocular or other positive evidence offered by the claimant to prove it-The principle of *res ipsa loquitur*, given the circumstances of the accident ought to have been invoked in this case -The negligence, therefore, has to be presumed on the owner's part, who has exclusive knowledge of the circumstances attending the accident through her driver-The Tribunal has felt no difficulty in holding that it was the offending truck that caused the accident- Still, the Tribunal has gone off course in not holding the owner liable because there is no evidence in the sense of an eye-witness account or other evidence aliunde to prove the offending truck's negligence-The Tribunal is not a Civil Court in seisen of an action governed by the Code of Civil Procedure, 1908- The jurisdiction of the Tribunal under the Act of 1988 is one to hold an inquiry into the accident and determine just compensation payable to the injured, or the legal representatives of the deceased, as the case may be- it was held that the duties of the Tribunal while determining a compensation claim in a motor accident are essentially inquisitorial; not adversarial. The provisions of Rule 215 of the U.P. Motor Vehicles Rules, 1998 must also be noticed- If the Tribunal was of opinion that the FIR shows that the informant was an eye-witness, the Tribunal was duty bound to examine him in the exercise of powers under Rule 215 of the Rules of 1998-Hence, The Tribunal shall proceed to decide the claim afresh. (Para 1 to 30)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Km. Jyoti Tripathi & ors. Vs Devendra Singh Yadav & ors., AHC 202049/2023
2. Srikrishna Kant Singh Vs Sri. Parameswar Achutanan Nair & ors. (2019) 4 TAC 920 : 2018 SCC OnLine Cal 5308
3. Asha Devi & ors. Vs Asst. Dir. St. Ins. & Provident Fund Deptt & ors. (2021) 4 TAC 8
4. Basthi Kasim Saheb (dead) by LRs Vs Mysore SRTC & ors. (1991) 1 SCC 298

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

1. This claimant's appeal under Section 173 of the Motor Vehicles Act, 1988 is directed against the judgment and award of Mr. Sarvat Ali Khan, the Motor Accident Claims Tribunal/ the Additional District Judge, Court No.1, Allahabad dated 24th February, 2001, declining the claim under Section 166 of the Act last mentioned and awarding for 'no fault' liability alone.

2. The facts giving rise to this appeal make a brief count.

3. On the 16th of June, 1997 in the morning hours, the claimant's husband, Ramroop was proceeding from his Village to Atrampur Post Office in order to withdraw and deposit money. After finishing his work, he was proceeding to Post Office Senghar when at about 11.30 a.m., Truck No. UP-70H-9920, driven at a high speed, proceeding from the Allahabad end of the road, approached. The driver operating the vehicle negligently hit the deceased's bicycle on the rear side, crushing him under its wheels. The accident is said to have happened in front of one Satya Narain's house, the Local Sarpanch. The truck escaped towards Pratapgarh. Ramroop, the claimant's husband died on the spot. He left behind him a family of three dependents, to wit, his widow Smt. Ram Dulari and two unmarried daughters, Asha Devi and Sangeeta Devi, aged 18 and 15 years in that order. The deceased was a government servant, a Grih Darshak, posted at the Community Health Centre, Karchhana, Allahabad. He was in receipt of a gross salary of Rs.4578/- per mensem and a net of Rs.4398/-. The deductions of Rs.180/- were beneficial, being those towards his contributions to the general provident fund

account and group insurance. The claimant, accordingly, demanded for herself and the two other dependents of the deceased, a total compensation in the sum of Rs.5,65,000/-.

4. The claimant-appellant, who has instituted this claim petition, unless the context requires an individual or different reference, shall hereinafter be called 'the claimant'.

5. The truck bearing Registration No. UP-70H-9920, which caused the accident, is owned by one Smt. Saroj Devi. She has been impleaded as opposite party No.1 to the claim petition and respondent No.1 to this appeal. She would hereinafter be referred to as 'the owner', unless the context requires an individual or different reference.

6. The New India Assurance Company Limited, Allahabad are the insurers of the offending truck. They are impleaded as opposite party No.1 to the claim petition and respondent No.2 to this appeal. They will, hereinafter, be referred to as 'the Insurers'.

7. A written statement was filed on behalf of the owner, where in para-wise reply to the claim petition, there is a general denial, except the fact that the ownership of the offending vehicle is acknowledged. In the additional pleas, the owner has averred that the offending truck is insured with the Insurers vide Policy No. 3131422000550 21/361, valid from 26.02.1997 to 25.02.1998. It is the owner's case that the offending truck was being driven by one Mehtab Khan, who held a valid driving licence. The Police have incorrectly shown the driver to be one Durga Prasad Tiwari, who has no

connection with the owner. According to her, the Police have filed a charge-sheet against a driver on mistaken identity. The owner has also denied the accident.

8. In the written statement filed on behalf of the Insurers, there is a general denial of the assertions and in the additional pleas it is said that it is incorrect to assert that the deceased died of the injuries sustained in the alleged accident. It is also denied that the accident was caused by the offending truck. There is also a denial of the fact that the accident took place due to rash and negligent driving by the driver of the offending truck. The identity of the claimants mentioned in the petition as dependents of the deceased is denied as well as the deceased's income or the post that he held at the time of his demise. There is then an averment that in the absence of complete particulars of the insurance policy, it is denied at the stage of pleadings that the offending truck was insured by the Insurers. If, however, the insurance policy, produced by the owner or the claimant at any subsequent stage, shows the Insurers to be the ones, who have issued the policy, they reserve their right to file an additional written statement. The fact that the offending truck was driven by a man duly licensed to drive it was denied, citing want of knowledge. The owner was put to strict proof of the fact. The Insurers also availed of the plea that their liability was subject to the provisions of Section 64(v)(b) of the Insurance Act.

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

“(1) Whether on 16.06.1997 at about 11.30 in the morning hours, near Police Station Nawabganj, Allahabad,

within the local limits of Police Station Nawabganj, Truck No. UP-70H-9920, on account of its driver driving it at a high speed and negligently, caused accident, where the deceased Ramroop sustained grievous injuries, resulting in his death on the spot?

(2) Whether the driver of Truck No. UP-70H-9920, at the time of the aforesaid accident, held a valid driving licence?

(3) Whether at the time of the accident, Truck No. UP-70H-9920 was validly insured with opposite party No.2 and other papers of the truck were valid? If yes, its effect?

(4) Whether the claimant is entitled to compensation on account of the death that happened in the accident? If yes, how much and from which opposite party?"

10. The claimant appeared in the witness-box herself as PW-1 and testified. In addition, documentary evidence was also produced. Vide list 29-Ga, a certificate of heirs relating to the deceased and a salary certificate in original issued by the Superintendent and In-charge Officer, Community Health Centre, Karchhana, Allahabad were filed. A list, paper No.31-Ga was filed on behalf of the claimant carrying a certified copy of the FIR, a certified copy of the charge-sheet, a certified copy of the postmortem report relating to the deceased, another salary certificate in original, paper No.35-Ga, a photostat copy of the deceased's High School certificate issued by the U.P. Board of High School and Intermediate Education and a certified copy of the site-plan.

11. The owner along with a list 17-C filed two documents, a photostat copy of

the insurance policy and a photostat copy of the driving licence relating to one Mehtab Khan.

12. The Tribunal in returning its finding on Issue No.1 held that accident involving the offending truck is proved, leading to his death on the spot, but in the absence of evidence, it could not be proved that the offending truck was being driven at a high speed and negligently.

13. Issue No.2 has been decided in favour of the claimant and against the Insurers holding that the driver of the offending truck had a valid driving licence.

14. Issue No.3 was also answered in favour of the claimant and against the Insurers holding that on the date of the accident, the offending truck was validly insured with the Insurers.

15. So far as Issue No.4 is concerned, a compensation of Rs.50,000/- was awarded to the claimants as no fault liability, because of the Tribunal's finding on Issue No.1 that negligence of the offending truck was not proved in the accident, so as to make out a case under Section 166 of the Motor Vehicles Act, 1988 (for short, 'the Act of 1988').

16. Heard Mr. Ram Singh, learned Counsel for the claimant and Mr. Arun Kumar Shukla, learned Counsel appearing on behalf of the Insurers. No one appears on behalf of the owner.

17. So far as the factum of the accident and involvement of the offending truck is concerned, the same is proved because during hearing before the Tribunal, the learned Counsel representing the owner, made a statement admitting the accident

involving her vehicle. The Police after investigation also have charge-sheeted the driver of the offending truck in the relative crime vide charge-sheet dated 14.09.1997, albeit finding that the driver of the offending truck was one Durga Prasad Tiwari son of Ram Awadh Tiwari, whereas according to the claimant, the driver of the offending truck was a certain Mehtab Khan. The owner has filed the copy of a driving licence of Mehtab Khan on record acknowledging him to be the driver of the offending truck. The Police, however, have charge-sheeted a different man as the driver of the offending truck, but they too found that it was Truck No. UP-70H-9920, the owner's vehicle that caused the accident.

18. Whoever was the driver of the offending truck, it is certainly within the knowledge of the owner and the driver as to what was the cause of the accident, and, a fortiori the negligence, if any, of the driver involved, assuming that there was no eye-witness of the accident. Of whatever evidence is forthcoming, may be circumstantial, points to the negligence of the offending truck. The chief amongst these circumstances is the fact that the deceased was hit from the rear side by the offending truck. A look at the site plan drawn up by the Police, part of the charge-sheet, indicates that the truck driver would have seen the cyclist from a distance sufficient to brake and avert the accident. The site plan shows the place of accident as 'A'. It is slightly moved from the left but not entirely in the centre of the road. The road shown in the site plan is straight and it does not suggest any kind of a sudden bend. To the right of 'A' too, there was sufficient space for the truck to have passed by safely overtaking the deceased. The site plan is strongly suggestive of the offending truck driver's negligence.

19. Whatever happened on the fateful day would certainly be within the knowledge of the owner and her driver, assuming that there was no other eye-witness. There being circumstances to suggest that the offending truck was negligent, burden would lie upon the owner to offer evidence showing that there was no negligence on the driver's part. In this context, the principle of *res ipsa loquitur* has been resorted to in case of motor accidents, where an accident happened, the cause whereof is within the offending party's knowledge. The principle was acknowledged by the Supreme Court in the case of a motor accident of a different kind, that is to say, the owner's truck catching fire and resulting in one of the employees' death, when he jumped off truck to save himself. This was the principle in **Shyam Sunder and others v. State of Rajasthan, (1974) 1 SCC 690**, where it was held:

“9. The main point for consideration in this appeal is, whether the fact that the truck caught fire is evidence of negligence on the part of the driver in the course of his employment. The maxim *res ipsa loquitur* is resorted to when an accident is shown to have occurred and the cause of the accident is primarily within the knowledge of the defendant. The mere fact that the cause of the accident is unknown does not prevent the plaintiff from recovering the damages, if the proper inference to be drawn from the circumstances which are known is that it was caused by the negligence of the defendant. The fact of the accident may, sometimes, constitute evidence of negligence and then the maxim *res ipsa loquitur* applies.

10. The maxim is stated in its classic form by Erle, C.J.: [*Scott v. London*

& *St. Katherine Docks*, (1865) 3 H&C 596, 601]

“... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.”

The maxim does not embody any rule of substantive law nor a rule of evidence. It is perhaps not a rule of any kind but simply the caption to an argument on the evidence. Lord Shaw remarked that if the phrase had not been in Latin, nobody would have called it a principle [*Ballard v. North British Railway Co.*, 1923 SC (HL) 43]. The maxim is only a convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it even when the facts bearing on these matters are at the outset unknown to him and often within the knowledge of the defendant. But though the parties' relative access to evidence is an influential factor, it is not controlling. Thus, the fact that the defendant is as much at a loss to explain the accident or himself died in it, does not preclude an adverse inference against him, if the odds otherwise point to his negligence (see John G. Fleming, *The Law of Torts*, 4th Edn., p. 264). The mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. The maxim is based as

commonsense and its purpose is to do justice when the facts bearing on causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant (see *Barkway v. S. Wales Transo* [(1950) 1 All ER 392, 399]).

11. The plaintiff merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it, makes it more probable than not that it was caused by the negligence of the defendants, the doctrine of *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability.

12. The answer needed by the defendant to meet the plaintiff's case may take alternative forms. Firstly, it may consist in a positive explanation by the defendant of how the accident did in fact occur, of such a kind as to exonerate the defendant from any charge of negligence.

13. It should be noticed that the defendant does not advance his case by inventing fanciful theories, unsupported by evidence, of how the event might have occurred. The whole inquiry is concerned with probabilities, and facts are required, not mere conjecture unsupported by facts. As Lord Macmillan said in his dissenting judgment in *Jones v. Great Western* [(1930) 47 PLR 39] :

“The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess. An inference, in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution, of an occurrence to a cause is, I take it, always a matter of inference. The cogency

of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved.”

In other words, an inference is a deduction from established facts and an assumption or a guess is something quite different but not necessarily related to established facts.

14. Alternatively, in those instances where the defendant is unable to explain the accident, it is incumbent upon him to advance positive proof that he had taken all reasonable steps to avert foreseeable harm.

15. *Res ipsa loquitur* is an immensely important vehicle for importing strict liability into negligence cases. In practice, there are many cases where *res ipsa loquitur* is properly invoked in which the defendant is unable to show affirmatively either that he took all reasonable precautions to avoid injury or that the particular cause of the injury was not associated with negligence on his part. Industrial and traffic accidents and injuries caused by defective merchandise are so frequently of this type that the theoretical limitations of the maxim are quite overshadowed by its practical significance [Millner: “Negligence in Modern Law”, 92].”

20. The aforesaid decision of the Supreme Court was followed by their Lordships in **Basthi Kasim Saheb (dead) by LRs v. Mysore State Road Transport Corporation and others, (1991) 1 SCC 298**. This was a case under the Motor Vehicles Act, 1939. It was a case where the

motor accident again did not involve a collision. It was a case where the Corporation's bus, proceeding on a certain road, moved to the right to avoid a bullock cart standing unattended. Its wheels left the metalled portion of the road and sank in the muddy soil there, leading the bus to turn turtle. The claimant, who was a passenger on board bus, sustained serious injuries, requiring a long period of hospitalization. The Motor Accident Claims Tribunal accepted it to be a case of rash and negligent act by the bus driver and decreed the claim for Rs.35,000/-. The High Court on appeal by the Corporation thought that there is no negligence of the driver involved and it was just an accident. The claim was dismissed by the High Court. On further appeal by Special Leave to their Lordships of the Supreme Court, circumstances and the evidence were noticed, that did seem to show that the driver had not slowed up sufficiently to avoid the bullock cart and risk wheels of the bus from sinking in the muddy portion of the road. The Court looked into the site plan drawn up by the Police to gauge the width of the road and other necessary circumstances. No doubt, in that case, there was oral testimony of the claimant and other witnesses, but the cause of the accident was apparently beyond explanation by ocular testimony offered by the claimant. It is in those circumstances that it was observed in **Basthi Kasim Saheb** (supra):

“8. The evidence in the case indicates that there was no traffic on the road at the time of the accident. No untoward incident took place like sudden failure of the brakes or an unexpected stray cattle coming in front of the bus and still the vehicle got into trouble. In absence of any unexpected development it was for the

driver to have explained how this happened and there is no such explanation forthcoming. In such a situation the principle of *res ipsa loquitur* applies. The petitioner, in the circumstances, could not have proved the actual cause of the accident, and on the face of it, it was so improbable that such an accident could have happened without the negligence of the driver, that the court should presume such negligence without further evidence. The burden in such a situation is on the defendant to show that the driver was not negligent and that the accident might, more probably, have happened in a manner which did not connote negligence on his part, but the defence has failed to produce any evidence to support such a possibility. We, therefore, agree with the finding of the trial court on this issue and set aside the judgment of the High Court.”

21. The principle was again invoked by the Supreme Court in **Asha Devi and others v. Assistant Director, State Insurance and Provident Fund Department and others, 2021 (4) TAC 8**, which is a case closer on facts to the one at hand. The facts relevant to the issue, the proceedings before the Tribunal and the High Court, and the holding of their Lordships are encapsulated in the observations of their Lordships in **Asha Devi** (supra), which read:

“2. The challenge in the present appeals is to an order passed by the High Court of Judicature for Rajasthan at Jaipur Bench, wherein the appeal filed by the Insurance Company was allowed and the claim petition filed Under Section 166 of the Motor Vehicles Act, 1988 was dismissed. The reason for dismissing the claim application was that the wife of the deceased had not deposed regarding the

manner of accident as she was not the eye witness. It was thus held that the accident is not proved to be on account of negligent driving of tractor by its driver.

3. We find that the reasoning given by the High Court is patently erroneous. The deceased-Ummad Singh was working as a cleanliness employee with the Municipal Council, Beawar. He had gone along with the tractor to pick up the garbage. The wife of the deceased appeared as her own witness and produced certain documents to prove income of the deceased. On behalf of the Respondents, an employee of the Insurance Company was produced as NAW-1 Akhil Ahmad and NAW-2 Tarachand Sharma. After considering the evidence on record, the learned Motor Accidents Claims Tribunal found that the deceased was an employee of Municipal Council drawing a salary of ` 13,016/- per month and was of 46 years of age. The Tribunal assessed the compensation as ` 20,14,734/- based upon the last drawn salary and future prospects. The Tribunal also granted simple interest @ 6% per annum.

4. The deceased-Ummad Singh was an employee of the Municipal Council. As per the Appellant, the accident occurred due to the negligent driving of the Tractor. However, the driver of the tractor namely, Hariprakash was not produced as a witness. He was the witness who could depose in respect of the manner of accident and to prove that he was not negligent in driving tractor. The doctrine of *res ipsa loquitur* will come into play as the Respondents have failed to discharge onus on them to prove that the accident was not on account of any negligent driving of the Tractor. This Court in *Shyam Sunder v. State of Rajasthan*, (1974) 1 S.C.C. 690, held that the maxim *res ipsa loquitur* is resorted to when an accident is shown to have

occurred and the cause of the accident is primarily within the knowledge of the Defendant.”

22. The factum of accident involving the offending truck is admitted to parties. Negligence, as noticed hereinabove, does appear to be there on part of the driver of the offending truck. In these circumstances, it was incumbent upon the owner to have produced the driver in the witness-box and explained the accident consistent with absence of any negligence on his part. Else, the owner would have to offer evidence *aliunde*, that would include the driver's testimony as well to prove that the driver had taken all reasonable care to avert the accident, but still it happened. Nothing of this kind has been done. The owner never called her driver to the witness-box and in the absence of an eye-witness account, the Tribunal, as if it were a Civil Court, has declined to accept a case of negligence, sans ocular or other positive evidence offered by the claimant to prove it. The principle of *res ipsa loquitur*, given the circumstances of the accident ought to have been invoked in this case and this Court is of opinion that it is attracted. It was for the owner to have either explained the accident or offered positive proof of absence of negligence on her driver's part, that has not been done. The negligence, therefore, has to be presumed on the owner's part, who has exclusive knowledge of the circumstances attending the accident through her driver.

23. There is another vantage of looking at the issue. The factum of accident is not denied and so also the involvement of the offending truck. There are police papers relating to the crime, which show the involvement of the offending truck running over the ill-fated bicycle that the

deceased was riding. There is no doubt a discrepancy between the identity of the driver that the owner claims and the one the Police have found on investigation. However, both are unanimous that the accident was caused by the offending truck. Whoever drove the truck, apart from its relevance to determine the Insurers' liability, does not matter much. This is so because the liability is that of the owner vicariously through his driver, who was driving the offending truck at the time of the accident in course of employment. The Tribunal has felt no difficulty in holding that it was the offending truck that caused the accident. Still, the Tribunal has gone off course in not holding the owner liable because there is no evidence in the sense of an eye-witness account or other evidence *aliunde* to prove the offending truck's negligence.

24. This would have been the correct approach if the Tribunal were a Civil Court trying a suit, but the Tribunal is not a Civil Court in *seisen* of an action governed by the Code of Civil Procedure, 1908. The jurisdiction of the Tribunal under the Act of 1988 is one to hold an inquiry into the accident and determine just compensation payable to the injured, or the legal representatives of the deceased, as the case may be. In this connection, it would be apposite to refer to the provisions of Sections 168 and 169 of the Act of 1988. These provide:

“168. Award of the Claims Tribunal.—(1) On receipt of an application for compensation made under section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case

may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:

Provided that where such application makes a claim for compensation under section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X.

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned

expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct.

169. Procedure and powers of Claims Tribunals.—(1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and

of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.”

25. The issue was considered by me in **Km. Jyoti Tripathi and others v. Devendra Singh Yadav and others, Neutral Citation No. - 2023:AHC:202049**. After an elaborate reference to a Bench decision of the Calcutta High Court in **Sri. Srikrishna Kant Singh v. Sri. Parameswar Achutanan Nair and others, 2019 (4) TAC 920 : 2018 SCC OnLine Cal 5308**, it was held that the duties of the Tribunal while determining a compensation claim in a motor accident are essentially inquisitorial; not adversarial. The provisions of Rule 215 of the U.P. Motor Vehicles Rules, 1998 (for short, 'the Rules of 1998') must also be noticed. Rule 215 of the Rules of 1998 reads:

“215. Power of examination.—

The Claims Tribunal may if it thinks necessary, examine any person likely to be able to give information relating to the injury irrespective of the fact whether such person has been or is to be called as a witness or not.”

26. If the Tribunal had reminded itself of its duties to hold an inquiry in order to determine the just compensation as

envisaged under Sections 168 and 169 of the Act of 1988, instead of the trying the claim as if it were a suit before a Court of civil jurisdiction, the Tribunal would not have held itself back from summoning necessary witnesses and other witness to pass a just award. Since the Tribunal thought of itself as a Court of civil jurisdiction trying an action, it answered the issue of negligence against the claimant on ground that no eye-witness of the accident or other evidence *aliunde* was produced that might establish the offending truck's negligence. And, to think that the Tribunal adopted this approach though the factum of accident involving the offending truck was not in dispute, certainly makes the Tribunal's determination on the issue flawed, given the nature of its inquisitorial function. The Tribunal has remarked in the judgment that the FIR was lodged by the deceased's brother Nanku Lal and the report gives an impression as if the informant was an eye-witness.

27. With this remark, the Tribunal has observed that no such material has been produced, on the basis of which, it may be impossible to infer that during police investigation, some other eye-witness of the accident was present. The Tribunal has then remarked that in the aforesaid circumstances, it is not possible to hold that the offending truck was being driven at a high speed or negligently. In the aforesaid conclusions, the Tribunal has again forsaken its role that is primarily inquisitorial. If the Tribunal was of opinion that the FIR shows that the informant, Nanku Ram was an eye-

witness, the Tribunal was duty bound to examine him in the exercise of powers under Rule 215 of the Rules of 1998. It hardly needs be gainsaid that by the time the Tribunal heard and decided the claim petition, the Rules of 1998 had come into force in Uttar Pradesh.

28. In the opinion of this Court, therefore, the conclusions of the Tribunal on Issue No.1 are patently flawed.

29. In the totality of circumstances, this matter ought to go back to the Tribunal, that has now jurisdiction to decide a motor accident claim under the Act of 1988 for decision afresh. However, the findings of the Tribunal carried in the impugned judgment and award on Issues Nos.2 and 3 are not required to be disturbed and these are affirmed. The Tribunal shall proceed to decide the claim afresh with reference to Issues Nos.1 and 4. For the purpose, the evidence on record shall be read and such other evidence would be called as the Tribunal considers expedient.

30. In the circumstances, this appeal **succeeds** and is **allowed in part**. The impugned judgment and award passed by the Motor Accident Claims Tribunal/ Additional District Judge, Court No.1, Allahabad dated 24th February, 2001 is set aside. The claim petition is restored to the file of the Motor Accident Claims Tribunal that has now jurisdiction in the matter, which shall proceed to hear and decide it afresh in accordance with law within six months of the date of

receipt of a copy of this judgment.
There shall be no order as to costs.

(2023) 11 ILRA 137
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.10.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

First Appeal From Order No. 2170 of 2022

Salik Mukhtar & Ors. ...Appellants
Versus
M/S. M.M.I. Tobacco Pvt. Ltd. & Ors.
...Respondents

Counsel for the Appellants:

Sri S.M. Iqbal Hasan, Sri Raghav Garg, Sri Tarique Quasimuddin, Sri Anurag Khanna (Sr. Advocate)

Counsel for the Respondents:

Sri Mohd. Waseem, Sri Arvind Srivastava, Sri Ravi Kant (Sr. Advocate)

A. Civil Law - Trade Marks Act, 1999-Sections 29, 124, 134 & 135 - Copyrights Act, 1956-Section 62-Infringement of trademark-Interim injunction-Validity- In the present case, the district court has recorded cogent findings on all the three ingredients by observing that the registered trademark of the plaintiff-respondents is valid upto 15.01.2024 and that the defendant-appellants have failed to establish any registered trademark or copyright with them. The court below has also observed that any rights flowing from Sri Subedar would be of no consequence as, admittedly, Subedar had retired from firm 'Musa and Sons' with effect from 01.04.1999. The court has further observed that any activity of manufacturing and sale of product which is deceptively similar with 'Musa Ka Gul Super' would be contrary to law. Regarding pecuniary and territorial jurisdiction of the district court, it has been observed by the court below that at the time of registration of the suit, the pecuniary jurisdiction was found to have vested in the court and the said issue along with an issue of territorial jurisdiction would be decided after framing the issues in the suit. manner in which injunction application has

been dealt with, findings on all three ingredients of granting injunction is based upon cogent analysis of material available on record-Even if, it is assumed that a very detailed discussion of various documents has not been made, after perusing entire record of present appeal, documents which were sufficient to form an opinion regarding grant or denial of injunction, have been dealt by Court below-Even otherwise, it was not required for district Court to hold a mini trial at time of consideration of injunction application-Once Court below was satisfied that registered trademark has been prima facie infringed by defendant-appellants, in absence of anything substantial which can persuade Court to take a different view, there is no good ground to interfere in order passed by Court below.(Para 1 to 32)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Arun Kumar Tiwari Vs Deepa Sharma & ors. F.A.F.O. No.3481 of 2004
2. Indian Performing Rights Society Ltd Vs Sanjay Dalia (2015) AIR SC 3479
3. Neon Laboratories Limited Vs Medical Technologies Ltd & ors. (2016) 2 SCC 672
4. Renaissance Hotel Holdings Inc. Vs B. Vijaya Sai & ors. (2022) 5 SCC 1

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Sri S.M. Iqbal Hasan along with Sri Raghav Garg and Sri Tarique Quasimuddin, learned counsel for the defendant-appellants and Sri Ravi Kant, learned Senior Counsel, assisted by Sri Arvind Srivastava and Sri Arvind Srivastava separately too, as learned counsel for the plaintiff-respondents.

THE APPEAL

2. This appeal under Order 43 Rule 1(r) CPC has been filed by the defendants

of Suit No.10 of 2021 (M/S. M.M.I. Tobacco Pvt Ltd and another Vs. Salik Mukhtar and five others) challenging the order dated 21.09.2022, whereby the learned Additional District Judge, Court No13, Varanasi has allowed the application seeking temporary injunction, being Paper No.6-C, filed by the plaintiff-respondents and restrained the defendant-appellants till disposal of the suit from manufacturing or selling product namely, 'Musa Ka Gul Super' or any product with the deceptively similar name and logo by which any common man could be deceived.

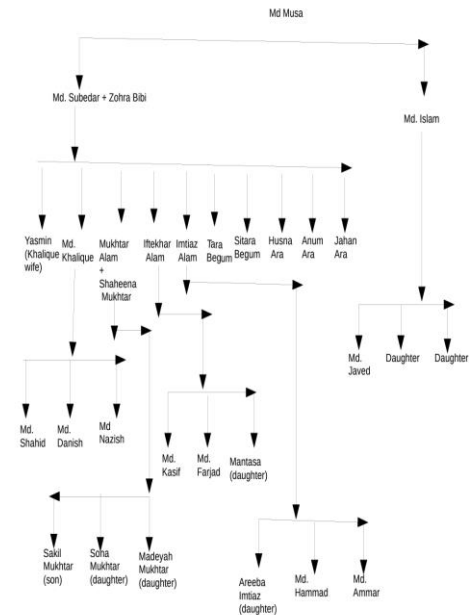
BINDING EFFECT OF THE ORDER UNDER CHALLENGE AND THIS ORDER

3. Since the present appeal has arisen out of disposal of an application seeking temporary injunction pending suit, the observations and findings recorded in the present order would not be treated as any final opinion on the merits of rival claims of the parties as the same are yet to be decided on the basis of oral and documentary evidence to be produced in the pending suit. It is well settled that the findings recorded in an order granting or refusing injunction are to be looked into only in connection with three basic ingredients, i.e. prima facie case, balance of convenience and irreparable loss and any such order does not affect final adjudication of substantive rights of the parties. Therefore, the observations recorded in the present judgment shall not affect the final adjudication to be made by the court below, independently, on the basis of oral and documentary evidence led by the parties.

THE FAMILY TREE

4. The record of this case contains discussion of various family members of late Mohd. Musa, therefore, before discussing the factual aspects of the case, it

would be necessary to draw a family tree for understanding inter-se relationship between the parties to the lis. It is described as follows:-



FACTS OF THE CASE

5. The suit giving rise to the present appeal was filed by M/s M.M.I. Tobacco Pvt Ltd represented through its Director, Mohd. Nazish son of Mohd. Khalique, as plaintiff no.1 and Mohd. Nazish, in his individual capacity, as plaintiff no.2 against six defendants, under Sections 29, 134, 135 of the Trademarks Act, 1999 and Section 62 of Copyrights Act, 1956. As per the plaint averments, the plaintiff-respondent no.1 is a private limited company with the plaintiff no.2 being its Director, involved in manufacturing and wholesale business of 'Musa Ka Gul Super', a toothpaste, in States of Uttar Pradesh, Bihar, Bengal and other States of India for the last several years, particularly, since 1994. The case of the plaintiffs is that the plaintiff no.1 has

earned a very high goodwill being a registered company manufacturing 'Musa Ka Gul Super' which is famous all over India and the company has its agency, office and store in House No. C-20/6 Mohalla Nawapura (New Pokhari) Habibpura, Ward Chetganj, City Varanasi wherefrom the aforesaid product, 'Musa Ka Gul Super', is being sold in district Varanasi as well as nearby districts. It is further pleaded that the copyright office of New Delhi has issued a registered No. A132955 of 2020 dated 31.10.2020 conferring right to use the label over the box for the product 'Musa Ka Gul Super' and the similar rights have been conferred in relation to use of wrapper also. It is further pleaded that the plaintiff no.1 is registered at registration No. U16004WB2011 PTC170780 and trademark was registered on 15.01.1994 at Trademarks No.616611, certificate No.733679 and that in the year 2021, the plaintiff-respondents came to know about identical production and sale of 'Musa Ka Gul Super Marka', 'Shahi Taj Marka Musa Ka Gul' and 'Moti Marka Musa Ka Gul' at the instance of the defendants and when the latter were contacted and requested not to use the said products, they showed arrogance and did not stop manufacturing and selling the products, due to which the entire goodwill of the plaintiff-respondents in the market was being adversely affected. Under the said circumstances, a decree for declaration was sought against the defendants restraining them as well as their shell companies or their agents and employees set up by them from manufacturing and selling 'Musa Ka Gul Super Marka', 'Shahi Taj Marka Musa Ka Gul' and 'Moti Marka Musa Ka Gul'. The plaintiff-respondents also claimed temporary injunction pending suit on the same lines by filing an application under

Order 39 read with Section 151 CPC supported by affidavit.

6. The trial court, by an ex-parte ad-interim injunction order dated 08.07.2021, restrained the defendants from manufacturing and selling product 'Musa Ka Gul' or any other product of deceptively similar name till the next date fixed in the suit. It appears that after the defendants filed objections against the injunction application and their objections were not being decided, few appeals were filed before this Court, as there were other identical matters also, and the said appeals were decided by order dated 02.11.2021 directing the trial court to decide the objections expeditiously. The order impugned in the present appeal has been passed thereafter.

7. The defendant-appellants filed objections against the injunction application. The defendant no.5 Mohd. Kashif came up with the stand that the entire business was, in fact, a family business being run by the members of the same family, being descendants of Mohd. Musa and it was agreed in between the parties that every member of the family would use the same name and goodwill associated with Musa Ka Gul product and that the defendant no.5 had not infringed any trademark or copyright of the plaintiffs and that the product being manufactured and sold by the defendant no.5 was totally different. Reference to certain proceedings, without their specific disclosure, pending in Calcutta District Court and Calcutta High Court was also given and, in sum and substance, the objection was that there being no connection in between the plaintiffs' product and defendants' product, the injunction application had no force and be rejected.

8. The defendants no.1 and 2 filed separate objections against the injunction application and, apart from factual aspects, they objected to the valuation of the property and also took a ground that the application was barred by territorial jurisdiction. On merits, it was stated as follows:-

“a. That the defendant no. 3 and 4 namely Iftekhar Alam and Imtiaz Alam are the sons of Late Md. Subedar. Md. Nazish (plaintiff no. 2) and defendant no. 5 Md. Kashif are the grandsons of Late Md. Subedar. Defendant no. 1 and 2 are the grandsons and daughter in law of late Md. Subedar, defendant no. 2;

b. A business of 'Gul' and/or tobacco based tooth powder was initiated by one Md. Musa, the deceased grandfather of the defendant no. 1 father/ husband namely Mukhtar Alam, under the distinctive trademark of 'Ghora Marka Gul' in Hindi, Urdu & English script & 'Musa Ka Gul', in Hindi script with the device of the head of a horse. The said mark has been used by Md. Musa openly & extensively since March, 1974.

c. The said Md. Musa died intestate on 1st January, 1977. On and from 1st January, 1972 the said business was continued by his sons Md. Subedar, (the father of Mukhtar Alam) and his brother, Md. Islam under the name and style of the partnership firm M/S. Md. Musa & Sons. The said M/S. Md. Musa & Sons applied for registration of the trade mark "Ghora Marka Musa Ka Gul" on 22 October, 1979 claiming a date of user since 4th March, 1974. Such registration was granted on 15.07.1982 being Trade Mark No. 354633 in Class 3. The said business through Md. Musa & Sons was carried on by the sons of Md. Musa, being Md. Subedar and Md. Islam since 21st November, 1977 from 41,

P. K. Biswas Road, Khardah, North 24 Parganas.

d. By a Partnership Deed dated 4th April, 1983, the said firm M/s. Mohammad Musa & Sons was reconstituted by inducting Mohammad Khalique, (father of plaintiff no. 2), who was also the eldest son of Md. Subedar and his wife, Zohra Bibi as partners of the firm on and from 01.04.1983, they have equal share i.e. 1/3rd share each in the said partnership firm. Moreover Md. Khalique is also the director of the plaintiff company M/s. M.M.I. Tobacco Pvt. Ltd.

e. The "Ghora Marka Musa Ka Gul" Registered Trade Mark No. 354633 in Class 3 was renewed from time to time by M/S. Md. Musa & Sons. On 25th January, 1989, the address of the said Partnership firm was changed to 145-B, Rabindra Sarani, Kolkata - 700073 and the requisite Form - 34 was also submitted to that effect.

f. On 15th January, 1994 M/s. Mohammad Musa & Sons applied for registration of a separate trademark comprising of the bust photo of Md. Musa with respect to Gul, a toothpowder made of tobacco. The bust photo which has been in use as a Trade Mark since 4th March, 1994.

g. In 1989-1990 Mukhtar Alam (father of the defendant no. 1 and husband of defendant no. 2 / son of Late Md. Subedar) started a separate business under the name and style of M/s. Md. Musa & Co., as his sole proprietorship. The said Firm used to carry on business of Gul and/or tobacco based tooth powder under the trade mark "Musa Ka Gul".

h. That by a Deed of Assignment dated 1st November, 1991, Md. Subedar, Md. Islam and Md. Khalique the M/S. Md. Musa & sons of defendant no. 1 / son of Late Md. Subedar) who is also a grandson of Md. Musa, the "Ghora Marka Musa Ka Gul" Trademark, registered under

the Trade & Merchandise Mark Act, 1958 being No. 354633 in Class 3, and the 'Ghora Marka Gul', 'Musa Ka Gul' trademarks, applications for registration of which were at the time pending, together with the goodwill of the gul tobacco business in respect of which said marks were used.

i. On 6th December, 1991 the Mukhtar Alam made an application before the Trademark Registry for recording his name as the proprietor of the said two abovementioned marks, which had since been registered, and also submitted the requisite Forms for the purpose.

j. From the aforementioned facts it is clear that the business of dentifrices made under the name and style of 'Ghora Marka Gul', 'Musa Ka Gul' was being run by the M/s. Md. Musa & Sons by Md. Khalique (father of Md. Nazish, plaintiff no. 2 therein and also one of the director of the plaintiff's company) being the eldest son of Md. Subedar and thereafter by Mukhtar Alam (husband of the defendant no. 2) through his proprietorship firm M/S. Md. Musa & Co. At all material times, it had been the clear understanding of the parties that each branch of the heirs of Md. Musa and their respective families will be entitled to engage in the business of gul tobacco which was started in the name of Md. Musa as "Musa Ka Gul" and under the various avatars of the same mark "Ghora Marka Musa Ka Gul", each comprising of the name of Md. Musa and a picture of his bust or the bust of Md. Subedar as their distinctive components. It was the understanding between all the parties herein and at material times, that each branch of the family would be entitled to

exploit the said registered and unregistered trade marks in furtherance of the business of gul tobacco started by Md. Musa.

k. Thereafter in 1st April, 1992 partnership firm was formed under name and style of M/s. Md. Musa & Co. which took over the business of the proprietorship Firm M/S. Md. Musa & Co. The reason for converting the proprietorship business into a partnership was to allow the family to prosper in its entirety and not just Mukhtar Alam's branch. The business was however looked after by Mukhtar Alam up until November 2018. Initially the partners to the M/s. Md. Musa & Co. firm were Yasmin Khalique (mother of Md. Nazish, plaintiff no. 2) each having 50% share. That Md. Khalique, (the father of Md. Nazish, plaintiff no. 2) did not want to join Mukhtar Alam in the business of the M/s. Md. Musa & Co. directly. That Md. Shahid (brother of Md. Nazish, plaintiff no. 2) at the age of 19 year, was inducted into the M/s. Md. Musa & Co. as a partner on 1st April, 2006.

l. On 9 December, 1996, the M/s. Md. Musa & Co., applied for registration of the trade mark "Musa Ka Gul Super" again comprising of the bust photo of Md. Subedar. Registration of the said Trade Mark No. 739085 was granted in class 34 in the name of Mukhtar Alam (father of the defendant no. 1) as a partner of the M/s. Md. Musa & Co. The same has been renewed from time to time.

m. It may be noted that trade mark "Musa Ka Gul Super" with the bust of Md. Subedar is the registered trade mark of the M/s. Md. Musa & Co. / partnership firm. However, the original business was a family business started by Md. Musa and all his grandsons- Md. Khalique, Iftekhhar Alam and Imtiaz Alam, Mukhtar Alam, and their respective branches of the family were at all material times had the understanding or had agreed that everybody in the family

would be entitled to benefit from the goodwill earned by said family business and would be entitled to carry on business in gul tobacco under the trade mark "Musa Ka Gul" either by itself or in conjunction with other words or devices. To facilitate the use of the said trade mark held by the M/s. Md. Musa & Co. firm by the other branches of the heirs of Md. Musa and Md. Subedar, and their respective families, it was agreed that formal licenses would be granted by the M/s. Md. Musa & Co., permitting the various branches of the family to exploit the valuable "Musa Ka Gul Super" held by the M/s. Md. Musa & Co. It was clearly understood the Licenses granted were mere formality and a means to avoid outsiders to cash in on the Goodwill earned by the Mark "Musa Ka Gul" by citing user by various persons of the said Mark. In reality, the licenses were in recognition of the aforesaid family agreement or understanding.

n. Three License Agreements were initially granted by the M/s. Md. Musa & Co. partnership firm. The first License Agreement was executed in favour of M/s. J.S. Engineering Work in 1992 run by Iftekhar Alam and Zohra Bibi, the son and wife of Late Md. Subedar. Thereafter M/s. J.S. Engineering Work was converted into proprietorship concern wherein Imtiaz Alam / defendant no. 4 was the proprietor. The name of the firm become M/s. J.S. Industries. Thereafter the M/s. Md. Musa & Co. executed a License Agreement from 1993 to 1995 in favour of M/s. J.S. Industries interestingly no royalty charge was claimed. Thereafter another Royalty Agreement was executed in 1995 for a period of 3 (three) years and Royalty was charged @ 2.5%. In the year 1998 the said proprietorship concern was converted into partnership namely M/s. J.S. Industries, wherein Iftekhar Alam / defendant no. 3

entered into as a partner along with his brother Imtiaz Alam, the defendant no. 4 hereinabove. In the year 1998 a License Agreement was issued and thereafter time to time it was renewed / extended / newly extend. The last of such renewal was on 1st April, 2012. The said document of renewal was signed by Mukhtar Alam, who was then looking after the management of the M/s. Md. Musa & Co.

o. The second License Agreement was in favour of M/S. M.M. Industries, a Partnership Firm of Md. Khalique (father of plaintiff no. 2 therein and also one of the director in plaintiff's company), Md. Danish (brother of plaintiff no.2 therein) and Md. Nazish, plaintiff no.2 therein. This license was initially granted in 1998 and lastly renewed on 1st April, 2011.

p. The third License Agreement was executed on 1st August, 2012 in favour of MMI Tobacco Pvt. Ltd., plaintiff No.1 hereinabove. The shareholders of the said company are the aforesaid Md. Khalique, Md. Danish and Md. Nazish, plaintiff no.2 therein.

q. By consent of all partners of Md. Musa & Co., on 1st April, 2017 executed a fourth License Agreement in favour of the defendant No.2 (wife of the Mukhtar Alam therein), proprietor of M/s. M.S. Industries, with conditions similar to the other three License Agreements dated 1st April, 2011, 1st April, 2012 and 1st August, 2012 executed in favour of M.M. Industries, M.M.I. Tobacco Pvt. Ltd and J.S. Industries. Subsequently in the year 2019 the proprietorship was converted into partnership by inducting Salik Mukhtar, son of Mukhtar Alam, who is also projected as defendant no.1 in the suit.

r. It would be clear from the above that the petitioner and the plaintiffs were at all material times had and were acting pursuant to the understanding that all

the descendants of Md. Subedar, together with their spouses and children i.e. the entire family, would be entitled to carry on business in gul tobacco under the trade mark “Musa Ka Gul Super”.

9. The defendants also stated about proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 held at Calcutta and also of appeal filed under Section 37 of the Act of 1996 before Calcutta High Court and further reference of various partnerships entered in between certain family members was made. In sum and substance, the case of the defendants is that they were independently manufacturing and selling the products of the identical names or otherwise pursuant to various licences and partnership agreements and since the plaintiffs had not described the same while claiming injunction and, even otherwise, the business being carried out by the defendants being lawful and under full authority, the application seeking injunction was liable to be rejected.

10. Various documents were filed by the parties before the court below and even in the present appeal, very bulky affidavits have been exchanged annexing therewith various documents and the court is not fully sure as to whether all documents filed before this Court were or were not there on the record of the court below. Nevertheless, when the Court peruses the order impugned with reference to the material placed by the respective parties in consonance with their applications and the objections, the Court finds the material sufficient for deciding the present appeal.

11. I have heard learned counsel for the parties and perused the record.

**CONTENTIONS RAISED BY THE
DEFENDANTS-APPELLANTS;
DISCUSSION AND FINDINGS
THEREON**

12. The first argument of the learned counsel for the appellants is that once the issue of under-valuation of the claim of the plaintiff-respondents as well as territorial jurisdiction of the court below was raised by means of objections against the injunction application, the court below was not justified in deciding the injunction application and it was under an obligation to defer consideration of the injunction application until the said issues were decided finally. In support of his submissions, learned counsel for the appellants has placed reliance upon the following authorities:-

(i) **Arun Kumar Tiwari Vs. Deepa Sharma and others passed in F.A.F.O. No.3481 of 2004, decided on 15.02.2006;**

(ii) **Indian Performing Rights Society Ltd Vs. Sanjay Dalia: AIR 2015 SC 3479;**

(iii) **Neon Laboratories Limited Vs. Medical Technologies Limited and others: (2016) 2 SCC 672; and**

(iv) **Renaissance Hotel Holdings Inc. Vs. B. Vijaya Sai and others: (2022) 5 SCC 1.**

13. In so far as the valuation is concerned, I find that the suit was valued at Rs.2,00,000/-. The suit, irrespective of its valuation, would lie before the District Court as per the provisions of the Trademarks Act, 1999 and, hence, whether the suit is under-valued or correctly valued

or over valued, the same has nothing to do with the claim for injunction as, during the course of trial, issue of valuation may be framed and decided by the District Court on the basis of material on record. Even if the suit is found to be under valued, neither the court below is powerless to pass an order directing the plaintiffs to correct the valuation nor can the plaintiffs be treated as incompetent to correct the valuation, if at all the said issue is decided against them. Therefore, the argument of the appellants in this regard has no force and is rejected.

14. As regards the judgment in the case of **Arun Kumar Tiwari (supra)**, reliance placed on paragraph no.12 of the same appears to be misconceived, inasmuch as, the Division Bench was of the view that whenever serious challenge is made to the jurisdiction of the court as well as to the valuation of the suit and sufficiency of the court fees 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. The said judgment was passed in an appeal arising out of a suit for permanent prohibitory injunction in which a sale deed was also claimed as void, inoperative and ineffective and the trial court had decided two preliminary issues framed on the basis of written statement of the concerned defendants. The Division Bench, after discussing the peculiar facts of that case, opined that such issues of valuation of suit and sufficiency of court fees be decided before deciding injunction application in case there appears prima facie substance in the pleas. The present case has arisen out of a stage when neither any issue has been framed by the court below nor decided. Even otherwise, the

court does not find any substance with regard to the half-hearted challenge to the valuation of claim made and, in any case, irrespective of valuation of the claim, the suit would lie before the District Judge as per the provisions contained under Section 134 of the Trademarks Act, 1999 and would not change the forum, hence, the judgment in the case of **Arun Kumar Tiwari (supra)** does not help the appellants.

15. The judgment in the case of **Indian Performing Rights Society Ltd (supra)** is on the point of territorial jurisdiction and the Apex Court discussed the provisions contained under Section 134(2) of the Trademarks Act, 1999 and also Section 20 of the Code of Civil Procedure in relation to the plea of territorial jurisdiction and held that if cause of action arises either wholly or in part at any place where the plaintiff is residing or doing business, the suit can be filed at such place. This Court does not find any good reason to read the said judgment in favour of the appellants, rather the same is against them and irrespective of applicability or non-applicability of Section 20 of Code of Civil Procedure, this Court finds that in view of Section 134(2) of Trademarks Act, 1999 read with pleadings contained in the plaint, the District Court, Varanasi has territorial jurisdiction to entertain the suit. In this regard, reference to Section 134 of the Trademarks Act, 1999 can be made. The same is quoted herein below:-

“134. Suit for infringement, etc., to be instituted before District Court.— (1) No suit—

(a) for the infringement of a registered trade mark; or

(b) relating to any right in a registered trade mark; or

(c) for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered, shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.

(2) For the purpose of clauses (a) and (b) of sub-section (1), a "District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain.

Explanation.—For the purposes of sub-section (2), "person" includes the registered proprietor and the registered user."

16. A bare perusal of contents of paragraphs no.6 and 7 of the plaint of the suit in question shows that the place of work has been clearly shown at city and district Varanasi and nearby areas also and, hence, in the considered opinion of the Court, the District Court Varanasi has territorial jurisdiction to entertain the suit or at least the injunction application inasmuch as the territorial jurisdiction would be governed prima facie by the averments contained in the plaint which are sufficient to confer jurisdiction upon the District Court Varanasi. Hence, argument of the appellants in this regard also stands rejected.

17. The judgment in the case of **Neon Laboratories Limited (supra)** is on the point that mere registration of a trademark does not vest permanent right in owner of

the said trademark and such a right is lost if it is not exercised within a reasonable time. The said judgment also does not help the appellants as it is not the case where despite registered trademark being existent in favour of the plaintiff-respondents, it was not used. Record, rather, reflects a contrary situation.

18. The last judgment relied upon by the appellants in the case of **Renaissance Hotel Holdings Inc. (supra)** also does not have any application as the Apex Court was dealing with a case where Karnataka High Court had allowed the appeal filed by the defendants setting aside the final judgment and decree of the Principal District Judge, Bangalore Rural District, Bangalore, whereas the present appeal has arisen out of disposal of an injunction application only. Even otherwise, the judgment in **Renaissance Hotel Holdings Inc. (supra)** dealt with a controversy where the High Court had misapplied certain sub-sections and sub-clauses of Section 29 of the Trademarks Act, 1999 and the Apex Court was of the view that the case had fallen under altogether different clauses and sub-clauses of the said section and reversed the decision of the High Court. No such issue is involved in the present case and, hence, the said judgment is also of no help to the appellants.

19. The contention of the appellants on merits of the claim for injunction is that though there may be a registered trademark in favour of the plaintiff-respondents, there being internal arrangements amongst the members of the same family who are descendants of late Mohd. Musa and there being partnership deeds and various licences, the business run by the defendant-appellants was separate from the business run by the plaintiff-respondents and there

being no direct connection in between two, the trial court was not justified in granting injunction. It has further been argued that since an objection was taken by them regarding validity of the plaintiffs' registered trademark and further they have applied before the Registrar for rectification, the proceedings of the suit should have been stayed in view of Section 124 of the Trademarks Act, 1999 and, therefore, the order granting injunction is liable to be set aside. In this regard, the submission of plaintiff-respondents is that even if the proceedings of the suit are stayed, the same will not preclude the Court from making any interlocutory order, including any order granting injunction, during the period of stay of the suit and reference to sub-section (5) of Section 124 of the Act, 1999 has been made in this regard. For a ready reference, entire Section 124 of the Act is reproduced below:-

“124. Stay of proceedings where the validity of registration of the trade mark is questioned, etc.— (1) Where in any suit for infringement of a trade mark—

(a) the defendant pleads that registration of the plaintiff's trade mark is invalid; or

(b) the defendant raises a defence under clause (e) of sub-section (2) of section 30 and the plaintiff pleads the invalidity of registration of the defendant's trade mark,

the court trying the suit (hereinafter referred to as the court), shall,—

(i) if any proceedings for rectification of the register in relation to the plaintiff's or defendant's trade mark are pending before the Registrar or the Appellate Board, stay the suit pending the final disposal of such proceedings;

(ii) if no such proceedings are pending and the court is satisfied that the plea regarding the invalidity of the registration of the plaintiff's or defendant's trade mark is prima facie tenable, raise an issue regarding the same and adjourn the case for a period of three months from the date of the framing of the issue in order to enable the party concerned to apply to the Appellate Board for rectification of the register.

(2) If the party concerned proves to the court that he has made any such application as is referred to in clause (b) (ii) of sub-section (1) within the time specified therein or within such extended time as the court may for sufficient cause allow, the trial of the suit shall stand stayed until the final disposal of the rectification proceedings.

(3) If no such application as aforesaid has been made within the time so specified or within such extended time as the court may allow, the issue as to the validity of the registration of the trade mark concerned shall be deemed to have been abandoned and the court shall proceed with the suit in regard to the other issues in the case.

(4) The final order made in any rectification proceedings referred to in sub-section (1) or sub-section (2) shall be binding upon the parties and the court shall dispose of the suit conformably to such order in so far as it relates to the issue as to the validity of the registration of the trade mark.

(5) The stay of a suit for the infringement of a trade mark under this section shall not preclude the court from making any interlocutory order (including any order granting an injunction directing account to be kept,

appointing a receiver or attaching any property), during the period of the stay of the suit.”

20. Though, the learned counsel for the appellants urged that power of the Court to pass any injunction order is confined only in relation to keeping of accounts and appointment of receiver or attaching any property, the Court is of the view that the District Court entertaining a suit based upon a registered trademark and alleging its infringement, is fully empowered to grant a temporary injunction of the nature that has been granted by the court below and neither stay of proceedings of the suit nor any other provision of the Act of 1999 restricts power of the district court to pass injunction order, otherwise the very purpose of the entire Act would stand frustrated and any violator of law, i.e. the infringer of registered trademark etc, would, by merely moving an application for rectification before the Registrar, succeed to get the consideration of injunction application held up and so long as the application for rectification remains pending before the Registrar, he would continue to use trademark, infringement whereof is alleged by the plaintiffs and, therefore, the Act would lose its significance for all purposes and the district court would become a mere spectator and, in fact, subordinate to the Registrar or the appellate Board dealing with the application for rectification, its disposal being an uncertain event. Hence the arguments of the appellants on this score, having no force, are turned down.

21. Learned counsel for the appellants also argued that under identical circumstances, the same plaintiff-respondents filed another Suit No. 20 of 2022 against one Iftikhar Alam and though

the injunction application was allowed by the court below by an order dated 10.10.2022, this Court, by a detailed order dated 07.08.2023, recently allowed the First Appeal From Order No.77 of 2023 (Iftikhar Alam Vs. M/s M.M.I. Tobacco Pvt. Ltd. and another) and, therefore, the present appeal is also entitled to be allowed on the same lines.

PROCEEDINGS BEFORE CALCUTTA HIGH COURT

22. Both the parties referred to certain proceedings held at Calcutta and the Court feels it appropriate to discuss effect of an order dated 03.10.2018 passed by the High Court of Calcutta in G.A. No.1331 of 2018 with A.P. No.282 of 2018 (Yasmin Khaliq and others Vs. Mukhtar Alam). The said order was passed on an application under Section 9 of the Arbitration and Conciliation Act, 1996. The applicants before the High Court of Calcutta were Yasmin Khaliq, i.e. the wife of Mohd. Khaliq and mother of the plaintiff-respondent Mohd. Nazish and the opposite party was Mukhtar Alam, i.e. the real brother of Mohd. Khaliq. After discussing the rival contentions in relation to the identical issue associated with manufacturing and sale of ‘Musa Ka Gul Super’ and also the licences as well as trademark etc, the High Court of Calcutta passed injunction order dated 03.10.2018 with following operative portion:-

“For the reasons as aforesaid, I find that the petitioners have made out a prima facie case and the balance of convenience and inconvenience also lies in their favour for obtaining interim production. The petitioners have fulfilled the tests laid down by the Supreme Court in the case of Adhunik Steels Ltd. (supra).

Accordingly, there shall be an order of injunction restraining the respondent whether by himself or through his agents or assignees or nominees or otherwise however from running a parallel business of manufacturing or dealing with or selling " Musa Ka Gul" or "Tobaco Gul", by the name of M/S M. S. Industries or in any manner whatsoever until the publication of the arbitral award. The respondent is also restrained from making any false allegation or writing any frivolous letter to any statutory authority or to any person whosoever affecting the business of the petitioner no. 3 firm, until publication of the arbitral award."

23. The Calcutta High Court, as such, passed a clear and specific injunction order restraining Mukhtar Alam, whether by himself or through his agents or assignees or nominees or otherwise however from running a parallel business of manufacturing or dealing with or selling " Musa Ka Gul" or "Tobaco Gul", by the name of M/S M. S. Industries or in any manner whatsoever until the publication of the arbitral award. The said respondent was also restrained from making any false allegation or writing any frivolous letter to any statutory authority or to any person whosoever affecting the business of the petitioner no.3 firm, until publication of the arbitral award.

24. Learned counsel for the appellants argued that the aforesaid order was passed by the High Court of Calcutta on 03.10.2018, however, immediately thereafter, on 17.11.2018, Mukhtar Alam dissolved partnership dated 01.04.2006 terming the same to be a partnership at will and the said dissolution, according to the defendant-appellants, would nullify the

effect of the injunction order dated 03.10.2018 as no partnership remained existent. It has also been argued that dissolution of partnership was approved in terms of an interim award dated 12.11.2010 passed by the Arbitrator and against the said interim award, an application No.359 of 2020 was filed by Yasmin Khalique and others against Mukhtar Alam before the High Court of Calcutta, however, the same was also rejected by the High Court by order dated 25.03.2021. The submission, therefore, is that once dissolution of partnership deed has been approved upto the level of the High Court of Calcutta, the injunction order dated 03.10.2018 is of no consequence.

25. It has also been argued that Mukhtar Alam, by executing a document dated 10.04.2019, being 50% undivided owner of the trade mark bearing No.851957 in Class 3 and Trademark No. 558741 and 739085 in Class 4 and Copyrights No. A-53487/96 and A-85679/09, duly authorized and permitted his wife Shaheena Mukhtar and son Salik Mukhtar to use and utilize the said trademarks and copyright for their lawful business purposes of Gul manufacturing and selling from their partnership firm under the name and style of M/s M.S. Industries, situated at 26, Zakaria Street, Kolkata. The submission is that under the law of partnership, Mukhtar Alam was fully competent not only to dissolve the partnership as per Section 43 of the Act but also to assign his rights to anyone and if he made assignment of rights in favour of his wife and son to use and utilize the trademarks, the assignees cannot be enjoined from using the same.

CONTENTIONS RAISED BY THE PLAINTIFFS-

**RESPONDENTS; DISCUSSION AND
FINDINGS THEREON**

26. First of all in relation to the order dated 07.08.2023, recently passed in the First Appeal From Order No.77 of 2023 (Iftikhar Alam Vs. M/s M.M.I. Tobacco Pvt. Ltd. and another), it has been argued on behalf of the plaintiff-respondents that the aforesaid appeal was allowed for the reason that this Court found the injunction order dated 10.10.2022 as quite cryptic in nature and necessary discussion was lacking, however, in the present case, the order impugned has been passed after dealing with the rival contentions and by recording complete satisfaction in respect of prima facie case, balance of convenience and irreparable loss, i.e. the three basic ingredients and though this Court, vide order dated 07.08.2023, had remanded the matter to the trial court for fresh consideration of the injunction application, there is no such necessity in the present case as the facts as well as documents are sufficient to finally decide this appeal. Further the reason for allowing the appeal was that certain documents forming part of the affidavits did not form part of the record of the trial court and, therefore, while discussing the concept of leading additional evidence, the parties were left at liberty to lead additional evidence before the trial court that was directed to reconsider the injunction application. Another reason for setting aside the injunction order was that the district court had not discussed those parameters which were described in paragraph no.24 of the order, particularly, in relation to the prior user of the product and findings on the application seeking withdrawal etc. Hence, facts and circumstances, while deciding F.A.F.O. No.77 of 2023 were not identical to those involved in the present appeal. In

the present case, considering the nature of the injunction, the appellants cannot merely take advantage of the order dated 07.08.2023 as the order impugned in the aforesaid appeal and the order impugned in the present appeal were passed in proceedings of different suits in which the defendants were also different. The defendant in the suit giving rise to F.A.F.O. No.77 of 2023 was not a member of the family of late Mohd. Musa and had come up with a defence of different nature arising out of deed of assignments etc, whereas the defendants in the present proceedings are the members of the same family and descendants of late Mohd. Musa and have come up with a defence of different nature supported by documents of different nature. Hence, no parity can be claimed by the defendant-appellants with the order dated 07.08.2023 passed in F.A.F.O. No.77 of 2023.

27. On merits of the case, It has been argued on behalf of the plaintiff-respondents that, admittedly, there being a registered trademark in favour of the plaintiffs, being trademark No.616611 and there being no registered trademark in the name of defendant-appellants, merely on the basis of assignments made successively by Mukhtar Alam who had been enjoined by the High Court of Calcutta, the defendants have no right to manufacture and sale 'Musa Ka Gul Super' under any authority and such manufacture and sale of the product by deceptively similar name or otherwise, is contrary to law. They have explained various partnership arrangements made amongst the defendants and it has been argued that every transaction was contrary to the injunction order granted by the High Court of Calcutta and that reliance placed upon Section 43 of the Indian Partnership Act, 1932 with reference to

dissolution of partnership would be of no consequence in view of Sections 46, 50 and 53 of the Act, 1932, as quoted below:-

“Section 46. RIGHT OF PARTNERS TO HAVE BUSINESS WOUND UP AFTER DISSOLUTION.

On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or which representatives according to their rights.

50. PERSONAL PROFITS EARNED AFTER DISSOLUTION.

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

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

53. RIGHT TO RESTRAIN FROM USE OF FIRM-NAME OR FIRM-PROPERTY.

After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm-name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up :

Provided that where any partner or his representative has brought the

goodwill of the firm, nothing in this section shall affect his right to use the firm-name.”

28. Placing reliance upon the aforesaid provisions, it has been argued that after a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm-name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up. It is submitted that there is nothing on record to demonstrate that partnership business was ever completely wound up and, hence, merely because partnership has been dissolved and has been given a seal of approval in the proceedings referred to herein above, the same would not clothe the defendants with the authority to manufacture and sale products of deceptively similar name and identity in infringement of registered trademark of the plaintiff-respondents. It has further been argued that the entire theory of joint family business has been set up and raised contrary to the basic concept of Muslim Law where no such concept of jointness exists. It has also been argued that the business carried by the defendants, being full of deception and contrary to the registered trademark of the plaintiff-respondents, the same has rightly been restrained by the district court. Learned counsel for the plaintiff-respondents has, in support of his submissions, relied upon following authorities:-

“(i) (2020) 6 SCC 557: Nusli Neville Wadia Vs. Ivory Properties and others; and

(ii) (2006) 8 SCC 726: Ramdev Food Products (P) Ltd. Vs. Arvindbhai Rambhai Patel and others.”

29. Having heard the learned counsel for the parties at length and having perused the record, I find that once the Calcutta High Court restrained Mukhtar Alam from running a parallel business of manufacturing or dealing with or selling ‘Musa Ka Gul’ or ‘Tobacco Gul’ by the name of M/S M.S. Industries or in any manner whatsoever until the publication of the arbitral award, any arrangement made by Mukhtar Alam, either in terms of entering into partnership or dissolving partnership or making assignment etc etc would be in teeth of the order of injunction which is still operative, irrespective of the fact that dissolution of partnership has been approved in the proceedings referred to herein above. The dissolution of partnership is one aspect and its effect on carrying of business by making different arrangements so as to defeat rights of a registered trademark owner, is altogether a different thing. Once no final award has been passed, the injunction order dated 03.10.2018 which was made effective until publication of the arbitral award, is still operative. The Court, therefore, reposes full faith in the injunction order passed by the High Court of Calcutta as per Constitutional mandate of Article 261 of the Constitution of India, which reads as follows:-

“261. Public acts, records and judicial proceedings.- (1) Full faith and credit shall be given throughout the territory of India to public acts, records and

judicial proceedings of the Union and of every State.

.....
”

30. The Court, in the present proceedings, is focused on the issue as to whether any inter se arrangement amongst the members of the family, in violation of the injunction order dated 03.10.2018, could at all operate to the detriment of the interest of the registered trademark owner, i.e. the plaintiff-respondents, particularly, when Section 31 of the Trademarks Act, 1999 clearly provides that registration is a prima facie evidence of its validity. For a ready reference, Section 31 of the Trademarks Act is quoted herein below:-

“31. Registration to be prima facie evidence of validity.— (1) In all legal proceedings relating to a trade mark registered under this Act (including applications under section 57), the original registration of the trade mark and of all subsequent assignments and transmissions of the trade mark shall be prima facie evidence of the validity thereof.

(2) In all legal proceedings as aforesaid a registered trade mark shall not be held to be invalid on the ground that it was not a registrable trade mark under section 9 except upon evidence of distinctiveness and that such evidence was not submitted to the Registrar before registration, if it is proved that the trade mark had been so used by the registered proprietor or his predecessor in title as to have become distinctive at the date of registration.”

31. In the present case, the district court has recorded cogent findings on all the three ingredients by observing that the

registered trademark of the plaintiff-respondents is valid upto 15.01.2024 and that the defendant-appellants have failed to establish any registered trademark or copyright with them. The court below has also observed that any rights flowing from Sri Subedar would be of no consequence as, admittedly, Subedar had retired from firm 'Musa and Sons' with effect from 01.04.1999. The court has further observed that any activity of manufacturing and sale of product which is deceptively similar with 'Musa Ka Gul Super' would be contrary to law. Regarding pecuniary and territorial jurisdiction of the district court, it has been observed by the court below that at the time of registration of the suit, the pecuniary jurisdiction was found to have vested in the court and the said issue along with an issue of territorial jurisdiction would be decided after framing the issues in the suit. I do not find any illegality in the view taken by the district court in this regard as I have already explained the said aspect in this judgment itself and I find that there was no factual or legal impediment in entertaining and deciding the injunction application by the court below.

32. This Court is satisfied that the manner in which the injunction application has been dealt with, the findings on all the three ingredients appear to be based upon cogent analysis of material available on record. Even if, it is assumed that a very detailed discussion of various documents has not been made, after perusing the entire record of the present appeal, I find that the documents which were sufficient to form an opinion regarding grant or denial of injunction, have been dealt by the court below and, even otherwise, it was not required for the district court to hold a mini trial at the time of consideration of the injunction application. Once the court

below was satisfied that the registered trademark No.616611 has been prima facie infringed by the defendant-appellants, in absence of anything substantial which can persuade this Court to take a different view, I do not find any good ground to interfere in the order passed by the court below.

33. For all the aforesaid reasons, the appeal fails and is hereby **dismissed**.

34. In case the written statements have been filed, the Court below shall frame issues before 31.12.2023 and shall decide the suit before 31.03.2025 by fixing short dates and subject to co-operation by the parties permitting them to lead oral and documentary evidence. Any unnecessary adjournment by either party shall entail cost of Rs. 750/- per adjournment.

(2023) 11 ILRA 152

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 19.10.2023

BEFORE

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

First Appeal From Order No. 2341 of 2006

Abdul Hameed Khan & Ors. ...Appellants
Versus
Vijay Kumar Singh & Anr. ...Respondents

Counsel for the Appellants:

Sri Ram Singh, Ms. Deepali Srivastava
Sinha

Counsel for the Respondents:

Sri Nagendra Kumar Srivastava

A. Civil Law - Motor Vehicles Act, 1988-Section 173-Enhancement of compensation-.The deceased in this case was aged 16 years, that is to say, much less than 40 years-His monthly notional income would be considered Rs.

5000/- The future prospects, which the claimants are entitled to add to the deceased's notional income, going by Rule 220-A(3) of the Rules of 1998, would be 50%- - The Tribunal has adopted a multiplier of '16' which does not conform to the principles laid down in Sarla Verma Case- Going by the age of the deceased and the principles laid down in Sarla Verma Case the applicable multiplier would be '18', the deceased being in the age bracket of 15-20 years –Thus, Total compensation will be Rs. 9,20,000/- after applying multiplier 18-As per Rule 220-A(6) of the Rules of 1998 provides the rate of interest shall be 7% pendente lite and future till the actual payment. (Para 1 to 41)

B. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit. (Para 21)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Sarla Verma (Smt.) & ors. Vs DTC & anr..
2. Gopalpur Jai Prakash & ors. Vs The Mngg. Dir. APSRTC & ors. MACMA. No. 694 of 2011
3. N. Manjegowda Vs United India Ins. Co. Ltd. (2014) 3 SCC 584 : (2014) 2 SCC (Civ) 297 : (2014) 4 SCC (Cri) 634
4. Oriental Ins. Co. Ltd. Vs Deo Patodi (2009) 13 SCC 123 : (2009) 5 SCC (Civ) 29 : (2010) 1 SCC (Cri) 963
5. M.R. Krishna Murthi Vs New India Assr. Co. Ltd & ors. (2020) 15 SCC 493
6. Arun Kumar Dwivedi & Anr Vs Sri Bharat Bhushan Khanna & anr..
7. Municipal Corp. of Greater Bom. Vs Laxman Iyer & anr.
8. Magma Gen. Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors.

9. Rajesh Vs Rajbir Singh (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149

10. Santosh Devi Vs NICL (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167

11. UPSRTC Vs Trilok Chandra (1996) 4 SCC 362

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

13. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd & ors.

14. New India Assr. Co. Ltd Vs Urmila Shukla & ors.

15. NICL Vs Pranay Sethi & ors. (2017) 16 SCC 680

16. Meena Pawaia & ors. Vs Ashraf Ali & ors. (2021) SCC OnLine SC 1083

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

This is an appeal by the claimants of Motor Accident Claim Petition No. 219 of 2004, seeking enhancement of compensation awarded by the Tribunal.

2. On the 16th of January, 2004, Abdul Maroof, a youth of sixteen years, was proceeding on his motorcycle bearing Registration No. UP 32 AB 2993, at 06:45 a.m., to a certain Sigma Coaching. He had left home for the coaching centre. At about 7 O'Clock, as Maroof reached the Indian Press Crossroads, within the local limits of Police Station Colonelganj, District Allahabad (now Prayagraj), a truck bearing Registration No. UP 70 Y 9448, driven at a high speed and negligently by its driver, hit the motorcycle on the rear side. The truck caused the accident, moving to the wrong side of the road. The impact caused Maroof

to sustain grievous injuries. The truck dragged the motorcycle and the victim across some distance, and turning left from the Indian Press Road Crossroads, made good its escape via the Balson Crossroads.

3. The victim was carried by his cousin, Parvez Ahmad, who witnessed the accident, to the Priti Hospital for medical aid. After administering some treatment, the victim was referred to the Beli Hospital. While on way to the Beli Hospital, the victim breathed his last on board ambulance.

4. A First Information Report¹ regarding the incident was lodged by Parvez Ahmed with the Police on 16.01.2004 at 08:30 a.m., giving rise to Crime No. 13 of 2004, under Sections 279, 337, 338, 427, 304A of the Indian Penal Code, 1860, Police Station Colonelganj, District Allahabad. The present claim petition was instituted by the deceased's father, Abdul Hamid Khan on his own behalf, and that on behalf of the deceased's mother, Smt. Kausari Begum, and his sister Kumari Fauzia Begum.

5. According to the claimant-appellant Abdul Hamid Khan, the deceased had passed his intermediate examination in the first division and was preparing to write his competitive examination for the purpose of seeking admission to his undergraduate engineering course. It was for the said purpose that he was going to the coaching institute, when the accident happened. The deceased would attend the Sigma Physics Centre in the morning hours, and, in the evening batch, at the Yes Academy, Tashkand Road, Civil Lines, Allahabad. The deceased's date of birth was 08.10.1987. The claimant has asserted that

the deceased would earn an estimated sum of ₹15,000 per month.

6. Opposite party No. 1 to the claim petition and respondent No. 1 to this appeal, Vijay Kumar Singh, is the owner of the offending truck, a DCM make. He shall hereinafter be called 'the owner'. Opposite party No. 2 to the claim petition and respondent No. 2 to this appeal are the National Insurance Company Limited, Civil Lines, Prayagraj, who are the insurers of the offending vehicle. They shall hereinafter be referred to as 'the insurers'.

7. A written statement was filed on behalf of the owner. The ownership of the offending truck was acknowledged, but the accident was denied. It was further pleaded that on the date and time of the accident, the offending truck was insured with the insurers. In the additional pleas, the case taken is that the offending vehicle was being operated by its driver carefully and slowly. The driver was one Ajay Kumar Pal son of R.N. Pal, who held a valid driving license bearing number A/347/2, valid from 18.01.2001 to 12.01.2005. The deceased was riding his motorcycle rashly and negligently at the time of the accident. The sole cause of the accident was the deceased's negligent driving. The deceased was a minor. He had no driving license, authorizing him ride a motorcycle. The insurers of the motorcycle were not impleaded, rendering the claim petition bad for non-joinder of necessary parties. The deceased had no income and that claimed for him in Column No. 6 was denied as incorrect.

8. A separate written statement was filed on behalf of the insurers. The allegations in the claim petition were generally denied. It was said that the

claimant has not furnished the particulars of the policy and other required information in relation to it. In the absence of full particulars of the insurance policy, the insurers could not say much about their liability. In the additional pleas, it was asserted that the registration certificate, the driving license and the road permit of the offending vehicle were not filed by the claimant along with the petition. The accident did not take place in the manner alleged by the claimant. The claim was asserted by the insurers to be false and bogus, so much so, that according to them, the accident never took place. It was also averred that the claimant had not annexed documents or furnished requisite information in support of his claim, which disentitles him to relief. The compensation claimed was castigated as inflated and imaginary.

9. About the offending vehicle, it was pleaded that it was being driven in violation of the terms and conditions of the insurance policy, when the accident happened. The driver of the offending truck had no valid and effective driving license to drive the particular kind of vehicle. The insurers, on the last plea, said that the Insurance Company are not liable to pay compensation, amongst others.

10. On the pleadings of parties, the following issues were framed :

(i) Whether on 16.01.2004, at about 7 O'Clock in the morning, near the Indian Press Crossroads, situate within the local limits of Police Station Colonelganj, Allahabad when Abdul Maroof was proceeding on his motorcycle bearing registration No. UP 32 AB/2993 from home to his coaching (institute) Truck No. UP 70 AY/9948, driven at a high speed and

negligently by its driver, hit the motorcycle, resulting in Abdul Maroof's death?

(ii) Whether the accident happened solely on account of the deceased's riding at a high speed and negligently?

(iii) Whether the truck driver had a valid and effective driving license at the time of the accident?

(iv) Whether the truck, at the time of the accident, was insured with the Insurance Company in accordance with law?

(v) Whether the claimants are entitled to compensation? If yes, from whom?

11. The Tribunal answered Issue No. 3 in the affirmative, holding that the truck driver held a valid driving license on the date and time of the accident. Issue No. 4 was likewise answered in favour of the claimant and against the insurers. Issue Nos. 1 and 2 were decided together by the Tribunal, while writing the impugned judgment. Issue No. 1 was answered in favour of the claimant, holding that on the basis of the evidence on record, it is well established that the driver of the offending truck, driving it at a high speed and negligently, caused the accident, resulting in injuries to the victim that led to his death. However, while answering Issue No. 2, 25% negligence was apportioned to the deceased and 75% to the driver of the offending truck. The Tribunal, thus, entered a finding of contributory negligence.

12. So far as the assessment of compensation is concerned, it was answered by the Tribunal in its decision on Issue No. 5. It was held that the deceased had a monthly income of ₹3,000. Apportioning out 25% towards contributory negligence, the monthly

income was held to be ₹2250. The multiplier of '16' was adopted and deduction made towards personal expenses was one-third of the deceased's income. Nothing was awarded towards future prospects or loss of consortium. ₹2,000/- was awarded under the head of funeral expenses. A total compensation of ₹1,46,000 was granted by the Tribunal together with simple interest at the rate of 6% *per annum* from the date of institution of claim petition until realization. The insurers were directed to deposit the awarded compensation with the Tribunal within three months and apportionment made in the manner that all the three dependants were held entitled to an equal share.

13. Heard Ms. Deepali Srivastava Sinha, learned Counsel for the claimants and Mr. Nagendra Kumar Srivastava, learned Counsel appearing for the insurers. No one appears on behalf of the owners.

14. There are two points, broadly on which this appeal has been pressed on behalf of the claimants. These relate to the findings on the issues of contributory negligence and the quantum.

15. So far as contributory negligence is concerned, it is argued by learned Counsel for the claimants Ms. Deepali Srivastava Sinha that the Tribunal's finding, holding contributory negligence on the deceased's part to the extent of 25% on ground that he had no driving license to ride the motorcycle, is manifestly illegal. It is argued that the mere fact that the driver of a vehicle has operated it without a driving license may constitute an offence under the Motor Vehicles Act, 1982 but that *ipso facto* cannot give rise to an inference of negligence on his part. In

support of her contention, learned Counsel for the claimants has placed reliance upon the decision of the Supreme Court in **Sudhir Kumar Rana v. Surinder Singh and others**³. It is next submitted that the respondents have failed to produce any evidence *aliunde* to substantiate the fact that the deceased, in any way, contributed to the accident. The truck hit the motorcycle from the rear side and the Tribunal has otherwise held that the accident was caused by the sole negligence of the driver of the offending truck. Nevertheless, the Tribunal, according to the learned Counsel, held in manifest error that the deceased was a contributor to the accident for the mere fact that he did not hold a valid license to drive a motor vehicle of the kind that he was riding, given his age, the cubic capacity of the vehicle's engine and the provisions of Section 4 of the Act of 1988.

16. On the other hand, Mr. Nagendra Kumar Srivastava, learned Counsel for the insurers has submitted that the Tribunal's finding regarding the contributory negligence is absolutely flawless, because, it is logical to draw the inference of negligence in some measure on the driver's part, whom the law holds ineligible to possess a license, authorizing him to drive a vehicle of the kind that he was operating in a public place.

17. On the other issue, that is about the quantum of compensation awarded, learned Counsel for the claimants submits that the award has made a very conservative estimate of the deceased's monthly income, given his educational qualification and his potential in the near future. It is also argued that the multiplier adopted is far on the lower side, and nothing has been awarded towards future

prospects. It is also urged that the Tribunal has failed to grant adequate compensation in that, that nothing has been awarded towards the loss of parental consortium to the deceased's parents, who are two of the three amongst the claimants. Also, nothing has been awarded towards loss of estate, and the funeral expenses ordered are grossly inadequate.

18. Mr. N.K. Srivastava, on the other hand, submits that given the time and the prevalent price index when the accident occurred, the Tribunal has awarded just compensation and the award does not call for interference on ground of inadequacy.

19. This Court has considered the submissions advanced on behalf of the parties by the learned Counsel and perused the record as also the judgment impugned.

20. So far as the issue of contributory negligence is concerned, looking to the site-plan and the testimony of the eye-witness P.W.2, it is evident that the offending truck had hit the motorcycle from the rear end. The motorcycle was moving on the left-hand side, according to the rule of the road. The offending truck hit from the rear and dragged the motorcycle across a considerable distance, before escaping from the Balson Crossroads. Thus, the negligence of the truck is writ large.

21. P.W.2, who had seen the accident from a distance of about 10 yards, as he says in his cross-examination, has described it in the following words :

.....दुर्घटना सड़क पर बाएं तरफ कर्नलगंज साइड में हुई थी। अल्फ्रेड पार्क की तरफ दुर्घटना नहीं हुई थी। यह दुर्घटना बिल्कुल चौराहे पर हुई थी। इंडियन प्रेस चौराहे पर हुई थी। दुर्घटना मेन रोड (अमर रोड) पर हुई थी। दुर्घटना के समय ट्रक मृतक के

शरीर के ऊपर चढ़ गयी थी मोटरसाइकिल के पिछले हिस्से पर भी चढ़ गयी थी।.....

22. The Tribunal has returned a finding to the following effect regarding the truck driver's negligence :

.....इस प्रकार मौखिक साक्ष्य एवं अभिलेखीय साक्ष्य से याचिका के कथनों को पर्याप्त समर्थन मिलता है और यह भलीभांति प्रमाणित होता है की प्रश्नगत ट्रक के चालक द्वारा ट्रक को तेजी एवं लापरवाही से चलाने के कारण यह दुर्घटना हुई जिसके फलस्वरूप पहुंची चोटों के कारण मृतक की मृत्यु हुई।

23. But, given this evidence and the finding returned by the Tribunal, regarding the truck driver's exclusive negligence, he has apportioned 25% of the blame upon the deceased on the ground alone that he was riding a motorcycle of Pulsar make, much above 50 c.c., while his age was 16 years. He was held to be riding in a public place. The Tribunal has, therefore, inferred a contributory negligence of 25% on the deceased's part, solely for the reason that he was riding the motorcycle in a public place, which, by the terms of his learner's license and given his age, he was not authorized to operate all by himself. The contributory negligence has, therefore, been constructed by the Tribunal on account of a violation of the provision of the Act of 1988 on the deceased's part in driving the motorcycle in a public place, which the law did not permit him to do. It is not the Tribunal's finding that for a fact, the deceased was, in any way, contributory to the accident or, in any manner, actually negligent.

24. There is high authority in favour of the view that a person driving a vehicle without a license is, by itself, no reason to infer negligence on that person's part. The principle came to be laid down by the Supreme Court in **Sudhir Kumar Rana**

(*supra*). In that case, the injured claimant was a 17 and a half year old youth, who was riding a two-wheeler on the fateful day. He met with an accident with a mini truck, that was rashly and negligently driven. He sustained a number of injuries, on account of which, the claim was brought. The Tribunal and the High Court both thought that for the reason alone that the claimant did not possess a driving license, he must be held to have contributed to the accident. In **Sudhir Kumar Rana**, it was held by their Lordships of the Supreme Court:

^9. If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the courts below that it was the driver of the mini truck who was driving rashly and negligently. It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence.

10. The matter might have been different if by reason of his rash and negligent driving, the accident had taken place.

25. The principle in **Sudhir Kumar Rana** governs the fate of the issue regarding contributory negligence arising in this case. The principle in **Sudhir Kumar Rana** blissfully was laid down in the background of facts that are strangely similar, including the finding on the point of negligence for a fact. Indeed, it is one thing to say that the deceased had, in riding

a motorcycle that he was not authorized by his age and the kind of license held, committed an offence punishable by law, and, quite another to infer from the commission of that offence or contravention of the provisions of the Act of 1988, a contribution on his part to the negligence, leading to the accident. There is no principle that may give rise to an inference of something that is constructive negligence, merely because a vehicle is operated in a public place by an unlicensed person; or a person not authorized to drive the vehicle by the terms of the license that he holds. Negligence in an accident is essentially a tort and has to be proved for a fact by evidence *aliunde*. The law cannot construct the negligence, at least, in the driving of motor vehicle, without a valid license.

26. Mr. Nagendra Kumar Srivastava has attempted to persuade this Court to infer contributory negligence by the fact alone that the deceased was riding a motorcycle without a valid license, invoking something like the principle of *res ipsa loquitur*. There is no principle or authority to support the view that the driving of motor vehicle without a driving license is an inherently hazardous activity. The principle is rather to the contrary, as laid down by the Supreme Court in **Sudhir Kumar Rana**. It is held accordingly.

27. This takes the matter to the issue of adequacy of compensation awarded by the Tribunal. The income of the deceased has been held to be ₹3000 per month by the Tribunal, taking note of the fact that the deceased had applied for admission to an engineering college and would have gained admission to one college or the other. The degree that he would have earned would have led to a job in Government or semi-

Government sector, yielding him an income of ₹15,000-20,000 per month. There would be prospects of promotion and increase in income also. The Tribunal has found that the deceased's high school and intermediate certificates have been annexed, a perusal whereof shows that he has passed those examinations in the first division. The deceased was also a Bharat Scout and an Uttar Pradesh Scout. A certificate was produced, indicating that he was studying in a coaching institute in order to facilitate his selection in the admission test to the B.Tech. course.

28. The Tribunal, relying upon the decision of the Supreme Court in **Municipal Corporation of Greater Bombay v. Laxman Iyer and another**⁴ has held that an income of ₹3000 per month can be conveniently credited to the deceased. 25% was apportioned away on account of the contributory negligence and a multiplier of '16' was adopted. The Tribunal directed a deduction of one-third to be made towards personal and living expenses of the deceased. There is then a further deduction of one-third directed by the Tribunal on ground that the deceased would have spent that sum on his family, once he got married. Therefore, effectively, the Tribunal had directed a deduction of two-thirds to be made out of the dependency worked out.

29. In order to assess the deceased's income, it has to be borne in mind that this is not a case where there is either an assertion or evidence about the unfortunate youth being productive at the time of his demise. There is good authority, however, to infer a projected income for a youth, making a good a career for himself, about which there is evidence. I had occasion to consider this issue in **Arun Kumar**

Dwivedi and another v. Sri Bharat Bhushan Khanna and another⁵. In **Arun Kumar Dwivedi (supra)** it was observed :

18. The principles regarding assessment of compensation in case of persons, who do not have an income in present, but are students, was considered by the Supreme Court in **M.R. Krishna Murthi v. New India Assurance Company Limited and others, (2020) 15 SCC 493**, where it was held:

“24. From the conjoint reading of the aforesaid judgments, inter alia, the following principles can be culled out which would be relevant for deciding the instant appeal:

24.1. In those cases where the victim of the accident is not an earning person but a student, while assessing the compensation for loss of future earning, the focus of the examination would be the career prospect and the likely earning of such a person in future. For example, where the claimant is pursuing a particular professional course, the poser would be: what would have been his income had he joined a service commensurating with the said course. That can be the future earning.

24.2. There may be cases where the victim is not, at that stage, doing any such course to get a particular job. He or she may be studying in a school. In such a case, future career would depend upon multiple factors like the family background, choice/interest of the complainant to pursue a particular career, facilities available to him/her for adopting such a career, the favourable surrounding circumstances to see which would have enabled the claimant to successfully pick up the said career, etc. If the chosen field is employment, then the future earning can be taken on the basis of salary and allowances

which are payable for such calling. In case, career is a particular profession, the future earning would depend on host of other factors on the basis of which chances to achieve success in such a profession can be ascertained.

24.3. There may be cases like *Deo Patodi [Oriental Insurance Co. Ltd. v. Deo Patodi]*, (2009) 13 SCC 123 : (2009) 5 SCC (Civ) 29 : (2010) 1 SCC (Cri) 963] where even a student, the claimant would have made earnings on part-time basis or would have received offer for a particular job. In such cases, these factors would also assume relevance.

24.4. After ascertaining the likely earning of the victim in the aforesaid manner, the nature of injuries and disability suffered as a result thereof would be kept in mind while determining as to how much earning has been affected thereby. Here, impact of injuries on functional disability is to be seen. In case of death of victim, it would result in total loss of earning. In the case of injuries, the nature of disability becomes important. Such an exercise was undertaken in *N. Manjegowda case [N. Manjegowda v. United India Insurance Co. Ltd.]*, (2014) 3 SCC 584 : (2014) 2 SCC (Civ) 297 : (2014) 4 SCC (Cri) 634].”

19. In **Gopalpuri Jai Prakash and others v. The Managing Director, APSRTC and others, MACMA. No. 694 of 2011, decided on 08.09.2022**, the Telangana High Court considered the income of a student studying in the intermediate course for the purpose of award of compensation to his legal representatives. The student in that case had died in a motor accident on 21.10.2006. While considering the question of income of student in **Gopalpuri Jai Prakash** (*supra*), it was observed:

“9. The petitioners stated that by the date of the accident Prakash/deceased

was aged 18 years and was brilliant student studying intermediate. Further by giving tuitions, he used to earn Rs. 6,000/- per month.

10. Out of the documents filed by the petitioners, the driving licence/Ex. A-5, S.S.C. certificate/Ex. A-7 and passport/Ex. A-10 are reflecting that the date of birth of Prakash/deceased is 09.10.1989. Thus, the age of Prakash/deceased by the date of the accident is 18 years. With regard to income though the petitioners placed the evidence of PW-2 to support the claim that the deceased was giving tuitions, the material particulars as to how many students and the fees per student were missing. However, having regard to the pleaded academic record in Ex. A-7, A-8 and A-9 a monthly income of Rs. 5,000/- can safely be taken on notional basis.”

20. Though **Gopalpuri Jai Prakash** was a case where it was asserted that the deceased had an actual income earned out of providing private tuitions, but the Court assessed his income on a notional basis at a figure of Rs.5000/- considering his academic record. Here, the deceased was a student of Class XI. This Court finds on a perusal of his mark-sheets for the High School Examination, 2004 conducted by the Central Board of Secondary Education dated 28.05.2004 that the deceased had averaged between C and D Grade, also earning a B, but nevertheless was a student of a good school, affiliated to the Central Board of Secondary Education. He had interest in extracurricular activities and there are certificates on record of his participation in these activities.

21. PW-1, the deceased's father Arun Kumar Dwivedi has said in his examination-in-chief that his son was reading in Class-XI in the Woodbine Gardenia School, Kanpur and was taking a

foundation course to upgrade his skills in writing his Engineering Entrance Examination. In his examination-in-chief, it is further said that his son had read from Nursery to Class X in the Sir Padampat Singhania Education Centre, Kanpur, U.P., affiliated to the CBSE. The witness has also stated that after passing his Engineering Examination, his son wanted to join the NDA. Considering the totality of evidence, it must be remarked that the deceased was a student, reading in a good institution at the intermediate level. Going by the guidelines in Paragraph No.24.2 of the report in **M.R. Krishna Murthi** (*supra*), it must be remarked that the deceased had an inclination to seek admission to an Engineering Course and aspired to join the NDA. The fact that he had passed his High School from a good institution and was pursuing his studies to earn his Intermediate Examination Certificate also from a good institution, both affiliated to the Central Board of Secondary Education, besides the fact that his family were spending money, providing him auxiliary coaching to upgrade his skills for the purpose of writing his competitive examination for selection to the Engineering Course, all go to show that he had good prospects of being selected in an Engineering Course and securing a rewarding job for himself. The mere fact that the deceased's High School Certificate does not carry very high grades is not an index about his future performance. The schools where he was studying and the fact that his family were funding his education in a good school, are dependable factors to infer a good future for the deceased in terms of his productivity.

22. In the opinion of this Court, bearing in mind the guidance on high authority regarding assessment to be made about the income of students on a notional

basis and the circumstances of the deceased, the time when the accident happened, that is to say, the year 2004, when an unskilled daily-wagers would be earning about Rs.3000/- per month, it would be fair to find for the deceased a notional income of Rs.5000/- per month.

30. In the present case, the deceased was aged 16 years and had already earned his intermediate examination certificate. A perusal of the high school certificate shows him to have passed that examination in the first division, earning a distinction in Mathematics, appearing as a regular student from the Government College, Allahabad in the year 2001. The intermediate examination certificate shows that the deceased passed that examination in the first division, earning a distinction in Chemistry and Hindi. There are documents on record to show that he was a member of the Bharat Scouts and Guides and also the Uttar Pradesh Bharat Scouts and Guides in his college. He had also earned a certificate in the year 2000 passing the *Bharat Sanskriti Gyan Pariksha* from the Antarashtriya Gayatri Pariwar, Shanti Kunj, Haridwar. The certificates relating to the deceased's activities as a scout and also as a member of the civil defence show that the deceased was a dynamic youth, with multi-faceted interests and a good academic record. There are then receipts, which indicate that he was reading to augment his scholastic abilities by coaching at the Sigma Physics Centre, Allahabad and the Yes Academy, Civil Lines, Allahabad, both of which he would attend in the morning and evening shifts, respectively. There is a certificate issued by the Sigma Physics Centre, saying that he was studying at the institute, preparing to write his engineering entrance test. The certificate is dated 25.01.2004. There is also on record an

admit card for the All India Engineering/ Pharmacy/Architecture Entrance Examination, 2004 convened by the Central Board of Secondary Education on 20.05.2004, and another admit card issued by the Union Public Service Commission, New Delhi, showing the deceased to have sat the National Defence Academy and Naval Academy Examination, 2004 held on 04.04.2004. There is nothing about results of these competitive examinations, but nevertheless, these are positive pointers towards a promising career profile for the deceased. The evidence also shows that the deceased's family were supportive of his endeavours and he was undergoing intense scholastic training in the coaching institute to successfully attempt his B.Tech. Engineering entrance test.

31. In the opinion of this Court, given these circumstances and what I have held in *Arun Kumar Dwivedi* which incidentally was a case that arose out of an accident very contemporaneous to the present one in time, the deceased must be credited with an income of ₹5000/- per month. The annual income of the deceased has to be worked out accordingly.

32. The Tribunal has adopted a multiplier of '16' which does not conform to the principles laid down in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another**⁶. Going by the age of the deceased and the principles laid down in **Sarla Verma** (*supra*) the applicable multiplier would be '18', the deceased being in the age bracket of 15-20 years. The finding of the Tribunal, therefore, requires to be modified on this score.

33. Again, the Tribunal has erred in deducting two-thirds towards personal and

living expenses of the deceased by telescoping the deceased's personal expenses currently incurred, pegged at a one-third of his income, with an added one-third after his marriage. That does not appear to be the trite principle. In **Sarla Verma** it has been held :

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

34. Clearly, therefore, the deceased being a bachelor, a deduction of 50% towards his personal and living expenses is all that has to be made and no more.

35. So far as the future prospects are concerned, the Tribunal has not awarded anything. The deceased did not have an income in presenti. He was neither self-employed nor a person working on a fixed salary. His income has been determined by projecting a future for him on a notional basis. How future prospects in a case like this are to be determined, if at all, was considered by me in **Arun Kumar**

Dwivedi. In **Arun Kumar Dwivedi**, I held :

25. Nothing has been awarded by the Tribunal towards the future prospects of the deceased. In view of the decision of the Supreme Court in **National Insurance Company v. Pranay Sethi and others (2017) 16 SCC 680**, the benefit of future prospects have been extended to the self-employed and those working on a fixed salary, but here the deceased was neither self-employed nor a person working on a fixed salary. He was a young boy with a future to look to and, therefore, his income has been assessed notionally. The question is whether in the case of notional income, future prospects are to be granted as well. This question fell for consideration of the Supreme Court in **Meena Pawaia and others v. Ashraf Ali and Others, 2021 SCC OnLine SC 1083**. The question and the holding figure in Paragraph Nos.11 and 13 of the report of their Lordships' decision in **Meena Pawaia (supra)**, where it has been observed:

“11. The next question which is posed for the consideration before this court is whether anything further is required to be added towards the future rise in income? It is submitted that on behalf of the Union of India that as the deceased was not serving and earning at the time of accident/death nothing further is to be added towards the future prospect/future rise in income. The aforesaid cannot be accepted.

13. We see no reason why the aforesaid principle may not be applied, which apply to the salaried person and/or deceased self employed and/or a fixed salaried deceased, to the deceased who was not serving and/or was not having any income at the time of accident/death. In case of a deceased, who was not earning

and/or not doing any job and/or self employed at the time of accident/death, as observed herein above his income is to be determined on the guesswork looking to the circumstances narrated hereinabove. Once such an amount is arrived at he shall be entitled to the addition over the future prospect/future rise in income. It cannot be disputed that the rise in cost of living would also affect such a person. As observed by this court in the case of *Pranay Sethi (Supra)*, the determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Motor Vehicles Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment and/or in case of a deceased who was on a fixed salary and/or self employed would only get the benefit of future prospects and the legal representatives of the deceased who was not serving at the relevant time as he died at a young age and was studying, could not be entitled to the benefit of the future prospects for the purpose of computation of compensation would be inapposite. Because the price rise does affect them also and there is always an incessant effort to enhance one's income for sustenance. It is not expected that the deceased who was not serving at all, his income is likely to remain static and his income would remain stagnant. As observed in *Pranay Sethi (Supra)* to have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Therefore we are of the opinion that even in case of a deceased who was not serving at the time of death and had no income at the time of death, their

legal heirs shall also be entitled to future prospects by adding future rise in income as held by this court in the case of *Pranay Sethi (supra)* i.e. addition of 40% of the income determined on guesswork considering the educational qualification, family background etc., where the deceased was below the age of 40 years.”

(emphasis supplied)

36. Now, it is well settled, in view of the decision of the Supreme Court in **New India Assurance Co. Ltd v. Urmila Shukla and others**⁷ that future prospects in the State of U.P. have to be calculated in accordance with the Rules of 1998 and not in accordance with the principles in **National Insurance Company v. Pranay Sethi and others**⁸. Therefore, the future prospects in this case, where the income has been notionally assessed for a non-earning deceased, have to be determined in accordance with Rule 220-A of the Rules of 1998. Rule 220-A, that was inserted in the Rules of 1998 with effect from 26.09.2011 by the Eleventh Amendment, was held to apply retrospectively to an accident that took place before the amendment, by a Division Bench of this Court in **Sushil Kumar and others v. M/s. Sampark Lojastic Private Limited and others**⁹. Therefore, there can be little cavil that Rule 220-A would apply to this accident as well, which happened before the Eleventh Amendment, inserting the rule.

37. The deceased in this case was aged 16 years, that is to say, much less than 40 years. The future prospects, which the claimants are, therefore, entitled to add to the deceased's notional income, going by Rule 220-A(3) of the Rules of 1998, would be 50%.

38. The next issue that arises for consideration is the entitlement of the claimants to claim compensation under the head of notional benefits. This question was, again, pronounced upon in **Pranay Sethi (supra)** where it has been held :

48. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule to the Act. The said Schedule has been found to be defective as stated by the Court in *Trilok Chandra [UP SRTC v. Trilok Chandra, (1996) 4 SCC 362]* . Recently, in *Puttamma v. K.L. Narayana Reddy [Puttamma v.K.L. Narayana Reddy, (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574]* it has been reiterated by stating : (SCC p. 80, para 54)

“54. ... we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy.”

49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:

“3. General damages (in case of death):

The following general damages shall be payable in addition to compensation outlined above:

(i)	Funeral expenses	Rs 2000
(ii)	Loss of consortium, if beneficiary is the spouse	Rs 5000
(iii)	Loss of estate	Rs 2500
(iv)	Medical expenses — actual expenses incurred	Rs 15, 000

	before death supported by bills/vouchers but not excee	

50. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in *Trilok Chandra [UP SRTC v. Trilok Chandra]*, (1996) 4 SCC 362] and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs 1,00,000 was granted towards consortium in *Rajesh [Rajesh v. Rajbir Singh]*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . The justification for grant of consortium, as we find from *Rajesh [Rajesh v. Rajbir Singh]*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , is founded on the observation as we have reproduced hereinbefore.

51. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in *Rajesh [Rajesh v. Rajbir Singh]*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . It has granted Rs 25,000 towards funeral expenses, Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though *Rajesh [Rajesh v. Rajbir Singh]*, (2013) 9 SCC

54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] refers to *Santosh Devi [Santosh Devi v. National Insurance Co. Ltd.]*, (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] , it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that

will bring in consistency in respect of those heads.”

(emphasis by Court)

39. The issue of award of compensation for the loss of consortium fell for consideration of the Supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others**¹⁰ where it was held :

21. A Constitution Bench of this Court in *Pranay Sethi[National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205]* dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, “consortium” is a compendious term which encompasses “spousal consortium”, “parental consortium”, and “filial consortium”. The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse : [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149]

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of “company, society, cooperation, affection, and aid of the other in every conjugal relation”. [Black's Law Dictionary(5th Edn., 1979).]

21.2. Parental consortium is granted to the child upon the premature death of a parent, for loss of “parental aid, protection, affection, society, discipline, guidance and training”.

21.3. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

(emphasis by Court)

40. In view of the law laid down in **Magma General Insurance Company Ltd. (supra)** it is to be observed that though the unmarried sister of the deceased has been regarded as a legal representative entitled to compensation for the loss of dependency, there is no principle by which she may be entitled to award of compensation for the loss of consortium. That would be the entitlement of the parents here; none else.

41. So far as the award of interest is concerned, Rule 220-A(6) of the Rules of 1998 provides :

(6) The rate of interest shall be 7% pendente lite and future till the actual payment.

Thus, the interest payable would have to be determined in accordance with the said rules.

42. In view of what this Court has found, the compensation payable to the

claimants in appeal deserves to be revised and determined in the following manner :

S. No.	Particulars		Amount (in ₹)
(i)	Monthly Income (of the deceased)	=	5000/-
(ii)	Monthly Income + Future Prospects (Monthly Income x 50%) = 5000+2500	=	7500/-
(iii)	Annual Income (of the deceased) = 7500x12	=	90,000/-
(iv)	Annual Dependency = Annual Income - 50% deduction towards personal expenses of the deceased = 90000 - 45000	=	45,000/-
(v)	Total Dependency = Annual Dependency x Applied Multiplier = 45000 x 18	=	8,10,000/-
(vi)	Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium = 15000+15000+40000x2	=	1,10,000/-
	TOTAL COMPENSATION (₹8,10,000 + 1,10,000)	=	9,20,000/-

**Total Compensation = ₹9,20,000
(Rupees Nine Lacs Twenty Thousand Only)**

43. In the result, this appeal stands **allowed in part**. The impugned award passed by the Tribunal is **modified** and the compensation awarded is **enhanced to ₹9,20,000**. The aforesaid sum of money shall carry simple interest at the rate of 7%

per annum from the date of institution of the claim petition, until realization. Any sum of money already deposited with the Tribunal by the insurers, pursuant to the impugned award or the interim orders passed by this Court, shall be adjusted. The other directions of the Tribunal in the award shall remain intact.

44. Costs easy.

(2023) 11 ILRA 167
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2023

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Public Interest Litigation (P.I.L.) No. 2117 of 2023

Kanhaiya Lal

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Dharmendra Kumar Tripathi, Sri Shashank Tripathi

Counsel for the Respondents:

C.S.C., Sri Bhupendra Kumar Tripathi

Civil Law - U.P. Revenue Code, 2006 –

Section 67-Petition filed to take appropriate action u/s 67 of the Code, 2006-for removal of illegal encroachment from the plot which are recorded as "Garaha" and reserved for "Holika Dahan"- and to restore the same in its original form- Assistant Collector concerned has exclusive jurisdiction- to exercise power to prevent damage, misappropriation and wrongful occupation of gram panchayat property u/s 67 of the Code.

Petition dismissed. (E-9)

Cases cited:

1. Shravan Kumar Yadav Vs St. of U.P. & ors. reported in 2022 (147) RD 373
2. Pankaj Devi Vs St. of U.P. & ors., Public Interest Litigation No.1892 of 2022
3. Rashid Ahmed Vs Municipal Board, Kairana AIR 1950 SC 163
4. Nain Sukh Das Vs The St. of U.P. AIR 1953 SC 384

(Delivered by Hon'ble Manish Kumar
Nigam, J.)

1. Heard learned Counsel for the parties and perused the record.

2. This Public Interest Litigation has been filed for issuance of a writ, order or direction in the nature of mandamus, directing the respondent-authorities to take appropriate action in view of Section 67 of the U.P. Revenue Code, 2006 for removal of illegal encroachment from the plot nos.163, 167, which are recorded as "*Garaha*" and plot no.165, which is reserved for "*Holika Dahan*" respectively situated in Village-Hamjapur, Tehsil-Sadar, District-Jaunpur and to restore the same in its original form within a stipulated period as may be fixed by this Hon'ble Court.

3. Brief facts of the case are that the petitioner claims himself to be a social worker and resident of Village-Hamjapur, Tehsil-Sadar, Districtt-Jaunpur. His grievance is that during the consolidation proceedings, Gata Nos.163 and 167 are recorded as

Garaha (pond) and Gata No.165 is reserved for Holika Dahan. The aforesaid land of Gata Nos.163, 167 and 165 have been encroached by respondent no.9 to 15. It is further claimed that in order to get the encroachments removed by the respondent nos. 9 to 15, application as well as representation have been moved by the petitioner to the Chief Minister, Uttar Pradesh, concerned S.D.M and concerned Tehsildar. It has been further claimed that the local Lekhpal in collusion with the private respondents has submitted a false and fake report before the authorities. It has also been stated that the respondent authorities are empowered under Section 67 of the U.P. Revenue Code, 2006 to get the illegal encroachment removed and, therefore, the present PIL has been filed for the relief mentioned above.

4. Contention of learned Counsel for the petitioner is that despite complaint being made with the authorities concerned, the respondents have failed to remove the encroachment made by respondent nos. 9 to 15 from the public utility land.

5. Per contra, learned Standing Counsel contended that the petitioner can approach the authority by filing an application under Section 67 of the U.P. Revenue Code, 2006, which provides the statutory remedy to the petitioner and the present PIL as framed may not be entertained for the aforesaid reason.

6. Considering the rival submissions, it is useful to look into the provisions of U.P. Revenue Code, 2006.

In this regard, Section 67 of the Revenue Code, 2006 is quoted as under :

67. Power to prevent (damage), misappropriation and wrongful occupation of (Gram Panchayat) (Property).-(1) *Where any property entrusted or deemed to be entrusted under the provisions of this Code to a [Gram Panchayat] or other local authority is damaged or misappropriated, or where any [Gram Panchayat] or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the [Assistant Collector] concerned in the manner prescribed.*

[(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.]

(3) If the person to whom a notice has been issued under sub-

section (2) fails to show cause within the time specified in the notice or within such extended time as the [Assistant Collector] may allow in this behalf, or if the cause shown is found to be insufficient, the [Assistant Collector] may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or misappropriation of the property or for wrongful occupation as the case may be, be recovered from such person as arrears of land revenue.

(4) If the [Assistant Collector] is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2), he shall discharge the notice.

(5) Any person aggrieved by an order of the [Assistant Collector] under Sub-section (3) or Sub-Section (4), may within thirty days from the date of such order, prefer an appeal to the Collector.

(6) Notwithstanding anything contained in any other provisions of this Code, and subject to the provisions of this section every order of the Sub-Divisional Officer under this section shall, subject to the provisions of sub-section (5) be final.

(7) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation. - For the purposes of this section, the word

"land" shall include the trees and building standing thereon.

7. Rule 66 and 67 of the U.P. Revenue Code, 2006 provides for the detailed procedure for inquiry as well as procedure for removal of encroachments over the public utility land of the Gaon Sabha. Rules 66 and 67 of the U.P. Revenue Code, 2006 are quoted as under :

"66. Information to Assistant Collector (Section 67).-- *The information to Assistant Collector required by Section 67(1) shall be submitted by the Chairman or any member or the Secretary of the Land Management Committee, or any officer of the Local Authority concerned in R.C. Form-19.*

67. Further inquiry by Assistant Collector (Section 67).-- *(1) On receipt of the information under Rule 66, or on facts otherwise coming to his knowledge, the Assistant Collector may make such inquiry as he deems proper and may obtain further information regarding the following points --*

(a) full description of damage or misappropriation caused or the wrongful occupation made with details of village, plot number, area, boundary, property damaged or misappropriated and market value thereof;

(b) full address along with parentage of the person responsible for such damage, misappropriation or wrongful occupation;

(c) period of wrongful occupation, damage or misappropriation and class of soil of the plots involved;

(d) value of the property damaged or misappropriated calculated at the circle rate fixed by the Collector and the amount sought to be recovered as damages.

(2) The Assistant Collector shall thereafter proceed to take action under section 67(2) and for that purpose issue a notice to the person concerned in R.C. Form-20 to show cause as to why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the notice referred to in section 67(2) remains uncomplied with or if the cause shown by the person concerned is found to be insufficient, the Assistant Collector may direct by order that --

(a) such person be evicted by using such force as may be necessary; or

(b) the amount of compensation for damage or wrongful occupation ordered by the Assistant Collector, if not paid in specified time, may be recovered as arrears of land revenue, including the amount of expenses referred to in sub-rule (3).

(4) The amount of damages sought to be recovered and the expenses of execution of the order shall be specified in such notice, which shall be determined in the following manner:-

(a) *In the case of damage or misappropriation, the amount of damages shall be assessed at the prevailing market rate.*

(b) *In the case of unauthorized occupation of any land, the amount of damages shall be the amount equal to the five percent of the market value of the land calculated at the circle rate fixed by the Collector for each year of unauthorized occupation.*

(c) *The expenses of execution of the order shall be assessed on the basis of one day's pay and allowances payable to the staff deputed.*

(5) *If the person wrongfully occupying the land has done cultivation therein, he may be allowed to retain possession thereof until he has harvested the crops subject to the payment by him of the amount equal to the five percent of the market value of the land calculated as per the circle rate which shall be credited to the Consolidated Gaon Fund or the Fund of the local authority other than the Gram Panchayat as the case may be. If the person concerned does not make the payment of the aforesaid amount within the period specified in the notice in R.C. Form-20, the possession of the land shall be delivered to the Land Management Committee or the local authority, as the case may be, together with the crop:*

Provided that where such person again wrongfully occupies the same land or any other land within the jurisdiction of the Gram Panchayat or the local authority as the case may be, he shall be evicted therefrom forthwith

and possession of the land vacant or together with the crop thereon shall be delivered to the Land Management Committee or the local authority as the case may be.

(6) *The Assistant Collector shall make an 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.*

(7) *Nothing in sub-rule (5) shall debar the Land Management Committee or the local authority as the case may be from prosecuting the person who encroaches upon the same land second time in spite of having been evicted under the Code or the rules, under section 447 of the Indian Penal Code, 1860.*

(8) *There shall be maintained in the office of each Collector a register in R.C. Form-21 showing details of the amount ordered to be realized on account of damages and compensation awarded in proceedings under section 67.*

(9) *A similar register shall also be maintained by each tahsildar showing realization of damages and compensation awarded in such proceeding. The entries made in the register maintained at tahsil shall be compared with the register maintained by the Collector to ensure accuracy of the entries made therein.*

(10) *A progress report showing realization of damages and compensation awarded in proceedings*

under section 67 shall be sent to Board of Revenue, U.P., Lucknow by the fifteenth day of April and October every year. The Board after consolidating the report so received from the districts shall send it to the Government.

(11) Nothing in Rules 66 and 67 shall debar any person from establishment of his right, title or interest in a court of competent jurisdiction in accordance with the law for the time being in force in respect of any matter for which any order has been made under Section 67 of the Code."

8. Rule 67 of U.P. Revenue Code Rules, 2016 as quoted above provides that the Assistant Collector may make inquiry on receipt of the information under Rule 66 of on facts otherwise coming to his knowledge and proceed thereafter in accordance with the procedure prescribed in sub-Rules of he Rule 67.

9. In view of the aforementioned provisions, the jurisdiction to prevent damage, misappropriation and wrongful occupation of gram panchayat property vests in the authority described under Section 67 of the Code. Consequently, the appropriate remedy available to the petitioner was to invoke the provisions of Section 67 of the Code or under the erstwhile provisions of Section 122B of the U.P.Z.A. & L.R. Act.

10. It is also the statutory duty of the authority under the Code to take action on receipt of information that

any property entrusted or deemed to be entrusted under the Provisions of the Code to a gram panchayat or other local authority is damaged or misappropriated or where any gram panchayat or other authority is entitled to take possession of any land under the provisions of the Code and such land is occupied otherwise than in accordance with the said provisions. Statutory duty has been cast upon Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, to inform the Assistant Collector concerned in the manner prescribed.

11. On the receipt of information under sub-section(1) or otherwise, and on being satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, the Assistant Collector shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land. If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person shall be evicted from the land, and may, for that

purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or misappropriation or for wrongful occupation as the case may be, be recovered from such person as arrears of land revenue. Sub-section 5 of the Section 67 of the Code provides a remedy to any person who is aggrieved by an order of the Assistant Collector under sub-section (3) or sub-section (4), may be within thirty days from the date of such order, prefer an appeal to the Collector. Thus, a complete machinery for eviction and to prevent damage, misappropriation and wrongful occupation of gram panchayat property has been provided under Section 67 of the Code read with Rule 67 of the Rules, 2016.

12. Section 206 of the Code provides that notwithstanding anything contained in any law for the time in force, but subject to the provisions of the Code, no Civil Court shall entertain any suit, application or proceeding to obtain a decision or order on any matter which the State Government, the Board, any Revenue Court or Revenue Officer is, by or under this Code, empowered to determine, decide or dispose of. Clause (a) of the sub-section 2 of Section 206 of the Code further provides that without prejudice to the generality of the provisions of sub-section (10) and save as otherwise expressly provided by or under this Code, no Civil Court shall exercise jurisdiction over any of the matter specified in the second Schedule.

Clause (b) of sub-section 2 of the Code further provides that no Court other than the revenue Court or the revenue officer specified in the column 3 of the third schedule shall entertain any suit, application or proceeding specified in column 3 thereof. Section 67 of the Code finds mention in the third schedule and the competent authority specified is Assistant Collector against whose order the first appeal would lie to the Collector.

13. In view of the clear provisions as aforementioned, the Assistant Collector concerned has exclusive jurisdiction to exercise power to prevent damage, misappropriation and wrongful occupation of gram panchayat property.

14. Learned Standing Counsel further contended that under Rule 67, the petitioner can move an appropriate application before the Assistant Collector informing him about the illegal encroachment made by the private persons over the public utility land.

15. Experience shows that large number of writ petitions are filed everyday in this Court for somewhat similar relief, regarding demarcation of boundaries of agricultural fields, for issuance of a mandamus restraining the private respondents from interfering in their possession, restraining the private respondents not to alienate the immovable property in favour of the third party and for other similar relieves. The U.P. Revenue Code, 2006

(U.P. Act No.8 of 2012) deals with all sorts of dispute relating to land. Section 230 of the Code repealed as many as 32 enactments mentioned in List-A of First Schedule including the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, Uttar Pradesh Urban Areas Zamindari Abolition and Land Reforms Act, 1956, The United Provinces Board of Revenue Act, 1922 and The U.P. Land Revenue Act, 1901 etc.

16. The Code, 2006 is designed to deal with the grievance relating to land tenures and land revenue and incidental matters. Chapter-II of the Code, 2006 provides that there would be a division of the State in which there would be revenue areas. Chapter III deals with the Board of Revenue its jurisdiction and various revenue officers. Chapter-IV deals with boundary and boundary marks. Chapter-V provides the scheme for maintenance of village records; Chapter-VI provides revision of village records; Chapter-VII about ownership of land other properties; Chapter-VIII provides management of land and other properties by Gram Panchayat or other local authorities; Chapter-IX deals with tenures; Chapter-X provides Government Lessees; Chapter XI & XII deals with assessment of land revenue and collection of that and Chapter-XIII deals with judicial procedure of the Revenue Courts.

17. A bird's-eye view of the U.P. Revenue Code, 2006 shows that the provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1950

and the U.P. Zamindari Abolition and Land Reforms Rules, 1952 have been incorporated in this Act and various procedures have been simplified. We find that without taking recourse to the remedy available under the Code, 2006 a large number of writ petitions are filed directly in this Court seeking reliefs under extraordinary jurisdiction of this Court under Article 226/227 of the Constitution.

18. The jurisdiction of the High Court under Article 226 of the Constitution of India is an extraordinary remedy, to be not invoked or allowed to be invoked ordinarily, as is found being done increasingly, leaving very little time for the High Courts to deal under Article 226 with issues really deserving consideration thereunder. Supreme Court, as far back as in *Rashid Ahmed Vs. Municipal Board, Kairana* AIR 1950 SC 163 and *Nain Sukh Das Vs. The State of Uttar Pradesh* AIR 1953 SC 384 held that prerogative writs are extraordinary remedies intended to be applied in exceptional cases in which the ordinary legal remedies are not adequate but in the last over half century the said principle appears to have been forgotten, with the writ remedy being considered as a cure for all ordinary ailments also and for which the ordinary legal remedies under the civil law are adequate. The same has resulted in the High Courts being flooded with writ petitions, the disposal whereof axiomatically is found to be taking, in most cases, as much time as the disposal of an ordinary civil lis, and which has resulted in the High Courts

facing difficulty in providing immediate relief even in deserving cases in writ jurisdiction and/or being left with little time to ponder over the important constitutional issues coming before it in the writ jurisdiction. In my humble view, a time has thus come for the High Courts to send out a clear message of the writ remedy being an extraordinary remedy not available as an alternative to the remedy already available under the civil and general laws.

19. Recently the Supreme Court in the case of ***Subrata Roy Sahara v. Union of India and others***, reported in (2014) 8 SCC 470, has again occasioned to consider the matter of frivolous petitions and need to curb them with firm hands. The Supreme Court has also held that exemplary costs should be imposed.

"191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel

and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs".

192. We should not be taken to have suggested that the cost of litigation should be enhanced. It is not our suggestion that the court fee or other litigation related costs should be raised. Access to justice and related costs should be as free and as low as possible. What is sought to be redressed is a habituation to press illegitimate claims. This practice and pattern is so rampant that in most cases disputes which ought to have been settled in no time at all before the first court of incidence are prolonged endlessly for years and years and from court to court up to the highest Court.

193. This abuse of the judicial process is not limited to any particular class of litigants. The State and its agencies litigate endlessly up to the highest Court just because of the lack of responsibility to take decisions. So much so that we have started to entertain the impression that all administrative and executive decision-making are being left to courts just for

that reason. In private litigation as well, the litigant concerned would continue to approach the higher Court, despite the fact that he had lost in every court hithertobefore. The effort is not to discourage a litigant in whose perception his cause is fair and legitimate. The effort is only to introduce consequences if the litigant's perception was incorrect and if his cause is found to be not fair and legitimate, he must pay for the same. In the present setting of the adjudicatory process, a litigant no matter how irresponsible he is suffers no consequences. Every litigant, therefore, likes to take a chance even when counsel's advice is otherwise.

20. In the present case itself, the petitioner without taking recourse to the remedy under the Code, 2006 has approached this Court for a direction to the respondent-authorities to get the illegal encroachments made by the respondent nos.5 to 9 removed.

21. I find that the present writ petition is misconceived and ill-advised. Instead of moving an application under the Code, 2006, which was appropriate remedy, the petitioner has filed the present writ petition, which in my view is an abuse of process of law. This Court is overburden with large number of case and is precious judicial time is wasted in such type of writ petitions, which are filed in large numbers, wherein the petitioners could have obtain relief or redressed their grievances by making an appropriate application under the provisions of U.P. Revenue Code, 2006. In this regard, I am supported by judgment of this Court in *Shravan Kumar Yadav Vs.*

State of U.P. and 15 others reported in 2022 (147) RD 373 as well as judgment and order dated 24.11.2022 passed in *Public Interest Litigation No.1892 of 2022 (Pankaj Devi Vs. State Of U.P. and others)*

22. For all the reasons mentioned above, I find that this writ petition is an abuse of process of law and meritless. Accordingly, the writ petition is **dismissed** with liberty to the petitioner to approach the competent authority by filing an application under Section 67 of the U.P. Revenue Code, 2006. In case, such an application is filed by the petitioner, the same shall be decided in accordance with law after providing opportunity of hearing to all the concerned parties. It is clarified that this Court has not adjudicated upon the merits of the claim as raised by the petitioner in the present Public Interest Litigation.

(2023) 11 ILRA 176

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 18.11.2023

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

RERA Appeal No. 67 of 2023

Connected With

RERA Appeal No. 68 of 2023

and other connected cases

U.P. Avas Evam Vikas Parishad, Lucknow

...Appellant

Versus

Dhruv Kumar Chaturvedi

...Respondent

Counsel for the Appellant:

Umesh Chandra Pandey

Counsel for the Respondent:

Reasoned order-Appellate Tribunal examined the evidence on record at length-and arrived at a reasoned conclusion-there was a delay in handing over of the possession of the project to the respondent-this finding is based on cogent and binding document-no any substantial question of law involved-**Appeals dismissed.** (E-9)

Cases cited:

1. Ramchandra Vs Ramalingam: AIR 1963 SC 302

2. Nazir Mohamed Vs J. Kamala & ors.: (2020) 19 SCC 57

3. Santosh Hazari Vs Purushottam Tiwari: (2001) 3 SCC 179

4. Chandrabhan v. Saraswati : 2022 SCC Online SC 1273

5. Government of Kerala Vs Joseph : 2023 SCC Online SC 961

6. Chittoori Subbanna Vs Kudappa Subbanna, AIR 1965 SC 1325,

7. St. of Punjab Vs Dr. R.N. Bhatnagar & ors.(1999) 2 SCC 330,

8. T.C. Appanda Mudaliar Vs St. of Madras, (1976) 4 SCC 821

9. Dr. Jagmittar Sain Bhagat Vs Dir. Of Health Services, (2013) 10 SCC 136,

10. Saroj Rani Vs Sudarshan Kr. Chadha (1984) 4 SCC 90,

11. St. of Uttar Pradesh & others Vs Dr. Anupam Gupta & ors.(1993) Suppl(1) SCC 594

12. Lakshmi Shankar Mehrotra & ors.Vs S.M. Sengupta & Ors, (1995) Suppl(4) SCC 40.

13. Neelkamal Realtors Suburban Pvt. Ltd. & ors.Vs U.O.I. : AIR 2018 (NOC) 398 (BOM.)

14. M/s Newtech Promoters and Developers Pvt. Ltd. Vs St. of U.P (Civil Appeal No. 6745-6749 of 2021) decided on 11.11.2021

15. Lucknow Development Authority Vs M.K. Gupta, 1994 (91) SCC 243,

16. Ghaziabad Development Authority Vs Balbir Singh, 2004 (5) SCC 65

17. Haryana Development Authority Vs Darsh Kumar, 2005 (9) SCC 449

18. Ghaziabad Development Authority Vs U.O.I., 2000 (6) SCC 113

19. Bangalore Development Authority Vs Syndicate Bank II (2007) CPJ 17 (SC)

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) At the outset, this Court deem it apt to divide the judgment into sections to facilitate analysis, which are as follows :-

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A. Introduction

(2) Heard Shri Anurag Singh, Shri Umesh Chandra Pandey and Shri Shikhar Srivastava, learned Counsel representing the appellant and Shri Pradeep Kumar Singh and Shri Santosh Kumar Bhatt, learned Counsel representing the respondent.

(3) The above-captioned appeals have been filed by the appellant- “U.P Avas Evam Vikas Parishad” under Section 58 of the Real Estate **(Regulation and Development) Act, 2016** (hereinafter referred to as “RERA Act, 2016”), wherein by virtue of the impugned order, the learned U.P. Real Estate Appellate Tribunal, Lucknow (hereinafter referred to as the ‘**Tribunal**’) has dismissed appeals filed by the appellant and it has been directed that the amount deposited in terms of Section 43 (5) of the RERA Act, 2016 by the appellant to be transferred to the concerned account of the Regulatory Authority for disposal as per the provisions of the Act.

(4) Due to reasons recorded by this Court in its earlier order dated 28.1.2023, the delay in filing of these appeals has already been condoned and as such these bunch of appeals were heard together for their disposal on merits.

B. RERA Appeal Nos. 67, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 87 of 2023

(5) These appeals arise out of the common judgment/order dated 25.11.2022 passed by the learned Appellate Tribunal.

(6) Since common question of law has been raised by the appellant in all these appeals, it would be in the interest of justice that all these appeals are consolidated and taken together for hearing and disposal. However, before this Court deals with the question of law raised in these appeals, the brief facts culminating into these appeals be narrated to appreciate the law in its proper perspective. In this regard, the facts of the lead matter being RERA Appeal No. 67 of 2023 (*complainant- Dhruv Kr. Chaturvedi*) is taken into consideration.

Factual Matrix

(7) It has been submitted that the appellant is a public institution constituted under the provisions of U.P Avas Evam Vikas Adhiniyam, 1973 (hereinafter referred to as ‘**Adhiniyam, 1973**’) and is an instrumentality of State which works on ‘no profit and no loss’ basis. The appellant had been constituted for the welfare of the public and is engaged in providing planned development of the city and answering to the residential needs of the public at large in a regularised manner.

(8) It is claimed that the appellant has acquired the land for development of housing projects under the provisions of U.P Awas Evam Vikas Adhiniyam and the provisions of Land Acquisition Act, 1894 as provided under law. It is the case of the appellant that a Scheme was launched in Vrindavan Yojna and after delivery of possession made by the Land Acquisition in the year 2011 and during the project was to be in progress, a new Act, namely, “The

Right of Fair Compensation & Rehabilitation Act, 2013” came into force, which caused various hindrances in meaningful acquisition of the land and as such some delay has occurred in the said project, which was beyond the control of the appellant.

(9) It appears that registration for allotments of flats were opened by the appellant for Vrindavan Yojna, Nilgiri Enclave under self-finance scheme for a housing colony of 640 flats in March, 2013 and, as such, on an application by the respondent (complainant before the authority), the appellant allotted a Flat to the respondent on 31.08.2013 for an estimated sale consideration of Rs. 20,88,000/-. As per the respondent, the said amount of sale consideration was payable in installments and the possession was to be given by the appellant within 24 months. However, the appellant failed to offer for possession to the respondent within the said stipulated time period, which resulted in increase in the Flat price and additional burden of GST was made applicable to him. It was the case of the respondent before the Authority that although he had regularly paid all the installments, however, as per the registration booklet, no windows in the Flat, no car parking, no sewage and no other facilities were made available to him and most importantly the possession was delayed.

(10) Admittedly, the sale deed for the said Flat was executed on 08.12.2017 and possession was given on 27.01.2018 and the complaint was filed almost after one year of taking possession by the respondent on various grounds including delay of delivering possession of the flats, no windows in flats, parking issue etc.

(11) On the other hand, the appellant took a ground before the authority that the price of the flat was not fixed and was merely tentative and similarly 24 months of possession was a tentative date. According to them, construction was delayed because of pendency of litigation in the High Court being Writ Petition No. 110 of 11 and 3869 of 11. Further delay was because of *dharna pradarshan* of farmer's union, for which a report/complaint was also filed by the appellant. According to the appellant, the registration booklet also mentions that in case the respondent/allottee pays the last installment and still is not given the possession of the flat, he was well within his right to demand for refund of money, which in this case has not been done by the respondent/allottee, meaning thereby that they have volunteered to waive off their right to award of any compensation. The appellant also stated before the authority that the claim for compensation for delay under Section 12, 14, 18 and 19 of the Adhiniyam, 1973 was not maintainable. According to them, window has been provided and car parking has also been given.

(12) An objection was raised by the appellant before the Authority as to the maintainability of the complaint, wherein the Authority transferred the said complaint to the Adjudicating Officer under Section 71 of the Act, 1973 for determination of compensation for delay and other issues etc.

(13) The Adjudicating Authority, after discussing the contention of both the parties in great detail, returned a finding dated 11.02.2021 that there had been a delay in giving the possession of flat by the appellant. Thus, the authority, while accepting the complaint of the respondent,

directed the appellant to pay interest as compensation on the amount of Flat i.e Rs. 20,88,000/- for the period of delay between 31.08.2015 to 18.08.2017 at the rate of MCLR+1% per annum within 45 days of the passing of orders. Further direction was that in case the said amount of compensation in the form of Interest is not paid within the said 45 days, the respondent would be entitled for interest at the same rate till the receipt of actual amount from appellant.

(14) The appellant being aggrieved by the aforesaid order of the Adjudicating Authority filed an appeal under Section 44 of the RERA Act, 2016 before the Appellate Tribunal.

(15) The said appeal was taken for hearing along with 22 other appeals, lead matter being Appeal No. 245 of 2020 (*U.P Avas Evam Vikas Parishad V/s Sangeeta Singh*), wherein the Appellate Tribunal painstakingly prepared a tabular chart of the pending 23 appeals, giving brief description of the flat allotted, date of allotment, total price paid, date of impugned order, date of filing of appeal and the relief sought in each appeal.

(16) The Appellate Tribunal having recorded the facts of each appeal in a tabular form, went on to narrate the brief facts of the lead appeal and the grounds preferred by the appellant along with the relief sought. Further, the objection against the appeal by the respondent was also noted by the Appellate Tribunal along with the relevant judgments. Apparently, the Appellate Tribunal after discussing the various issues raised by the appellant as well as the respondent, rejected the appeal vide the common impugned order dated 25.11.2022 along with almost 22 other

appeals on the same issue. It is this order which is subject matter of challenge in these appeals.

Contention of the parties

(17) The learned Counsel for the appellant has strenuously argued that the impugned order has been passed without considering the fact that any claim under the RERA Act can be raised or compensation can be granted only on the basis of contract existing between the parties. According to him, after execution of the sale deed, the prior contract of year 2013 having been extinguished, the complaint itself was not maintainable and as such he has argued that the impugned order has been passed without any jurisdiction. The learned Counsel as an extension of his argument has cited judgments of the National Consumer Disputes Redressal Commission (NCDRC) to suggest that the complaint before the RERA was not maintainable of the respondent/allottee, in case he had taken possession with an open eye and without raising any objection. Further, grounds were agitated relating to non-applicability of Section 18 of the RERA Act, 2016 relating to grant of interest or compensation as there existed no privity of contract between the parties. Further thrust of the argument of the learned Counsel for the appellant were on the issue that when the allotment was made at a tentative rate subject to calculation of final cost, there could not had been any question about revised higher rates.

(18) Thus, the learned Counsel has attacked the impugned order from all four corners and has also buttressed to frame almost six substantial question of law, as

could also be found in the memo of appeals.

(19) Per contra, the learned Counsel for the respondent/allottee has supported the impugned judgment. According to him, there is no substantial question of law involved in the present appeal and as such he has prayed for dismissal of the present appeal.

Discussion & Findings

(20) Before this Court embarks on to the onerous path of deciding the present bunch of appeals, it would be apt to consider the scope and purport of the provision of law under which these appeals have been sought to be preferred by the appellant. Admittedly, these appeals have been filed under section 58 of the RERA Act, 2016, which inter-alia states :-

"58. Appeal to High Court-(1)

Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908:

Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

Explanation-The expression "High Court" means the High Court of a State or Union territory where the real estate project is situated.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties."

(21) A plain reading of the aforesaid provision although sufficiently provides for an appeal against the decision or order of the Appellate Tribunal on any one and more grounds specified in Section 100 of the Code of Civil Procedure, however, the word "Second Appeal" is missing from the aforesaid Section 58 of the Act. In any case, the very mention of the availability of grounds as specified in Section 100 of CPC makes the said provision of the CPC relevant for consideration of any appeal under Section 58 of the RERA Act, especially when technically it is an appeal against an Appellate Tribunal's decision or order and in that sense is virtually a second appeal. It would be profitable at this stage to quote Section 100 C.P.C, which reads as under:

"100.Second appeal-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.]”

(22) There is no gainsaying that a right to appeal is always conferred by the statute and any party does not have an inherent right to appeal. In the present case, it has been mentioned that an appeal under Section 58 of the RERA Act can be preferred on one or more grounds specified in Section 100 CPC. Apparently, Section 100 CPC provides for an appeal to the High Court, if it is satisfied that the case involves a substantial question of law. Thus, it can be safely deduced that the existence of substantial question of law is *sine quo non* for the exercise of jurisdiction under Section 100 of the CPC as well as Section 58 of the RERA Act.

(23) The principles for deciding when a question of law becomes a substantial question of law, have been enunciated by a Constitution Bench of the Apex Court in **Sir Chunilal v. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd** : AIR 1962 SC 1314 wherein it was held :-

“The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled

by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”

(24) Although, under Section 58 of the RERA Act, the jurisdiction of this Court is confined to substantial question of law, which as a corollary means that a finding of fact is not open to challenge in this proceeding, even if the appreciation of evidence is palpably erroneous and the finding of fact is incorrect as has been held by the Apex Court in **Ramchandra Vs. Ramalingam**: AIR 1963 SC 302, however the same is always to the exceptions that (i) the conclusions drawn by the court below do not have a basis in the evidence led or (ii) the appreciation of evidence “suffers from material irregularity”.

(25) Recently, the Apex Court in the case of **Nazir Mohamed V/s J. Kamala and Ors.** : (2020) 19 SCC 57 at paragraph 37 formulated the principles relating to Section 100 CPC as to how and in what circumstances the substantial question of law can be framed in the following words :-

“37. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in

construing a document, it gives rise to a question of law.

The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

The general rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”

(26) Having traced the scope and power of interference by this Court under Section 58 of the RERA Act, 2016 to an order passed by the Appellate Tribunal, this Court finds it profitable to quote the various question of law as mentioned by the appellant in the memo of appeal, so as to examine its relevance keeping in view the limited scope of provisions of Section 58 of the RERA Act, 2016. The question of law framed by the appellant are thus :-

“ (a) Whether the order and judgment impugned suffers from illegality on account of improper consideration of material and law as well as exercising the jurisdiction not vested in it?

(b) Whether the order of the tribunal upholding the order of adjudicating officer can be just, legal and proper ignoring that the complaint itself was not maintainable as was filed much before to the RERA Act came into force and was not an ongoing project in view to rule 2(h)?

(c) Whether the impugned judgment and order about awarding the interest of compensation for delayed period, ignoring that it was not due to fault of the appellant can be just and liable to be set aside in view of principles of force majeure?

(d) Whether after dismissal of complaint by authority vide order dated 19.10.2019 the compensation or interest can be awarded in view to section 12, 14 & 18 of the Act and the order be held to be just and proper.

(e) Whether in deciding all 18 appeals by common order without considering the fact of each cases or appreciating the points involved and argument made, the finding can be held to be a speaking order and not in violation to principles of natural Justice?

(f) Whether the finding of the impugned judgment and order specially awarding interest on delayed possession is being contrary to the law laid down by Apex Court is totally illegal arbitrary and is otherwise not valid in the eyes of law hence liable to be set-aside.”

(27) The aforesaid issues framed by the appellant apparently seems to have been already decided by the Appellate Tribunal, wherein the issues framed by the Tribunal subsumes the question of law framed by the appellant in the present petitions. Apparently, the Appellate Tribunal applauding the main aim of the RERA Act is to protect the home buyers and also to make sure that the investments in the field of the real estate industry get uplifted with time had proceeded to answer these questions, keeping in view that the RERA Act was brought in the scenario to see to the fact that the sale to a Home buyer whether it be an apartment or a plot transparently takes place between the promoter/developer and the allottee/Home buyers.

(28) Now the Court proceeds to see whether the six "substantial questions of law", as have been framed by the appellants, are invoked "substantially" or not, so as to invoke the jurisdiction of this Court. A three Bench Judge of the Apex Court some more than a decade ago in **Santosh Hazari Vs. Purushottam Tiwari**: (2001) 3 SCC 179, which was also reiterated and followed in **Chandrabhan v. Saraswati** : 2022 SCC Online SC 1273 and **Government of Kerala Vs Joseph** : 2023 SCC Online SC 961 had held that to constitute a substantial question of law, (i) the issue should not be previously settled by law of land or a binding precedent, (ii) the said issue should have material bearing

on the decision of the case and (iii) the issue raised should not be a fresh point raised for the first time before the High Court, unless it goes to the root of the matter.

(29) Although, this Court exercising its Jurisdiction under Section 58 of the RERA Act is not enthroned as a Second Appellate body, however, a fiction has been created by the Section itself, which cast a duty and somewhat provide an embargo on the appellant to file an appeal under the said section on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908. Thus, a restriction has been cast upon the appellant to prefer the appeal on a limited ground of "substantial question of law" and in that sense this Court could be held to have exercising its power of Second Appeal under Section 58 of the RERA as envisioned under Section 100 of the Civil Procedure Code. Pertinently, no such restriction is attributable to this Court of considering the present appeal only on the point of substantial question of law.

(30) From perusal of the bunch of appeals being decided by this common order, it comes out that the respondents in each of the cases have booked a flat with the U.P. Awas Evam Vikas Parishad and paid a booking amount in terms of scheme floated by the Parishad. Apparently, the respondents were allotted a flat in Neelgiri Enclave (Vrindavan Yojna) during the period 2013-2014. The Parishad, thereafter, demanded certain amount towards allotted flats. The respondent claims to have submitted the aforesaid amount as and when the demands were raised by the Parishad. It is admitted that the possession of the flat was supposed to be given within 30 months from the date of allotment as per

Clause 9.1 of the brochure. However, it was only in 2017, that the respondents were asked to deposit the final amount, so that the sale deed can be registered of the Flats and it was subsequently only that the possession of these Flats were given to the respondents. It is after having received the possession and after registration of the sale deed, the respondents filed a Complaint Case before the U.P. Real Estate Regulatory Authority (hereinafter referred to as "Authority") claiming refund of certain excess amount, refund of interest, compensation for delayed possession and other ancillary non-compliance of the RERA provisions relating to construction and parking. Apparently, the complaint was allowed by the Authority, wherein the Parishad was directed to pay interest on the total amount of sale consideration paid till the date of possession of the apartment at the rate of MCLR + 1% as compensation. Subsequently, the Parishad filed various appeals before the Appellate Tribunal, which came to be decided by the impugned common order dated 25.11.2022, by virtue of which the order of the Authority was upheld and hence the present second appeals.

(31) This Court has gone through the appeals filed by the Parishad with assistance of the learned Counsel appearing for the appellant and the alleged substantial questions of law.

(32) Having traced the principles of law for consideration of the present appeal under Section 58 of the RERA Act, it is apparent that none of the "substantial" questions of law" as have been framed by the appellant fall within the ambit of being "substantial" questions of law. The reason for the same is that the "substantial" questions of law as have been framed by

the appellant are specifically covered by the specific provisions of law as per the interpretation given to them and do not involve any debatable legal issue as has been also held in **Nazir Mohamed Vs J. Kamala and Ors.**: (2020) 19 SCC 57 at paragraph 32, which *inter-alia* observes :-

"32. To be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way."

(33) The learned Counsel for the appellant has during the course of his argument emphatically stressed on a recent order of the learned RERA Appellate Tribunal passed in Appeal No. 70 of 2023 (*GNIDA Vs. Ranjan Mishra*) and two other connected matters to argue that the RERA Tribunal has itself vide the said judgment dated 20.04.2023 has held that the Adjudicating Officer does not have the jurisdiction to grant interest in the form of compensation under section 18(1) of the RERA Act and that according to the learned Counsel, the Appellate Tribunal has itself recorded in the said order that the competence and jurisdiction of the Adjudicating Officer was being examined by the Appellate Tribunal for the first time in the said case. While the order of an Appellate Tribunal is not binding on this Court, which has been designated as a Court of Second Appeal under the scheme of RERA Act and even the judicial proprietary does not permit this Court to consider the said order for adjudication of these appeals, however, as is being discussed hereinafter, the issue raised and decided in both the cases are at stark differences.

(34) This Court on the specific query having put to the learned Counsel for the appellant as to whether any ground had been taken by him before the RERA Appellate Tribunal or before this Hon'ble Court relating to the competence or jurisdiction of the Adjudicating Authority for grant of interest as compensation under Section 18(1) of the RERA Act, learned Counsel has neither admitted nor denied the said query and has instead relied on the following judgments to buttress his submission that a pure question of law, not dependent upon any question of facts can be allowed to be raised for the first time even before the Appellate Court.

(I) **Chittoori Subbanna Vs Kudappa Subbanna**, AIR 1965 SC 1325,

(II) **State of Punjab Vs Dr. R.N. Bhatnagar & Ors.** (1999) 2 SCC 330,

(III) **T.C. Appanda Mudaliar Vs State of Madras**, (1976) 4 SCC 821,

(IV) **Dr. Jagmittar Sain Bhagat Vs Dir. of Health Services**, (2013) 10 SCC 136,

(V) **Saroj Rani Vs Sudarshan Kr. Chadha** (1984) 4 SCC 90,

(VI) **State of Uttar Pradesh & others Vs Dr. Anupam Gupta & Ors.** (1993) Suppl(1) SCC 594,

(VII) **Lakshmi Shankar Mehrotra & Ors. Vs S.M. Sengupta & Ors.** (1995) Suppl(4) SCC 40.

(35) There could not be any doubt about the aforesaid legal precedent, however, as held in various judgment that a decision is an authority for the questions of law determined by it and while applying the ratio, the Court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. Thus Court finds that there is no quarrel about the

proposition of law argued by the learned Counsel for the appellant, however, the fact of the matter remains that jurisdiction is an issue, which ought to have been decided at a preliminary stage itself.

(36) At this juncture, it would be apt to quote the question of determination formulated by the learned RERA Appellate Tribunal, which inter-alia enumerates as follows:

“ I. Whether the complaint filed before the Adjudicating officer is maintainable as cause of action arose in year, 2013 before RERA Act, 2016 came into force as pleaded by appellant- UP Avas evam Vikas Parishad, Lucknow in its Appeal ? .

II. Whether the project in question of the appellant- UP Avas evam Vikas Parishad, Lucknow is delayed ?

III. Whether the judgment and order dated 13.03.2020 passed by the Adjudicating Officer awarding the interest in terms of compensation to the respondent/ complainant for delayed period from 30.07.2016 to 24.09.2019 is liable to be set aside for the reasons mentioned in appeal?”

(37) Thus, apparently the issue of competence and jurisdiction was neither raised by the appellant before the Appellate Tribunal, nor the same has been raised in the present memo of appeals filed in this Court.

(38) Moreover, there is another aspect of the matter. This Court *de hors* the aforesaid belated challenge to the Jurisdiction by the appellant would had entertained the said challenge even at this stage, however, a plain reading of the facts of the present case leads one to the

conclusion that both the matters are distinguishable on facts.

(39) Apparently, it is available from the impugned order of the Adjudicating Officer that the allottee had filed a complaint seeking compensation for various reasons, including (i) relating to delay in possession, (ii) there being no windows in the flat and (iii) non-providing of parking area etc., wherein the RERA Authority vide an order dated 19.10.2019 marked the said case for adjudication to the said Adjudicating Officer because Section 18 of the Act related to grant of interest as well as compensation. The learned Adjudicating Officer after hearing the parties and recording the findings came to a conclusion that there had been a delay in providing possession to the allottee during the period from 31.08.2015 to 18.08.2017 and as such for that period granted compensation to be calculated as an interest at the rate of SBI Home loan rate MCLR+ 1% calculated annually. The Adjudicating Officer held that interest amount would be the compensation granted.

(40) Thus, this Court finds that the Adjudicating Officer has awarded compensation in the form of interest, which in this case is “SBI Home loan rate MCLR+ 1% calculated annually”. This Court needs not burden this judgement any further in explaining the meaning of compensation, which may be both monetary as well as non-monetary, direct or indirect etc. In the present case, apparently, it seems that the appellant is so engrossed with the word “Interest” that it is not able to visualize interest and compensation separately. Needless to say, interest is a sub-set of compensation and not vice-versa. Further, a Division bench of the Bombay High Court in the case of **Neelkamal**

Realtors Suburban Pvt. Ltd. And others Vs. Union of India : AIR 2018 (NOC) 398 (BOM.), while deciding the constitutionality of various provisions of RERA, observed as follows :-

“Section 18(1)(b) lays down that if the promoter fails to complete or is unable to give possession of an apartment due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or for any other reason, he is liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment with interest at such rate as may be prescribed in this behalf including compensation. If the allottee does not intend to withdraw from the project he shall be paid by the promoter interest for every month's delay till handing over of the possession. The requirement to pay interest is not a penalty as the payment of interest is compensatory in nature in the light of the delay suffered by the allottee who has paid for his apartment but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. **The interest is merely compensation for use of money.**”

(41) In any case, the point being raised by the learned Counsel for the appellant in challenging the jurisdiction of the Adjudicating Authority vis-à-vis the RERA Authority for grant of interest for an allottee who wishes to remain invested with the project and eventually takes the possession, is not under challenge, as proviso to Section 18(1) clearly mandates that where an allottee does not intend to withdraw from the project, he shall be paid

by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed. Therefore, by raising the point of jurisdiction, the learned Counsel has waived to certain extent the grant of interest, as the resurrected challenge is as to who can grant interest, whether the Authority or the Adjudicating Officer. This Court finds that the aforesaid challenge has been already answered by the Apex Court at paragraph 86 of the judgment reported as **M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P** (Civil Appeal No. 6745-6749 of 2021) decided on 11.11.2021, which inter-alia states;

“86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like ‘refund’, ‘interest’, ‘penalty’ and ‘compensation’, a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to

expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016.”

(42) It is no gain saying that both RERA Authority and Adjudicating Authority operates in different hemisphere, inasmuch as RERA Authority is empowered to grant interest whereas Adjudicating Authority is empowered to adjudge compensation and interest and thus the jurisdiction of grant of Interest in the form of compensation by the Adjudicating Authority for and in place of the RERA Authority cannot be faulted with.

(43) Further, there is another aspect of the matter. An examination of Section 71 of the Act reveals that an Adjudicating Officer is to be appointed by the Regulatory Authority in consultation with the Government. The Adjudicating Officer alone has the power to deal with the application for adjudging compensation under Section 71 read with Sections 12, 14, 18 and 19 of the Act as could be well deduced on a simple reading of section 71(1) and 71(2) of the Act. However, Section 71(3) of the Act provides that the Adjudicating Officer has powers to direct to pay such compensation or interest, as the case may be, if he is satisfied that the person has failed to comply with the provisions of any of the section as provided in subsection (1) i.e section 12, 14, 18 & 19 of the Act. as the case may, as much as subsection (3) of section 18 of the Act, 2016 signifies that if the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations, made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottee, in

the manner as provided under the Act, 2016. Moreover, section 71 relating to factors to be taken into account by adjudicating officer signifies various factors which are to be taken into consideration by the Adjudicating Officer, while adjudging the quantum of compensation or Interest as the case may be under section 71 of the Act. Thus, the provisions of RERA are wide enough to empower the adjudicating Officer to adjudicate the quantum of compensation and grant the same in the form of Interest as has been done in the present case.

(44) According to this Court, the challenge to the competence and jurisdiction of the Adjudicating officer in the present set of facts is wholly misplaced as the Adjudicating Officer has awarded compensation in the form of interest and not interest *simplicitor* as is being construed by the appellant, which according to him is the prerogative of the RERA Authority. This Court also finds that the Apex Court in the aforesaid **M/s Newtech Promoters and Developers Pvt. Ltd.** (supra) has nowhere discussed the form of compensation to be awarded to the allottee. Therefore, in the present case, in case the Adjudicating Officer has awarded compensation in the form of Interest, nothing illegal or infirmity could be found in the competence or Jurisdiction of the Adjudicating Officer. The said finding also is being given keeping in view the beneficial legislation for which RERA Act was enacted by the legislation for safeguarding the interest of Home Buyers by ensuring fair practice, providing timely information and resolving disputes between an allottee and the Developers.

(45) Having perused the records, this Court is of the view that no substantial

question of law arises in these petitions. In any case, a perusal of the impugned judgment would reveal that the Appellate Tribunal has not missed the woods of the tree and has dealt all the issues which are being raised herein by the Appellant in a very elaborate manner by following the provisions of the Act 2016 and the various judgment of the Apex Court in the said subject.

(46) Notwithstanding the above, as the memo of appeal has been preferred and since the counsel for the appellant has strenuously urged this Court to decide on the substantial question of law framed by him in the appeal, this Court finds its bounden duty to deal with these question (which has been termed by the Appellant as substantial question of law) as has been enumerated in the memo of appeal.

(47) Having regard to the question No. 1 i.e. “*(a) Whether the order and judgment impugned suffers from illegality on account of improper consideration of material and law as well as exercising the jurisdiction not vested in it?*”, learned counsel for the appellant is unable to show from records as to how the impugned judgment suffers from any illegality and as to which specific material or law has been improperly considered by the Appellate Tribunal. Learned Counsel has drawn attention of this Court to the provisions of Section 44 of the RERA Act in general which bestows the jurisdiction of appeal to the Appellate Tribunal and specifically Section 44(6) of the Act, which inter-alia gives sweeping power of jurisdiction vested in it as it says as under:-

“(6) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any order or

decision of the Authority or the adjudicating officer, on its own motion or otherwise, call for the records relevant to deposing of such appeal and make such orders as it thinks fit.”

(48) This Court finds that the Appellate Tribunal after narrating the facts and grounds of the contesting parties, went on to formulate the following points for determination:

“(I) whether the complaint filed before the Adjudicating Officer is maintainable as cause of action arose in year, 2013 before RERA Act, 2016 came into force as pleaded by appellant- U.P Avas evam Vikas Parishad, Lucknow in its Appeal?

(II) Whether the project in question of the Appellant- U.P Avas evam Vikas Parishad, Lucknow is delayed?

(III) Whether the judgment and order dated 13.03.2020 passed by the Adjudicating Officer awarding the interest in terms of compensation to the respondent/ complainant for delayed period from 30.07.2016 to 24.09.2019 is liable to be set aside for the reasons mentioned in appeal?”

(49) As far as the first issue is concerned, the Appellate Tribunal extensively recorded the facts and returned a finding that although the scheme was floated by the appellant in 2013 and the respondent booked a flat in the same year and the RERA Act, 2016 came into force on 1st May, 2016, however the project being an “Ongoing project” before 24.09.2019 i.e the date when *Antim Pradesh Patra* was issued by the Appellant for delivery of possession by them to the Respondent, the provisions of RERA were applicable to the project in

view of Rule 2(h) of the U.P Real Estate (Regulation & Development) Rules, 2016.

(50) This Court finds that the Appellate Tribunal has returned the aforesaid finding, after examining the expression and meaning of “ongoing project” as is to be found in Rule 2(h) of U.P Real Estate (Regulation & Development) Rules, 2016, Completion certificate as is defined in section 2(q) of the RERA Act, 2016, section 4(5) of the U.P Apartment (promotion of construction, Ownership and Maintenance) Act, 2010 relating to the requirement of “Completion Certificate” and “Occupancy certificate” as defined in section 2(zf) of the RERA Act, 2016.

(51) Further, as far as the second issue relating to the delay in the project, the Appellate Tribunal examined the provisions of clause 2.1 of the Registration Booklet relating to the date of possession proposed by the Appellant and the actual date of possession and after referring to the judgment of the Hon’ble Supreme Court in *M/s Fortune (now known as HICON Infrastructure) and Anr. V/s Trevor D’lima & Ors.* : (2018) 5 SCC 442, wherein it was held that a person cannot be made to wait indefinitely, concluded that the project of the Appellant was delayed.

(52) The Appellate Tribunal, while deciding the third point for determination, cited the provisions of Clauses 2.1 and 9.1 of the Registration Booklet along with Clauses 4.5 and 4.6 of the Registration Booklet. Apparently, the Appellate Tribunal after examining the various judgment including *Lucknow Development Authority Vs M.K. Gupta*, 1994 (91) SCC 243, *Ghaziabad Development Authority Vs Balbir Singh*, 2004 (5) SCC 65,

Haryana Development Authority V/s Darsh Kumar, 2005 (9) SCC 449 and also **Ghaziabad Development Authority V/s Union of India**, 2000 (6) SCC 113 along with **Bangalore Development Authority V/s Syndicate Bank** reported in II (2007) CPJ 17 (SC) arrived at a conclusion that the tentative period or proposed period for construction of the flat does not mean a “unreasonable period”. The Appellate Tribunal also recording that the possession of the flat was not given as per the proposed timeline of possession as mentioned in the Registration Booklet and the possession came to be given by the appellant much later. Thus, the Appellate Tribunal upheld the finding of the Adjudicating Authority by holding that the Authority had adopted a moderate view and has considered the delay from the proposed expiry of the date of possession to the date of issuance of *Antim pradeshana patra* by the Appellant and not the execution of the sale deed, which ought to have been the actual date of delivery of possession and as such held the calculation for delay in possession by the Authority to be not for an unreasonable period.

(53) As far as the other issues relating to failure of the appellant to rectify the structural defects and common facilities, in violation of Section 14 of the RERA Act, 2016 and the entitlement of compensation by the respondent in addition to the delay in possession as contended by the Respondent, the Appellant argued that in case of delay in giving possession of the flat, within prescribed period, the option was open to the allottee/respondent to claim refund of the deposited amount at the prescribed rate of interest and if despite the delay the allottee preferred for possession of the flat rather than refund of the deposited amount, the allottee’s right to

claim interest/compensation did not exist, especially when after execution of sale deed in favour of the allottee/respondent, the question of any structural defect does not arise.

(54) This Court finds that the Appellate Tribunal has extensively dealt with the aforesaid issue in the impugned order and while referring to Chapter III of the RERA Act, 2016 comprising of Sections 12 to 18 dealing with functions and duties of promoters has recorded a finding that Section 71 of the Act entails that in contravention of the provisions of section 12, 14, 18 and 19(4) by the promoter, the allottee is well within his rights to get refund of his/her entire deposited amount along interest “as such rate as may be prescribed” and “compensation in the manner provided under the Act”.

(55) The Appellate Tribunal also upheld the findings of the Adjudicating Authority to the effect that if the amount of interest was not paid within a period of 45 days, the respondent was entitled to get interest at the same rate till the date of actual payment, to be a means of check upon the appellant to honour the time-line within which the awarded amount of interest had been directed to be paid to the respondent/allottee. Even the last submission of the appellant related to financial crisis and running of the project on “no loss and no profit basis” to justify that the interest was not payable for delayed period was rejected on the ground that the same was immaterial and the award of interest in the case of delayed possession was as per the provision of the RERA Act.

(56) Thus, a well-reasoned and detailed judgment was passed by the

Appellate Tribunal, wherein all the Appeals filed by the Appellant was dismissed.

(57) The Appellate Tribunal examined the evidence on record at length, and arrived at a reasoned conclusion, that there was a delay in handing over of the possession of the project to the respondent. This finding is based on cogent and binding documents of Registration Document, occupation certificate, including the registered sale deeds by which the respective allottees have taken possession of the flats. There was no erroneous inference from any proved fact.

(58) The learned Counsel was not able to produce any judgment to espouse its cause of challenging the jurisdiction allegedly not having been vested with the Appellate Tribunal.

(59) In view thereof, this Court is of the view that the order and judgment impugned does not suffers from any illegality or infirmity. There is no alleged improper consideration of material and law nor the Tribunal has exercised its jurisdiction not specifically vested by the provisions of RERA Act.

(60) As far as Question No.2 i.e. “(b) *Whether the order of the tribunal upholding the order of adjudicating officer can be just, legal and proper ignoring that the complaint itself was not maintainable as was filed much before to the RERA Act came into force and was not an ongoing project in view to rule 2(h)?* is concerned, this Court finds that admittedly, the completion certificate has been issued to the Project after the commencement of the RERA Act, 2016 and the sale deed and possession has been granted in the year 2017-2018. Besides the fact that the said

issue has been extensively dealt with and decided by the Appellate Tribunal as issue No.1, this court finds that the said issue has already been settled by the Apex Court in various judgments including in the case of **M/s. Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP & Ors. (supra)**. The Apex Court, while deciding the issue as to whether the RERA Act has retroactive or retrospective effect, held that the Act is not retrospective in nature because it affects the existing rights of the persons mentioned in the Act like promoters, allottees etc. and the intent of the legislature was to bring all "ongoing projects"² which commenced prior to the Act and for which the completion certificate had not been issued, under the ambit of the Act. The relevant observation could be found at paragraph 34 to 40, which are being curled out for ready reference :-

“34. The term “ongoing project” has not been so defined under the Act while the expression “real estate project” is defined under Section 2 (zn) of the Act which reads as under:

“2(zn) “real estate project” means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;”

35. The Act is intended to comply even to the ongoing real estate project. The expression “ongoing project” has been defined under Rule 2(h) of the Uttar Pradesh Real Estate (Regulation and

Development) Rules, 2016 which reads as under:-

“2(h) “Ongoing project” means a project where development is going on and for which completion certificate has not been issued but excludes such projects which fulfil any of the following criteria on the date of notification of these rules:

(i) Where services have been handed over to the Local Authority for maintenance.

(ii) where common areas and facilities have been handed over to the Association for the Residents' Welfare Association for maintenance.

(iii) where all development work have been completed and sale/lease deeds of sixty percent of the apartment/houses/plots have been executed.

(iv) where all development works have been completed and application has been filed with the competent authority for issue of completion certificate.”

36. The expression “completion certification” has been defined under Section 2(q) and “occupancy certificate” under Section 2(zf) of the Act which reads as under :-

“2(q) “completion certificate” means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;

2(zf). “occupancy certificate” means the occupancy certificate, or such other certificate, by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has

provision for civic infrastructure such as water, sanitation and electricity;”

37. Looking to the scheme of Act 2016 and Section 3 in particular of which a detailed discussion has been made, all “ongoing projects” that commence prior to the Act and in respect to which completion certificate has not been issued are covered under the Act. It manifests that the legislative intent is to make the Act applicable not only to the projects which were yet to commence after the Act became operational but also to bring under its fold the ongoing projects and to protect from its inception the inter se rights of the stake holders, including allottees/home buyers, promoters and real estate agents while imposing certain duties and responsibilities on each of them and to regulate, administer and supervise the unregulated real estate sector within the fold of the real estate authority.

38. The emphasis of Mr. Kapil Sibal, learned senior counsel for the appellant is that the agreement of sale was executed in the year 201011, i.e. much before the coming into force of the Act and the present Act has retrospective application and registration of ongoing project under the Act would be in contravention to the contractual rights established between the promoter and allottee under the agreement for sale executed which is impermissible in law and further submits that Sections 13, 18(1), 19(4) of the Act 2016 to the extent of their retrospective application is in violation of Articles 14, 19(1)(g) of the Constitution of India.

39. Mr. Tushar Mehta, learned Solicitor General, on the other hand, submits that a bare perusal of the object and reasons manifest that the Act does not take away the substantive jurisdiction, rather it protects the interest of homebuyers

where project/possession is delayed and further submits that the scheme of the Act has retroactive application, which is permissible under the law. The provisions make it clear that it operates in future, however, its operation is based upon the character and status which have been done earlier and the presumption against retrospectively in this case is ex-facie rebuttable. The literal interpretation of the statute manifest that it has not made any distinction between the “existing” real estate projects and “new” real estate projects as has been defined under Section 2(zn) of the Act.

40. Learned counsel further submits that the key word, i.e., “ongoing on the date of the commencement of this Act” by necessary implication, ex-facie and without any ambiguity, means and includes those projects which were ongoing and in cases where only issuance of completion certificate remained pending, legislature intended that even those projects have to be registered under the Act. Therefore, the ambit of Act is to bring all projects under its fold, provided that completion certificate has not been issued. The case of the appellant is based on “occupancy certificate” and not of “completion certificate”. In this context, learned counsel submits that the said proviso ought to be read with Section 3(2)(b), which specifically excludes projects where completion certificate has been received prior to the commencement of the Act. Thus, those projects under Section 3(2) need not be registered under the Act and, therefore, the intent of the Act hinges on whether or not a project has received a completion certificate on the date of commencement of the Act.”

(61) Since the Authority and the Appellate Authority have returned a finding

of fact that the completion certificate was issued on 20.12.2018, i.e much later than the date of commencement of the RERA Act, 2016 and there is no contrary argument by the learned Counsel for the appellant, the Appellate Tribunal was right in holding that the present project was an “ongoing project” and the complaint filed by the respondent was maintainable. Thus, no substantial question of law arises as neither the issue raised is debatable nor the same has not been decided by a binding principle of the Hon’ble Apex Court.

(62) As far as the Question No.3 raised by the appellant is concerned, which inter-alia states that “(c) *Whether the impugned judgment and order about awarding the interest of compensation for delayed period, ignoring that it was not due to fault of the appellant can be just and liable to be set aside in view of principles of force majeure?*”, this Court finds that the aforesaid is essentially a question of fact and there are two concurrent findings against the appellant. The Appellate Authority have elaborately dealt with the said aspect and while deciding issue No.2 has returned a finding that the project was delayed. Further, this court finds that the factum of farmer agitation to be construed as force majeure was also considered by the Appellate Tribunal in extenso and has also discussed the principles of force majeure.

(63) The Tribunal also discussed the issue as to whether farmers agitation would be termed as “Force Majeure” or not and while citing the explanation appended to section 6 of the RERA Act, 2016 and discussing the expression “Act of God” or “Vis Major” and the Judgment of **Ramalinga Nadar V/s Narayan Reddiar**, AIR 1971 Kerala 197 which dealt with the term “Vis-Major”, returned a finding that

the case at hand and situation narrated by the Appellant could not be covered under the meaning of “Force majeure”

(64) This court also does not find any reason to interfere with the findings arrived by the Appellate Tribunal, which are based on precedent and sound legal principles. Thus, the present question does not give rise to any debatable point nor the issue being raised is in the nature of substantial question of law.

(65) Having regard to question No. 4 raised by the Appellant i.e. (d) *whether after dismissal of complaint by authority vide order dated 19.10.2019 the compensation or interest can be awarded in view to section 12, 14 & 18 of the Act and the order be held to be just and proper*, this court finds that the aforesaid issue is a misconceived perception of the Appellant. Apparently, the respondent had filed a cumulative complaint relating to delay in possession, no window in flat and no parking having been provided to him and as such has sought for compensation. The authority vide order dated 19.10.2019 has partially rejected the contention of the respondent relating to car parking and window not having been provided in the Flat taking cognizance of section 12 and 14 of RERA Act, however the Authority finding a delay in giving of possession to the respondent had referred the complaint for award of compensation & disposal under section 71 of the RERA Act to the Adjudicating Authority.

(66) The Appellate Tribunal has rightly observed that section 12 to 18 deals with “Functions and Duties of Promoter” and invariably relates to duties which have been imposed upon the promoter. Further, section 71 of the Act clearly says that in

contravention of the provisions of section 12, 14, 18 and 19(4) by the promoter, the allottee is well within his right to get refund of his/her entire deposited amount along with interest “at such rate as may be prescribed” and “compensation in the manner provided under the Act”. It goes without saying that Section 18(1) of the Act provides as under :-

“18(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”

(67) Thus, the said Section consists of two parts. Here this Court is concerned with the second part, which invariably gives an indefeasible right to the allottee in the case he does not intend to withdraw from the project. The second part in clear and loud terms say that the allottee in such

a situation would be entitled for interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed. Further, this court finds that in order to determine the point of compensation the power has been bestowed upon the adjudicating officer in terms of section 71 & 72 of the RERA Act read with rule 34(1) of the U.P RERA Rules, 2016. Thus, this also being a loosely connection of fact and law does not qualify to be termed as substantial question of law and as such needs no further interference from this court.

(68) As far as question No. 5 i.e. *(e) Whether in deciding all 18 appeals by common order without considering the fact of each cases or appreciating the points involved and argument made, the finding can be held to be a speaking order and not in violation to principles of natural Justice?*, is concerned, this Court finds that the Appellate Tribunal has painstakingly recorded the facts of each case in a tabular chart at paragraph No1 and has briefly given details of all the cases in the said chart. Further, this court finds that although the facts relating to flat no, sale consideration, project, allotment letter, final letter, date of sale deed or date of possession might have been different, but it is not the case of the Appellant that the completion certificate in any of the case was not 20.12.2018 or for that matter prior to the coming of force of the RERA Act. It is also not the case of the Appellant that the duration of completion of project was not 24/30 months but something more or that the possession was given by them during the said duration as provided in the registration booklet or that the possession was not delayed. Apparently, the appellant has taken a common defence in all the complaints filed by the respondent and as

such this court does not find any error of the Appellate Tribunal in deciding these cases vide the present common impugned order. In any case, this also does not qualify to be a substantial question of law as has been projected by the Appellant.

(69) The last question No. 6 as framed by the appellant i.e. *(f) whether the finding of the impugned judgment and order specially awarding interest on delayed possession is being contrary to the law laid down by Apex Court is totally illegal arbitrary and is otherwise not valid in the eyes of law hence liable to be set-aside.*” is concerned, a perusal of the order passed by the Authority as well as the Tribunal would sufficiently indicate that they have proceeded to grant compensation in terms of provisions contained in Section 71 read with Section 72 of the RERA Act 2016.

(70) The learned Appellate Tribunal has also recorded in the impugned order that the Adjudicating Officer has passed the impugned order by exercising his power under section 71 and 71 of the Act read along with Rule 34(1) of the Rules, 2016. Thus, the Tribunal while referring to the case reported as **M/s Imperia Structures Ltd. V/s Anil Patni and Another**, Civil Appeal Nos. 3581-3590 of 2020 decided on 02.11.2020 relating to the choice available to an allottee to seek for refund along with interest in terms of section 18(1) in case he chooses to not withdraw from the project and alternative remedy to seek interest for every month of delay till handing over of the possession in terms of proviso to section 18(1) of the RERA Act, 2016, in case he chooses to not to withdraw from the project. The judgment of **LIC of India and Anr. V/s Consumer Education & Research Centre & Ors.** : (1995) 5 SCC 482 was cited to hold that the terms &

conditions of the agreement must be reasonable. Further, Judgment passed in **Pioneer urban land and Infrastructure Ltd. V/s Govindan Raghavan, II** (2019) CPJ 34(SC) was cited to refer that the Hon'ble Apex court did not accept the plea of the builder that it should not be directed to pay interest at the rate of 10.7% as the agreement provided for 6% interest. Moreover, the judgment of Wg. Cdr. Arifur Rahman Khan & Others V/s DLF Southern Homes Pvt. Ltd. (2020) SCC Online 667 was cited to hold that given the one-sided nature of the Apartment Buyer's Agreement, the consumer for a had the Jurisdiction to award just and reasonable compensation as an incident of the power to direct removal of deficiency in service.

(71) The contention of the appellant before the Appellate Tribunal that as per clause 4.5 and clause 4.6 of the registration booklet/ Brochure there is no mention of any specific date of possession or that as to whether any interest being payable, in case the project is delayed or what amount of interest would be payable by the Appellant, was held to be an omission against the provisions of section 4(2) (b) of the U.P Apartment Act, 2010. The Tribunal also recorded the judgment of **HUDA and another V/s Shakuntala Devi**, (2017) 2 SCC 301 to hold that even in cases, where the delivery of possession had been directed there would be compensation for harassment/loss in a consumer protection case and thus concluded that sicne the possession of the allotted flat was delayed, the respondent was entitled for interest/compensation as per the legal norms. The Tribunal cited the judgment of **M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of U.P** (supra) to ratify the proposition that contractual terms do

not have overriding effect over the provisions of the Act.

(72) This Court does not find any reasons as to how the awarding of interest on delayed possession by the Appellate Tribunal is in any manner contrary to law as laid down by Apex Court. The Learned Counsel for the appellant could not place nor refer to any judgment of the Apex court to show any contrary view as has been deduced by the Appellate Tribunal in arriving at the impugned conclusion. In any case, the findings returned by the Appellate Tribunal is based on sound principles of law & precedents and as such, this Court does not find any substantial question of law involved for the present question framed by the Appellant.

(73) As a sequel to above, this Court does not find any merit in RERA Appeal Nos. 67, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 87 of 2023 and the same are hereby **dismissed**.

C. RERA Appeal No. 68 of 2023 (U.P Ewas Evam Vikas Parishad Vs. Arun Kumar Dwivedi)

(74) It is seen from the records that the aforesaid appeal has been filed by the appellant- "U.P Avas Evam Vikas Parishad" under Section 58 of the RERA Act, 2016, against an order dated 05.09.2022 passed by the UP Real Estate Appellate Tribunal at Lucknow. Apparently, by virtue of the impugned order, the learned Appellate Tribunal with the consent of the parties has directed the Parishad to pay interest from (30.10.2015 to 11.02.2000) instead of interest for the period from (30.06.2015 to 11.02.2000) as directed by the Adjudicating Authority. The Appellate Authority has also directed both the parties to move release

Application regarding withdrawal of amount deposited under Section 43(5) of the Act.

(75) This appeal has been filed under Section 58 of the RERA, 2016, which inter-alia states :-

"58. Appeal to High Court-(1)

Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908:

Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

Explanation-The expression "High Court" means the High Court of a State or Union territory where the real estate project is situated.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties."

(76) The learned Counsel for the appellant was requested to refer section 58(2) of the RERA Act, 2016, which bars any appeal against any decision or order made by the Appellate Tribunal with the consent of the parties. The learned Counsel was asked to address his arguments on the said point.

(77) The learned Counsel for the appellant raised the point of competence & Jurisdiction of the Adjudicating officer in deciding the matter and further raised the

competence of Appellate Tribunal to decide the issue. However, no arguments were addressed on the point of maintainability of the present Appeal on the point of section 58(2) of the RERA Act. Also there was no argument denying or disputing the consensual order passed by the Appellate tribunal vide the impugned order dated 05.09.2022.

(78) Accordingly, this Court is of the opinion that in view of the findings returned in the aforesaid appeals lead being "RERA Appeal No. 67 of 2023 (Complainant- Dhruv Kr. Chaturvedi), no substantial question of law arises in RERA APPEAL No. 68 of 2023 and as such the same is dismissed.

D. RERA Appeal No. 81 of 2023 (U.P Avas Evam Vikas Parishad Vs U.P Real Estate Appellate Tribunal and others).

(79) This appeal has been filed by the appellant against the impugned order dated 13.08.2021 relating to relief of interest in the form of compensation granted to the allottee- Somyata Zaidi. The complainant in that case, i.e Somyata Zaidi was allotted flat in Vrindvan Yojna, Part-4, sector-17, Niligiri Enclave, wherein the sale deed was executed on 12.10.2017 and the possession was granted on 17.10.2017. It was the case of the complainant/ allottee therein that the possession was delayed and he was entitled for compensation. Accordingly, compensation was awarded by the adjudicating officer vide order dated 20.09.2019 in the form of Interest.

(80) On perusal of the impugned judgment dated 13.08.2021, this court finds that the Appellate Tribunal has framed three question for determination as has

been done by the Appellate Tribunal in similar other matters, which were decided by this court in the lead matter “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(81) Thus, this Court does not find any new point agitated or any new issue raised in the present Appeal by the learned counsel for the appellant and as such RERA Appeal No. 81 of 2023 is also decided in terms of the finding of the lead matter- “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*). Accordingly, RERA Appeal No. 81 of 2023 (U.P Avas Evam Vikas Parishad Vs U.P Real Estate Appellate Tribunal and others) is **dismissed**.

E. RERA Appeal No. 86 of 2023 (U.P Avas Evam Vikas Parishad V/s Satya Narain Agnihotri)

(82) This appeal has been filed by the Appellant against the impugned order dated 30.06.2022 relating to relief of interest in the form of compensation granted to the allottee- Satya Narain Agnihotri at the rate of MCLR + 1% per annum for the delay period from 30.03.2016 to 13.10.2017. The complainant in that case, i.e Satya Narain Agnihotri was initially allotted a 3BHK flat in Bhagirathi Enclave on 13.09.2013. However, the Appellant failed to deliver possession of the allotted flat within the stipulated date i. 30.03.2016 as mentioned in the Brochure and demand letter dated 30.09.2013. The complainant being in acute need of the flat as early as possible as he was to superannuate on 29.04.2018, approached the promotor for delivering the possession of the allotted flat so that he may shift prior to demitting his office. The officials of the Appellant in the month of October 2017 informed the complainant

that he may get his flat changed from 3 BHK to 3 BHK + Servant and then the Appellant would be in a position to deliver the flat at the time. The complainant, having no option except to agree with oral offer of the promoter gave consent for 3 BHK + Servant flat for which an extra payment of Rs. 11,50,000/- was further required. Thereafter the complainant was allotted flat no. 2B/T-1/306 vide letter dated 13.10.2017 at an additional amount of Rs. 11,86,127/- along with the miscellaneous expenses of Rs. 1,53,885/- by the appellant. The complainant deposited the said amount under protest and got the sale deed executed on 25.11.2017 in respect of Flat No. 2B/T-1/306. There has been considerable delay of 20 months’ delivery of possession of the flat as mentioned in the Brochure issued in the year 2013. However, the Adjudicating officer awarded interest for delay in delivery of possession for the period from 30.03.2016 to 13.10.2017 at the rate of MCLR +1% per annum. Accordingly, compensation was awarded by the adjudicating officer vide order dated 20.11.2020 in the form of Interest.

(83) This Court finds that both the complainant Satya Narain Agnihotri and the appellant (Avas Evam Vikas Parishad) filed cross-Appeals, which was eventually decided by the impugned order. On perusal of the impugned judgment dated 30.06.2022, this court finds that the Appellate Tribunal has framed almost Nine question for determination. The Appellate Tribunal in deciding these issues arrived at a decision that the Act of 2016 provided a mechanism for determination of interest and/or compensation for the delay in handing over possession of the unto to the allottee, if the allottee wishes to stay with the project. The Tribunal also held that in view the Newtech *Promoter’s case*, the

promoter cannot shirk from the responsibilities/ liabilities under the Act and the contractual terms do not have an overriding effect to the retrospective applicability of the authority under the provisions of the Act. In the facts of the case, the Tribunal held that there was delay of more than 18 months in delivery of possession by the Appellant to the complainant. The Tribunal also held that a home buyer does not lose his/her right to claim compensation for the delay in possession even after execution of the conveyance deed and taking of possession of the unit/Apartment/Fat booked by him. The Appellate Tribunal while deciding the 5th point of determination concluded that the rate of interest i.e MCLR + 1% granted by the Adjudication officer, as compensation for delayed possession, if fair, just and reasonable as it balances the equities between the parties and the Adjudicating Officer's action is in accordance with the provisions of the Act. The learned Appellate Tribunal also held that as per the provisions of the U.P Apartments (Promotion of construction, ownership and Maintenance Act, 2010 read with the provisions of the Act, 2016 a promoter is required to offer legal and habitable possession to the allottees only after obtaining C.C/O.C and ask for clearing dues by raising the final demand. The Tribunal also affirmatively held that the amenities, facilities and services advertised by the appellant in its Brochure are required to be fulfilled and provided to the allottees of the project. The Appellate authority after examining the facts in great detail and considering the various Judgement, held that there was no illegality or perversity in the impugned order of the Adjudicating officer of the regulatory authority in awarding interest as compensation to the allottee/complaint for

delay in possession of the flat by the appellant.

(84) This Court finds that the appellant has primarily challenged the aforesaid impugned order of the Appellate Tribunal primarily on the ground, which has been a subject matter of challenge in similar other matters, which were decided by this court in the lead matter- “RERA Appeal No. 67 of 2023 (*Complainant-Dhruv Kr. Chaturvedi*).

(85) Thus, this court does not find any new point agitated or any new issue raised in the present Appeal by the learned counsel for the appellant and as such the present Appeal is also decided in terms of the finding of the lead matter- “RERA Appeal No. 67 of 2023 (*Complainant-Dhruv Kr. Chaturvedi*).

(86) Accordingly, RERA Appeal No. 86 of 2023 (U.P Avas Evam Vikas Parishad V/s Satya Narain Agnihotri) is **dismissed**.

F. RERA Appeals No. 88, 89, 90, 91, 93, 96, 97, 98, 99, 100, 101, 102, 103, 104 of 2023

(87) These appeals have been filed against the impugned common order dated 21.01.2022 passed by the learned UP Real Estate Appellate Tribunal at Lucknow.

(88) Since, common question of law has been raised by the Appellant in all these appeals, which are all directed towards a common order dated 21.01.2022, it would be in the interest of justice that all these appeals are consolidated and taken together for hearing and disposal. However, before this court deals with the question of law raised in these appeals, the brief facts culminating into these appeals be narrated

to appreciate the law in its proper perspective. In this regard, the facts of the lead matter being RERA Appeal No. 88 of 2023 (*Complainant- Kunwar Bahadur Singh*) is taken into consideration.

(89) Succinctly, it is available from records that the complainant (Kunwar Bahadur Singh) filed a complaint for compensation in delay in offering possession, no window in the flat offered and no parking allotted by the Appellant/Promoter. The said complaint was marked/referred to the Adjudicating Officer vide order dated 25.11.2019 of the Authority. As per the complaint, the complainant was allotted a flat in Vrindavan Yojna in Nillgiri Enclave on 30.08.2013 for an amount of Rs. 20,88,000/-. The possession of the said flat was to be given in 24 months, however the same was not offered by the Promoter, which resulted in increase in the price of the flat, levy of GST etc. It was the case of the complainant that although he had regularly paid the instalments, however the promoter failed to provide window in the flat as well as the parking as promised in Brochure. However, the appellant defended the said complaint by stating that the price of the flat was never fixed, nor the date of possession had been fixed and the same were only proposed. They also took ground of certain litigation relating to acquisition of land pending before this court for the delay. They also submitted that the complaint was not maintainable for compensation under section 12, 14, 18 and 19 of the Act.

(90) This Court finds that the Adjudicating Officer after recording the submission of the parties and dealing with the provisions of the RERA Act gave a detailed Judgment vide order dated

13/08/2020, thereby returning a finding that the complainant in spite of taking the possession of the flat is entitled for compensation for delay in offering of possession and as such the Adjudicating Officer awarded compensation in the form of interest @ MCLR+ 1% on the total amount of consideration for the period of delay between 30.08.2015 to 18.08.2017.

(91) This Court finds that the aforesaid order of the Adjudicating officer was a subject matter of challenge by the Appellant before the Appellate Tribunal in terms of section-44 of the RERA Act. The said Appeal filed by the Appellant was decided along with 25 other matters vide the impugned common order dated 22.01.2022. On a perusal of the impugned judgment of the Appellate Tribunal it is seen that the Tribunal has painstakingly recorded details of facts of each Appeal in a tabular chart and framed the following questions for determination:

“ i. Whether the Adjudicating officer ought to have examined the complaint of the respondent only on the basis of agreed terms and conditions mentioned in the Registration Booklet, read with allotment letter.

ii. Whether there is any delay in handing over of the possession to the allottee, and if yes, on whose account?

iii. Whether an allottee is entitled for claiming compensation/ interest for the delayed possession of the flat and agreed to pay the final cost of the flat?”

(92) This Court finds that the Appellate tribunal has exhaustively dealt with each of the aforesaid issue and after recording various precedents, arrived at a decision that as far as the first issue is concerned, in terms of the Newtech

Promoter's case, the promoter cannot shirk from the responsibilities/ liabilities under the Act and the contractual terms do not have an overriding effect to the retrospective applicability of the authority under the provisions of the Act. On the facts, the Appellate Tribunal returned a finding that the project was delayed by 2 years and 4 months in giving of the possession and that the Appellant/ Promoter was solely responsible for the said delay. Further, as far as the third issue is concerned, the Tribunal after considering various judgements including that of W. Cdr. Arifur Rahman Khan and Aleya Sultan and others V/s DLF Southern Homes Pvt. Ltd, held that a home buyer does not lose his/her right to claim compensation for the delay in possession even after execution of the conveyance deed and taking possession of the unit/ Apartment/ flat booked by him. Thus, the Appellate Tribunal did not find any illegality or infirmity in the impugned order of the Adjudicating Officer and as such dismissed all the Appeals.

(93) This Court finds that the appellant has filed an Appeal against the aforesaid impugned order dated 22.01.2022, which are largely premised on the same grounds and question of law as has been decided by this court in “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*). The fulcrum of the Appeal hinges on the determination of question as to whether the adjudicating officer appointed under Section 72 of the RERA Act can grant compensation in form of interest in case where allottee does not exit the project under Section 18 of the RERA Act.

(94) This Court finds that the aforesaid ground has been a subject matter of challenge in similar other matters, which

were decided by this court in the lead matter- “RERA Appeal No. 67/2023 (*Complainant- Dhruv Kr. Chaturvedi*), wherein this court held that compensation in the form of interest can be awarded by the Adjudicating Officer and as such has rejected the said contention and dismissed the appeal of the Parishad.

(95) Thus, this Court does not find any new issue being raised in the present bunch of Appeals by the Ld. counsel for the Appellant, which requires any separate considerations either on facts or on law and as such the present bunch of appeals are also decided in terms of the finding of the lead matter- “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(96) Accordingly, RERA Appeal No. 88 of 2023, RERA Appeal No. 89 of 2023, RERA Appeal No. 90 of 2023, RERA Appeal No. 91 of 2023, RERA Appeal No. 93 of 2023, RERA Appeal No. 96 of 2023, RERA Appeal No. 97 of 2023, RERA Appeal No. 98 of 2023, RERA Appeal No. 99 of 2023, RERA Appeal No. 100 of 2023, RERA Appeal No. 101 of 2023, RERA Appeal No. 102 of 2023, RERA Appeal No. 103 of 2023 and RERA Appeal No. 104 of 2023 are also **dismissed**.

G. RERA Appeal No. 92 of 2023 (U.P Avas Evam Vikas Parishad Vs U.P Real Estate Appellate Tribunal and others).

(97) This appeal has been filed by the appellant against the impugned order dated 07.07.2022 relating to relief of interest in the form of compensation granted to the allottee- Abhai Verma & Anju Verma. The complainant in that case, i.e Abhai Verma & Anju Verma was allotted flat in Himalaya Enclave, Vrindavan Yojna, Part-

4, Sector-17, Nilgiri Enclave, wherein the sale deed was executed on 12.10.2017 and the possession was granted on 02.04.2019. It was the case of the complainant/ allottee therein that the possession was delayed and he was entitled for compensation for delayed possession and other issues. The regulatory authority vide an order dated 10.05.2019 after holding that the project was delayed and the delay period was fixed as 25.08.2014 to 30.04.2018, marked the case to the Adjudicating Officer for determination of entitlement of compensation. Accordingly, the Adjudicating Officer, vide order dated 29.08.2019 allowed the complaint and directed the promoter to pay interest as compensation at the rate of SBI MCLR +1% per annum on the deposited amount for the delayed period within 45 days of the order.

(98) The complainant filed an Appeal before the Appellate Tribunal limited to the extent of granting of interest as provided under section 2(z)(i) of the RERA Act. As per the said provisions, the complainant claimed interest at the rate of 13.05% per annum and sought parity with another case passed by the Tribunal in Upasana Duggal Vs LDA.

(99) The Tribunal vide the impugned order dated 07.07.2022, which has been interdicted in the present proceedings before this court, has directed the Parishad/promoter for payment of interest at the rate of SBI MCLR+1% per annum along with other reliefs to the complainant. It is this directions, which the Appellant is herein aggrieved with. On perusal of the impugned judgment dated 07.07.2022, this court finds that interestingly, there is no Appeal u/s 44 of the Act by the Appellant against the order dated 29.08.2019 of the

Adjudicating Officer. It is only the order of the Appellate Tribunal, which has reduced the interest rate and other reliefs that the Appellant are aggrieved and as such has filed the present Appeal before this court. A glimpse of the impugned order of the Appellate Tribunal would reveal that the Appellate Tribunal has recorded the Appeal, reply and rejoinder filed by the parties exhaustively in the said impugned order and has framed the following three question for determination:

“ (i) Whether appellants are entitled to get interest @ 13.5% per annum for the delayed period i.e from 24.08.2014 to the actual date of realization ?

(ii) Whether respondent- U.P Avas Evam Vikas Parishad is liable to pay Rs. 5 Lakhs as compensation for mental harassment and agony and Rs. 7,61,052/- for house rent allowances to appellants.?

(iii) whether appellants are entitled to get Rs. 50,000/- as cost of litigation.?”

(100) The Appellate Tribunal after formulating the aforesaid point of determination, while deciding the 1st issue held that the delay was to be fixed for a period from 25.08.2014 to 28.02.2019 and not to be kept open. Further, as far as the rate of interest, the Appellate Tribunal keeping in view Rule 9.2(ii) & 9.3(1) of the “Uttar Pradesh Real Estate (Regulations and Development) Rules, 2018, which came into effect from 17.10.2018 awarded compensation in the form of interest at the rate of SBI MCLR+1% to balance the equities and in line of the spirit of the Act, which uses the phrase “interest at such rate as may be prescribed” in section 12, 18 and 19(4) of the Act. The Appellate Tribunal as far as the second issue formulated held that the observation of the Adjudicating officer

had legal backing and did not interfere in the payment of compensation to the complainant. Similarly, as far as the third issue is concerned, the Appellate Tribunal reduced the cost of litigation from Rs. 50,000/- to Rs. 40,000/-.

(101) The Appellant have taken a plethora of grounds in the appeal filed against the aforesaid impugned order of the Tribunal, however a closer look would reveal that almost all the grounds are related to facts and the hinge of the Appeal filed by the Appellant lies on the issue, which were decided by this court in the lead matter- “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(102) Thus, this Court does not find any new point agitated or any new issue raised in the present Appeal by the learned counsel for the Appellant and as such the present Appeal is also decided in terms of the finding of the lead matter- “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(103) Accordingly, RERA Appeal No. 92 of 2023 (U.P Avas Evam Vikas Parishad V/s U.P Real Estate Appellate Tribunal and others) is **dismissed**.

H. RERA Appeal No. 94 of 2023 (U.P Avas Evam Vikas Parishad Vs Presiding Officer, U.P Real Estate Appellate Tribunal and others).

(104) This appeal has been filed by the appellant against the impugned order dated 08.09.2022 relating to relief of interest in the form of compensation granted to the allottee- Shobit Chaturvedi. The complainant in that case, i.e Shobit Chaturvedi was allotted flat in Neelgiri Enclave, a project of the appellant located

at Sector-17, Vrindavan Yojna, Lucknow. The conveyance deed was executed on 08.03.2018 and the physical possession was handed over to the complainant on 05.06.2018. It was the case of the complainant/ allottee therein that the possession was delayed and he was entitled for compensation for delayed possession and other issues like not providing window as per the registration booklet, car parking etc. were also raised in the said complaint. The regulatory authority vide an order dated 16.09.2020 marked the case to the Adjudicating Officer for determination of entitlement of compensation. Accordingly, the Adjudicating Officer, vide order dated 18.12.2020 allowed the complaint and directed the promoter to pay interest as compensation at the rate of SBI MCLR +1% per annum on the deposited amount for the delayed period of 30.08.2015 to 21.07.2017, within 45 days of the order.

(105) The appellant was obviously not happy with the said order of the Adjudicating officer and as such interdicted the said order of the adjudicating officer in Appeal u/s 44 of the Act, before the Appellate Tribunal.

(106) The Tribunal vide the impugned order dated 08.09.2022, has dismissed the Appeal of the Parishad/ promoter and has upheld the direction of the Adjudicating officer for payment of interest at the rate of SBI MCLR+1% per annum along with other reliefs to the complainant. It is this directions, which the Appellant is herein aggrieved with. On perusal of the impugned judgment dated 08.09.2022, this court finds that the Appellate Tribunal has recorded in detail the various contention of the parties and discussed the case laws cited by them exhaustively in the said

impugned order and has framed the following three question for determination:

“ (i) Whether the Adjudicating Officer ought to have examined the complaint of the respondent only on the basis of the agreed terms and conditions mentioned in the Registration Booklet, read with allotment letter.

(ii) Whether there is any delay in handing over of the possession to the allottee, and if yes, on whose account?

(iii) Whether an allottee is entitled for claiming compensation/ interest for the delayed possession, even if the allottee has already taken possession of the flat and sale deed has been executed after the allottees agreed to pay the final cost of the flat.?

(iv) Whether there is any illegality or perversity in the impugned order dated 16.07.2021 of the Adjudicating officer in granting interest as compensation to the respondent for delay in providing possession of the flat by the Appellant?”

(107) The Appellate Tribunal after formulating the aforesaid point of determination, while deciding the 1st issue held that in view of the observation of the Apex Court in Newtech’s case regarding the terms of the contract to the effect that promoter cannot shirk from the responsibilities/ liabilities under the act and the contractual terms do not have an overriding effect to the retrospective applicability of the authority under the provisions of the Act. The Appellate Tribunal in answer to issue No.2 returned a finding of fact that the project was delayed by 1 year and 11 months in offering of possession to the complainant and that the Appellant was solely responsible for the same. As regards the third issue, the Appellate Tribunal held that a home buyer

does not lose his/her right to claim compensation for the delay in possession even after execution of the conveyance deed and taking possession of the unit/ Apartment/ Flat booked by him. The Appellate Tribunal after enumerating the various provisions of RERA as well as the binding precedents concluded that there was no illegality or perversity in the order of the Adjudicating officer in awarding interest as compensation to the complainant for delay in possession of the flat.

(108) The appellant have taken a plethora of grounds in the Appeal filed against the aforesaid impugned order of the Tribunal, however a closer look would reveal that almost all the grounds are related to facts and the hinge of the Appeal is premised on the issue, which were decided by this court in the lead matter- “RERA Appeal No. 67/2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(109) Thus, this Court does not find any reasons to differ with the findings, which stands already decided in the aforesaid matter. Thus, the present Appeal, as such, is also decided in terms of the finding of the lead matter- “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(110) Accordingly, for all the reasons as mentioned herein above, RERA Appeal No. 94 of 2023 is also dismissed.

I. RERA Appeal No. 95 of 2023 (U.P Avas Evam Vikas Parishad V/s Presiding Officer, U.P Real Estate Appellate Tribunal and others).

(111) This appeal has been filed by the appellant against the impugned order dated 28.09.2022 relating to relief of

interest in the form of compensation granted to the allottee- Atul Kumar. The complainant in that case, i.e Atul Kumar was allotted flat in Neelgiri Enclave, a project of the Appellant located at Sector-17, Vrindavan Yojna, Lucknow. The sale deed was executed on 08.03.2018 and the physical possession was handed over to the complainant on 05.06.2018. It was the case of the complainant/ allottee therein that the possession was delayed and he was entitled for compensation for delayed possession as well as for other issues like not providing window as per the registration booklet, car parking etc. The regulatory authority vide an order dated 19.10.2019 marked the case to the Adjudicating Officer for determination of entitlement of compensation. Accordingly, the Adjudicating Officer, vide order dated 11.02.2021 allowed the complaint and directed the promoter to pay interest as compensation at the rate of SBI MCLR +1% per annum on the deposited amount for the delayed period of 30.08.2015 to 01.11.2017, within 45 days of the order.

(112) The appellant was obviously not happy with the said order of the Adjudicating officer and as such interdicted the said order of the adjudicating officer in appeal under Section 44 of the Act, before the Appellate Tribunal.

(113) The Tribunal vide the impugned order dated 08.09.2022, has dismissed the appeal of the Parishad/promoter and has upheld the direction of the Adjudicating officer for payment of interest at the rate of SBI MCLR+1% per annum along with other reliefs to the complainant. It is this directions, which the Appellant is herein aggrieved with. On perusal of the impugned judgment dated 08.09.2022, this court finds that the Appellate Tribunal has

recorded in detail the various contention of the parties and discussed the case laws cited by them exhaustively in the said impugned order and has framed the following four question for determination:

“ (i) Whether the Adjudicating Officer ought to have examined the complaint of the respondent only on the basis of the agreed terms and conditions mentioned in the Registration Booklet, read with allotment letter.

(ii) Whether there is any delay in handing over of the possession to the allottee, and if yes, on whose account?

(iii) Whether an allottee is entitled for claiming compensation/ interest for the delayed possession, even if the allottee has already taken possession of the flat and sale deed has been executed after the allottees agreed to pay the final cost of the flat.?

(iv) Whether there is any illegality or perversity in the impugned order dated 11.02.2021 of the Adjudicating officer in granting interest as compensation to the respondent for delay in providing possession of the flat by the Appellant?”

(114) The Appellate Tribunal after formulating the aforesaid point of determination, while deciding the 1st issue held that in view of the observation of the Apex Court in Newtech's case regarding the terms of the contract to the effect that promoter cannot shirk from the responsibilities/ liabilities under the act and the contractual terms do not have an overriding effect to the retrospective applicability of the authority under the provisions of the Act. The Appellate Tribunal in answer to issue No.2 returned a finding of fact that the project was delayed by 1 year and 5 months in offering of possession to the complainant and that the

Appellant was solely responsible for the same. As regards the third issue, the Appellate Tribunal held that a home buyer does not lose his/her right to claim compensation for the delay in possession even after execution of the conveyance deed and taking possession of the unit/ Apartment/ Flat booked by him. The Appellate Tribunal after enumerating the various provisions of RERA as well as the binding precedents concluded that there was no illegality or perversity in the order of the Adjudicating officer in awarding interest as compensation to the complainant for delay in possession of the flat.

(115) The appellant have taken a plethora of grounds in the Appeal filed against the aforesaid impugned order of the Tribunal, however a closer look would reveal that almost all the grounds are related to facts and the hinge of the Appeal is premised on the issue, which were decided by this court in the lead matter- “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(116) Thus, this Court does not find any reasons to differ with the findings, which stands already decided in the aforesaid matter. Thus, the present Appeal, as such, is also decided in terms of the finding of the lead matter- “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(117) Accordingly, for all the reasons as mentioned herein above, RERA Appeal No. 95 of 2023 is also **dismissed**.

J. RERA Appeal No. 105 of 2023
(U.P Avas Evam Vikas Parishad Vs.
Presiding Officer, U.P Real Estate
Appellate Tribunal and others).

(118) This appeal has been filed by the appellant against the impugned order dated 24.05.2022 relating to relief of interest in the form of compensation granted to the allottee. The allottee/complainant in that case, i.e Jitendera Kumar Madheshiya was allotted flat in Himalaya Enclave, a project of the Appellant. The sale deed was executed on 08.03.2018 and the physical possession was handed over to the complainant on 05.06.2018. It was the case of the complainant/ allottee therein that the possession was delayed and he was entitled for compensation for delayed possession. The Adjudicating Officer, vide order dated 04.08.2021 allowed the complaint and directed the promoter to pay interest as compensation at the rate of SBI MCLR +1% per annum on the deposited amount for the delayed period of 31.12.2014 to 30.08.2018, within 45 days of the order.

(119) The appellant was obviously not happy with the said order of the Adjudicating officer and as such interdicted the said order of the adjudicating officer in Appeal u/s 44 of the Act, before the Appellate Tribunal.

(120) However, at the time of hearing, the appellant at the outset stated that though in the relief clause he had challenged the entire impugned order dated 04.08.2021 of the Adjudicating Officer, whereby the adjudicating authority directed the opposite party/appellant to pay interest @ MCLR+ 1% as compensation to the complainant/respondent for the delay period from 31.12.2014 to 30.08.2018, but he confined his prayer only to the correction of amount from Rs. 16,60,000/- to Rs. 15,75,000/- and the date of starting interest from 31.12.2014 to 28.02.2015. The Tribunal vide the impugned order

dated 04.08.2021, has recorded the no objection of the complainant/respondent and on the basis of the said statement of the parties, the the Appeal of the Parishad/promoter was disposed of by holding that the appellant/promoter shall be liable to pay interest at the rate of SBI MCLR+1% per annum as compensation on the amount of Rs. 15,75,000 (deposited in the year 2012) for delayed period from 01.03.2015 to 30.08.2018”.

(121) The present Appeal has been filed under section 58 of the RERA, 2016. However, section 58(2) of the said Act, inter-alia states:

“58 (2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.”

(122) The learned Counsel for the appellant was requested to refer section 58(2) of the RERA Act, 2016, which bars any appeal against any decision or order made by the Appellate Tribunal with the consent of the parties. The learned Counsel was asked to address his arguments on the said point.

(123) The learned Counsel for the Appellant raised the point of competence & Jurisdiction of the Adjudicating officer in deciding the matter and further raised the competence of Appellate Tribunal to decide the issue. However, no arguments were addressed on the point of maintainability of the present Appeal on the point of section 58(2) of the RERA Act. Also there was no argument denying or disputing the consensual order passed by the Appellate tribunal vide the impugned order dated 24.05.2022. According, this court in view of the findings returned in the aforesaid

Appeals lead being “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*) does not find any substantial question of law raised in the present Appeal and as such RERA Appeal No. 105 of 2023 (U.P Avas Evam Vikas Parishad V/s Presiding Officer, U.P Real Estate Appellate Tribunal and others is dismissed.

K. RERA Appeal No. 106 of 2023 (U.P Avas Evam Vikas Parishad V/s Presiding Officer, U.P Real Estate Appellate Tribunal and others).

(124) This appeal has been filed by the Appellant against the impugned order dated 28.03.2022 relating to relief of interest in the form of compensation granted to the allottee. The allottee/complainant in that case, i.e Charan Singh was allotted flat in Brahmaputra Enclave, a project of the Appellant. On the date of filing of the complaint, neither the sale deed was executed in his favour nor the physical possession was handed over to the complainant and as such a cumulative complaint was filed for execution of sale deed, giving of possession and delay compensation against the Appellant. The Adjudicating Officer, vide order dated 22/01/2020 allowed the complaint with various reliefs including a direction to the promoter to (i) give possession along with all facilities till 29.02.2020, (ii) pay interest as compensation at the rate of SBI MCLR +1% per annum on the deposited amount for the delayed period of 31.01.2018 till the date of possession.

(125) The appellant was obviously not happy with the said order of the Adjudicating officer and as such interdicted the said order of the adjudicating officer in Appeal u/s 44 of the Act, before the Appellate Tribunal.

(126) During the course of hearing, the Appellate Tribunal recorded that the completion certificate was obtained by the Appellant on 31.12.2018 and the possession was offered to the complainant on 06.12.2018 and in fact the physical possession was granted to the complainant/respondent on 24.02.2020. Although the Appellant tried to urge a point that the delay in possession was due to non-submission of certain papers by the complainant/respondent, which was opposed by the respondent, however, the Appellate Tribunal noting that there had been a delay in giving of possession by the appellant, without considering other point, upheld order dated 22/01/2020 of the Adjudicating Officer, whereby the adjudicating authority directed the opposite party/appellant to pay interest @ MCLR+1% as compensation to the complainant/respondent for the delay period from 01.01.2018 to 31.12.2018.

(127) The learned Counsel for the appellant interdicting the impugned order of the Appellate Tribunal has raised the point of competence & Jurisdiction of the Adjudicating officer in deciding the matter and further raised the competence of Appellate Tribunal to decide the issue. However, no arguments were addressed on the point of decision of the Appellate Tribunal on merits. However, this court took that pain to go through the memo of Appeal filed by the Appellant and as such is of the considered view that the findings returned in the aforesaid Appeals lead being “RERA Appeal No. 67 of 2023 (Complainant- Dhruv Kr. Chaturvedi) is squarely applicable to the present case. Thus, this court does not find any substantial question of law raised in the present Appeal and as such RERA Appeal No. 106 of 2023 (U.P Avas Evam Vikas

Parishad V/s Presiding Officer, U.P Real Estate Appellate Tribunal and others) is **dismissed**.

**L. RERA Appeal No. 107 of 2023
(U.P Avas Evam Vikas Parishad V/s
Presiding Officer, U.P Real Estate
Appellate Tribunal and others).**

(128) This appeal has been filed by the appellant against the impugned order dated 23.06.2022 relating to relief of interest in the form of compensation granted to the allottee- Vandana Sharma. The complainant in that case, i.e Vandana Sharma was allotted flat in Ganga, Yamuna & Hindon Enclave, a project of the Appellant. On the date of filing of the complaint, neither the sale deed was executed in his favour nor the physical possession was handed over to the complainant and as such a cumulative complaint was filed for execution of sale deed, giving of possession and delay compensation against the Appellant. The Adjudicating Officer, vide order dated 29/09/2020 allowed the complaint with various reliefs including a direction to the promoter to (i) give possession along with all facilities till 31.10.2020 (ii) pay interest as compensation at the rate of SBI MCLR +1% per annum on the deposited amount for the delayed period of 17.04.2018 to 28.02.2019.

(129) The appellant was obviously not happy with the said order of the Adjudicating officer and as such interdicted the said order of the adjudicating officer in Appeal under Section 44 of the Act, before the Appellate Tribunal.

(130) The Tribunal vide the impugned order dated 30.06.2022, has dismissed the Appeal of the Parishad/ promoter and has

upheld the direction of the Adjudicating officer for payment of interest at the rate of SBI MCLR+1% per annum along with other reliefs to the complainant. It is this directions, which the Appellant is herein aggrieved with. On perusal of the impugned judgment dated 30.06.2022, this court finds that the Appellate Tribunal has recorded in detail the various contention of the parties and discussed the case laws cited by them exhaustively in the said impugned order and has framed the following five question for determination:

“(i) Whether under the scheme of the Act, 2016 and rules 2016 any mechanism has been provided for determination of the interest or the compensation for delay in handing over possession of the flat/apartment/ plot to the allottee and/or refund with interest, if allottee does not want to continue/wish to withdraw from the project?

(ii) Whether the Regulatory Authority ought to have examined the complaint of the respondent only on the basis of agreed terms and conditions mentioned in the registration Booklet read with allotment letter.

(iii) Whether the project of the appellant/promoter is delayed?

(iv) Whether an allottee is entitled for interest for the delay in completion of the project under the scheme of Act, 2016 if yes, what rate of interest is required to be paid by the promoter to the allottee?

(v) Whether it is necessary and mandatory for the promoter to have first completion certificate (CC) and occupation certificate (OC) under the provisions of the Act 2016 and Rules of 2016 read with the UP Apartment (promotion of construction, ownership and maintenance) Act, 2010 before offering possession as well as asking

the allottee to settle the account and satisfy the final demand?.”

(131) The learned Appellate Tribunal after formulating the aforesaid point of determination, while deciding the 1st issue held that the Act, 2016 provides a mechanism for determination of interest and/or compensation for the delay in handing over possession of the unit to the allottee, if the allottee wishes to stay with the project and/or refund with interest, if allottee wants to withdraw from the project. As far as the aforesaid second issue is concerned, the Appellate Tribunal in view of the observation of the Apex Court in Newtech's case regarding the terms of the contract to the effect that promoter cannot shirk from the responsibilities/ liabilities under the act and the contractual terms do not have an overriding effect to the retrospective applicability of the authority under the provisions of the Act and held that the regulatory authority is required to examine a complaint as per the provisions of the Act, rules and regulations and not merely on the basis of the terms and conditions of the registration booklet or as provided in the demand letter only. The Appellate Tribunal in answer to issue No.3 returned a finding of fact that the project was delayed by 11 months in offering of possession to the complainant and that the Appellant was solely responsible for the same. As regards the fourth issue relating to entitlement of interest on account of delay in completion of the project, the Appellate Tribunal returned a finding in affirmative. As far as the last issue is concerned, the Tribunal held that a promoter is required to offer legal and habitable possession to the allottees only after obtaining CC/OC and ask for clearing dues by raising a final demand. The Appellate Tribunal after enumerating the various provisions of

RERA as well as the binding precedents concluded that there was no illegality or perversity in the order of the Adjudicating officer in awarding interest as compensation to the complainant for delay in possession of the flat.

(132) The appellant have taken a plethora of grounds in the Appeal filed against the aforesaid impugned order of the Tribunal, however a closer look would reveal that almost all the grounds are related to facts and the hinge of the Appeal is premised on the issue, which were decided by this court in the lead matter- “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(133) Thus, this Court does not find any irresistible reasons to differ with the findings, which stands already decided in the aforesaid matter. Thus, the present Appeal, as such, is also decided in terms of the finding of the lead matter- “RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(134) Accordingly, for all the reasons as mentioned herein above, the present Appeal being RERA Appeal No. 107 of 2023 (U.P Avas Evam Vikas Parishad V/s U.P Real Estate Appellate Tribunal and others) is also **dismissed**.

M. RERA Appeals No. 108, 109 of 2023

(135) These appeals have been filed by the appellant against the impugned common order dated 30.12.2022 relating to relief of interest in the form of compensation granted to the allottees, Indranath Agnihotri & Rajesh Kumar Singh. Both the original complaints had been filed by the aforesaid complainant for

(i) Giving of possession, (ii) interest for delayed compensation and (iii) mental harassment etc. It was the case of the complainant/ allottee therein that the possession was delayed and he was entitled for compensation for delayed possession as well as for other issues like not providing of possession, mental harassment etc. The Adjudicating Officer, vide order dated 26.11.2019 allowed the complaint and directed the promoter to pay interest as compensation at the rate of SBI MCLR +1% per annum on the deposited amount for the delayed period of 01.05.2018 to 19.08.2019, within 45 days of the order.

(136) The appellant was obviously not happy with the said order of the Adjudicating officer and as such interdicted the said order of the adjudicating officer in Appeal u/s 44 of the Act, before the Appellate Tribunal.

(137) The Tribunal vide the impugned order dated 30.12.2022, has dismissed the Appeal of the Parishad/ promoter and has upheld the direction of the Adjudicating officer for payment of interest at the rate of SBI MCLR+1% per annum along with other reliefs to the complainant. It is this directions, which the Appellant is herein aggrieved with. On perusal of the impugned judgment dated 30.12.2022, this court finds that the Appellate Tribunal has recorded in detail the various contention of the parties and discussed the case laws cited by them exhaustively in the said impugned order and has framed the following four question for determination:

“ (i) Whether the Regulatory Authority has jurisdiction to pass the impugned order dated 26.11.2019 directing the appellant- U.P Avas Evam Vikas Parishad, Lucknow to handover possession

of the flat to the complainant within 45 days from the date of order after taking the legal charges from the complainant and the opposite party is also directed to pay interest at the rate of MCLR+1% per annum to the complainant for the delayed period from 31.08.2018 till date of offer of possession i.e 09.09.2019,... as the matter is covered under sections 12, 14, 18 and 19 of the Act.

(ii) Whether the project of the appellant- UP Avas Evma Vikas parishad, Lucknow is delayed as stated by respondent in reply to the Appeal.

(iii) Whether respondent/complainant is entitled to get interest for the delayed period, if so on what rate?

(iv) Whether the impugned judgment and order dated 26.11.2019 is liable to set aside?."

(138) The Appellate Tribunal after formulating the aforesaid point of determination, while deciding the 1st issue held that when it comes to a question of seeking the relief of adjudging compensation and interest thereon under section 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of section 71 read with section 72 of the Act. If the adjudication under sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer, it may intend to expand the ambit and scope of the powers and function of the adjudicating officer under section 71 and that would be against the mandate of the Act, 2016. The Appellate Tribunal in answer to issue No.2 returned a finding of fact that the project was delayed from 31.08.2015 to 09.09.2019. As regards the third issue, the Appellate Tribunal held that in view of

"Uttar Pradesh Real Estate (Regulation and development) Rules, 2018, it would be just to award rate of interest MCLR + 1% per annum as directed by the Authority. As far as the last issue is concerned, the Appellate Tribunal decided to not interfere with the Adjudicating officer order and as such confirmed the same. The Appellate Tribunal after enumerating the various provisions of RERA as well as the binding precedents concluded that there was no illegality or perversity in the order of the Adjudicating officer in awarding interest as compensation to the complainant for delay in possession of the flat.

(139) The appellant have taken a plethora of grounds in the Appeal filed against the aforesaid impugned order of the Tribunal, however a closer look would reveal that almost all the grounds are related to facts and the hinge of the Appeal is premised on the issue, which were decided by this court in the lead matter- "RERA Appeal No. 67/2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(140) Thus, this court does not find any reasons to differ with the findings, which stands already decided in the aforesaid matter. Thus, the present Appeal, as such, is also decided in terms of the analogy & discussion in the lead matter- "RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(141) Accordingly, for all the reasons as mentioned herein above, RERA Appeal Nos. 108 of 2023 and 109 of 2023 are also **dismissed.**

N. RERA Appeals No. 110, 111, 112, 113, 114, 115, 116, 117 of 2023

(142) These appeals have been filed against the impugned common order dated 14.03.2022 passed by the learned UP Real Estate Appellate Tribunal at Lucknow.

(143) Since, common question of law has been raised by the appellant in all these appeals, which are all directed towards a common order dated 14.03.2022, it would be in the interest of justice that all these appeals are consolidated and taken together for hearing and disposal. However, before this court deals with the question of law raised in these Appeals, the brief facts culminating into the present Appeal be narrated to appreciate the law in its proper perspective. In this regard, the facts of the lead mater being RERA Appeal No. 110 of 2023 (*Complainant- Ms. Arifa Khatoon*) is taken into consideration.

(144) Succinctly, it is available from records that the complainant (Ms. Arifa Khatoon) filed a complaint for compensation in delay in offering possession, no window in the flat offered and no parking allotted by the Appellant/Promoter. The said complaint was marked/referred to the Adjudicating Officer vide order dated 25.11.2019 of the Authority. As per the complaint, the complainant was allotted a flat in Vrindavan Yojna in Nillgiri Enclave on 31.08.2013 for an amount of Rs. 20,88,000/-. The possession of the said flat was to be given in 24 months, however the same was not offered by the Promoter, which resulted in increase in the price of the flat, levy of GST etc. It was the case of the complainant that although she had regularly paid the instalments, however the promoter failed to provide window in the flat as well as the parking as promised in Brochure. However, the appellant defended the said complaint by stating that the price

of the flat was never fixed, nor the date of possession had been fixed and the same were only proposed. They also took ground of certain litigation relating to acquisition of land pending before this court for the delay. They also submitted that the complaint was not maintainable for compensation under section 12, 14, 18 and 19 of the Act.

(145) This court finds that the Adjudicating Officer after recording the submission of the parties and dealing with the provisions of the RERA Act gave a detailed Judgment vide order dated 26/06/2020, thereby returning a finding that the complainant inspite of taking the possession of the flat is entitled for compensation for delay in offering of possession and as such the Adjudicating Officer awarded compensation in the form of interest @ MCLR+ 1% on the total amount of consideration for the period of delay between 31.08.2015 to 25.07.2017.

(146) This Court finds that the aforesaid order of the Adjudicating officer was a subject matter of challenge by the Appellant before the Appellate Tribunal in terms of section-44 of the RERA Act. The said Appeal filed by the Appellant was decided along with 9 other matters vide the impugned common order dated 14.03.2022. On a perusal of the impugned judgment of the Appellate Tribunal it is seen that the Tribunal has painstakingly recorded details of facts of each Appeal in a tabular chart and framed the following questions for determination:

“ i. Whether the Adjudicating officer ought to have examined the complaint of the respondent only on the basis of agreed terms and conditions

mentioned in the Registration Booklet, read with allotment letter.

ii. Whether there is any delay in handing over of the possession to the allottee, and if yes, on whose account?

iii. Whether an allottee is entitled for claiming compensation/ interest for the delayed possession of the flat and sale deed has been executed after the allottees agreed to pay the final cost of the flat?

iv. Whether the respondent is entitled for interest and/or compensation on account of delayed possession under the scheme of the Act, 2016 and whether the rate of interest granted by the Adjudicating officer is in accordance with the provisions of the Act, 2016, Rules 2016?"

(147) This Court finds that the Appellate Tribunal has exhaustively dealt with each of the aforesaid issue and after recording various precedents, arrived at a decision that as far as the first issue is concerned, in terms of the *Newtech Promoter's case*, the promoter cannot shirk from the responsibilities/ liabilities under the Act and the contractual terms do not have an overriding effect to the retrospective applicability of the authority under the provisions of the Act. On the facts, the Appellate Tribunal returned a finding that the project was delayed by 2 years and 4 months in giving of the possession and that the Appellant/ Promoter was solely responsible for the said delay. Further, as far as the third issue is concerned, the Tribunal after considering various judgments including that of *W. Cdr. Arifur Rahman Khan and Aleya Sultan and others Vs. DLF Southern Homes Pvt. Ltd.*, held that a home buyer does not lose his/her right to claim compensation for the delay in possession even after execution of the conveyance deed and taking possession of the unit/ Apartment/ flat booked by him.

The Appellate Tribunal also returned a finding that the complainant was entitled for interest on account of delayed possession and that the rate of interest awarded i.e MCLR + 1% by the regulatory authority was fair, just and reasonable. Thus, the Appellate Tribunal did not find any illegality or infirmity in the impugned order of the Adjudicating Officer and as such dismissed all the Appeals.

(148) This Court finds that the Appellant has filed an Appeal against the aforesaid impugned order dated 14.03.2022, which are largely premised on the same grounds and question of law as has been decided by this court in "RERA Appeal (Defective) No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*). The fulcrum of the Appeal hinges on the determination of question as to whether the adjudicating officer appointed under the RERA section 72 can grant compensation in form of interest in case where allottee does not exit the project under section 18 of the RERA Act.

(149) This Court finds that the aforesaid ground has been a subject matter of challenge in similar other matters, which were decided by this court in the lead matter- "RERA Appeal No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*), wherein this court held that compensation in the form of interest can be awarded by the Adjudicating Officer and as such has rejected the said contention and dismissed the appeal of the Parishad.

(150) Thus, this Court does not find any new issue being raised in the present bunch of appeals by the learned counsel for the Appellant, which requires any separate considerations either on facts or on law and as such the present bunch of Appeals are

also decided in terms of the finding of the lead matter- “RERA Appeal (Defective) No. 67 of 2023 (*Complainant- Dhruv Kr. Chaturvedi*).

(151) Accordingly, RERA Appeal No. 110 of 2023, RERA Appeal No. 111 of 2023, RERA Appeal No. 112 of 2023, RERA Appeal No. 113 of 2023, RERA Appeal No. 114 of 2023, RERA Appeal No. 115 of 2023, RERA Appeal No. 116 of 2023 & RERA Appeal No. 117 of 2023 are also **dismissed**.

(152) As a priori, all these appeals are **dismissed** and interim orders, if any, stands vacated.

(153) Office is directed to place a copy of this order in each of the above-captioned appeals.

(154) There shall be no order as to cost.

(2023) 11 ILRA 215

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 03.11.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Civil Misc. Review Application No. 187 of 2023

Dinesh Kumar Maurya & Anr. ...Applicants
Versus
The Chancellor, Lucknow University Lko. & Ors.
...Opposite Parties

Counsel for the Applicants:
Yadukul Shiromani Srivastava (Y.S. Lohit)

Counsel for the Opposite Parties:

A. Civil Law - Code of Civil Procedure, 1908 - Order XLVII Rule 1 - Review - Grounds - Counsel's failure to notice relevant case law not a valid ground - A review application can only be filed where the Court has committed an error apparent on the face of the record. An error committed by counsel in failing to notice or cite a relevant judgment cannot constitute a valid ground for review, since review is not intended to provide a re-hearing of the matter. (Para 11)

B. Civil Law - Limitation Act, 1963 - Section 5 - Order XLVII Rule 1 CPC - Review - Delay Condonation - Explanation vis-à-vis Excuse - Condonation of delay being a discretionary power available to courts, the exercise of discretion must necessarily depend upon the sufficiency of the cause shown and the degree of acceptability of the explanation. Courts must distinguish between an "explanation" and an "excuse." An explanation lays out the cause for something, allowing a person to show that what happened was not his fault. However, care must be taken to distinguish an explanation from an excuse, which is often offered to deny responsibility or consequences when under attack — a defensive action implying the reason proffered is not genuine. (Para 8)

C. In the present case, the review was filed on the ground that the petitioners had preferred SLP against the judgment dated 07.02.2023 sought to be reviewed, and while preparing submissions before the Hon'ble Supreme Court, counsel came across the judgment dated 08.09.2015 reported in AIR 2015 SC 3473, which he had earlier failed to notice. The SLP was subsequently withdrawn without liberty and dismissed as such on 10.04.2023. The review was then filed on 02.09.2023, i.e. 145 days after withdrawal of the SLP. Held: Failure of learned counsel to notice a judgment earlier and its later discovery while preparing submissions for the SLP does not amount to "discovery of a new and important matter or evidence" within

the meaning of *Order XLVII Rule 1 CPC*. Under the guise of review, the petitioners cannot claim a re-hearing on this ground. (Paras 11, 18)

D. In the instant case, an application was filed on 02.09.2023 seeking condonation of delay in filing a review of the judgment and order dated 07.02.2023. To explain the delay, a copy of a pathological examination report dated 08.02.2023 and a prescription dated 17.03.2023 issued on plain paper advising seven days' medication for petitioner no. 1 were annexed. The doctor's advice ended on 24.03.2023, and there was nothing on record to indicate continuance of any ailment thereafter till the filing of the petition on 02.09.2023. There was also no averment explaining why petitioner no. 2 did not approach the Court within the prescribed limitation. No circumstance was pleaded giving rise to a sufficient cause for not filing the review application in time. *Held:* The averment regarding petitioner no. 1 having consulted a doctor on 17.03.2023 was made merely as an *excuse* for delayed filing and did not constitute a *bona fide explanation* amounting to sufficient cause for condonation of delay. (Para 13)

Dismissed. (E-5)

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

1. Heard Sri Y. S. Lohit, the learned counsel for the applicants and perused the records.

2. The instant application has been filed seeking condonation of delay in filing an application for review of the judgement and order dated 07.02.2023 passed by a coordinate bench of this Court dismissing Writ A No. 4433 of 2010 filed by the petitioners. The office has reported a delay of 174 days in filing the review application.

3. In the affidavit filed in support of the application for condonation of delay, it has been stated that while preparing arguments to be advanced in SLP (C) No. 00633/2023, the learned counsel for the petitioners came across the judgment in the case of Vice Chancellor, Lucknow University, Lucknow versus Akhilesh Kumar Khare and others, AIR 2015 SC 3473 rendered in the matter of daily wage employee of Lucknow University. Therefore, their Counsel withdrew the S.L.P. and it was dismissed as such on 10.04.2023. Much after 10.04.2023, they came to know that a person who was employed on daily wages and whose services were terminated in the year 2008, and whose writ petition and special appeal had been dismissed by this Court, had been paid back wages by means of an order dated 25.02.2016 passed by the Deputy Registrar (Administration), with the approval of the Vice Chancellor. They also came to know that by means of the judgement and order dated 24.07.2019 passed in Writ Petition No. 6680 (S/S) of 2007 filed by Srimati Anima Shukla, who was working on a non-approved post in self financed scheme in Lucknow University, this Court had ordered payment of dues of the petitioner.

4. It has been stated in the affidavit that there is sufficient cause to review the judgement dated 07.02.2023 but the petitioner no. 1, who is doing Pairvi was ill and, therefore, the petition could not be filed earlier.

5. A copy of pathological examination report dated 08.02.2023 of Dinesh Maurya and a copy of a prescription dated 17.03.2023 issued on a plain paper for treatment of Dinesh Kumar advising medication for seven days, have been annexed with the affidavit filed in support of the application. Apparently, even after

the pathological examination report dated 08.02.2023, the petitioner no.1 went to consult a doctor only on 17.03.2023 and the doctor advised medication for seven days only, which ended on 24.03.2023. There is nothing on record to indicate continuance of any ailment after 24.03.2023 till filing of the petition on 02.09.2023. Moreover, no circumstance has been pleaded which would give rise to a sufficient cause for the petitioner no. 2 having not approached this Court for filing the review application within the prescribed period of limitation. Thus there is absolutely no explanation for the delay.

6. In **Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and Ors.** (2013) 12 SCC 649, the Hon'ble Supreme Court discussed the law regarding condonation of delay as explained in various precedents and summarized the same as follows: -

"21. From the aforesaid authorities the principles that can broadly be culled out are:

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay

but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm

of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) *The State or a public body or an entity representing a collective cause should be given some acceptable latitude.*

22. *To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:*

(a) *An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.*

(b) *An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.*

(c) *Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.*

(d) *The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters."*

(Emphasis supplied)

7. In **Ajay Dabra versus Pyare Ram and others** 2023 SCC OnLine SC 92, the Hon'ble Supreme Court held that: -

"5. What we have here is a pure civil matter. An appeal has to be filed within the stipulated period, prescribed under the law. Belated appeals can only be

condoned, when sufficient reason is shown before the court for the delay. The appellant who seeks condonation of delay therefore must explain the delay of each day. It is true that the courts should not be pedantic in their approach while condoning the delay, and explanation of each day's delay should not be taken literally, but the fact remains that there must be a reasonable explanation for the delay."

(Emphasis supplied)

8. In **Sheo Raj Singh (Deceased) Through Lrs. and Others Versus Union of India and Another**, 2023 SCC OnLine SC 1278, after discussing the various precedents on the issue, the Hon'ble Supreme Court summarized the principles regarding condonation of delay in the following words: -

"29. Considering the aforementioned decisions, there cannot be any quarrel that this Court has stepped in to ensure that substantive rights of private parties and the State are not defeated at the threshold simply due to technical considerations of delay. However, these decisions notwithstanding, we reiterate that condonation of delay being a discretionary power available to courts, exercise of discretion must necessarily depend upon the sufficiency of the cause shown and the degree of acceptability of the explanation, the length of delay being immaterial. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being proffered, delay of the shortest range may not be condoned whereas, in certain other cases, delay of long periods can be condoned if the explanation is satisfactory and acceptable. Of course, the courts must distinguish between an 'explanation' and an 'excuse'. An 'explanation' is designed

to give someone all of the facts and lay out the cause for something. It helps clarify the circumstances of a particular event and allows the person to point out that something that has happened is not his fault, if it is really not his fault. Care must however be taken to distinguish an 'explanation' from an 'excuse'. Although people tend to see 'explanation' and 'excuse' as the same thing and struggle to find out the difference between the two, there is a distinction which, though fine, is real. An 'excuse' is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something as just an 'excuse' would imply that the explanation proffered is believed not to be true. Thus said, there is no formula that caters to all situations and, therefore, each case for condonation of delay based on existence or absence of sufficient cause has to be decided on its own facts. At this stage, we cannot but lament that it is only excuses, and not explanations, that are more often accepted for condonation of long delays to safeguard public interest from those hidden forces whose sole agenda is to ensure that a meritorious claim does not reach the higher courts for adjudication.

(Emphasis supplied)

9. The judgment sought to be reviewed was delivered on 07.02.2023. The petitioners did not apply for grant of its certified copy. They applied for obtaining an authenticated computerised copy of the judgment on 10.02.2023 and the copy was prepared on the same day, but it was received on 13.02.2023. Even if the period between 10.02.2023 to 13.02.2023 is excluded, the limitation for filing the review application expired on 13.03.2023.

10. The petitioners had filed SLP (C) No. 00633/2023 against the judgment and order dated 07.02.2023 which is sought to be reviewed. The petitioners claim that while preparing the submissions to be advanced before the Hon'ble Supreme Court, their learned counsel came across the judgment dated 08.09.2015 reported in AIR 2015 SC 3473, which he had failed to notice earlier. Thereafter, the Counsel withdrew the SLP without seeking any liberty and it was dismissed as such on 10.04.2023. The review application has been filed on 02.09.2023, i.e. 145 days after dismissal of the S.L.P. as withdrawn.

11. Review application can only be filed on the ground that the Court had committed an error, which is apparent on the face of the record and an error committed by the Counsel by failing to notice a relevant case-law and failing to place the same before the Court cannot be a ground for review of the judgment, as the provision for review a judgment is not meant to provide a re-hearing to the parties.

12. The petitioner no.1 had gone to consult a doctor on 17.03.2023 and the doctor had advised medication for seven days only. It is not the case of the petitioner no. 1 that he remained ill till filing of the review application on 02.09.2023. There is absolutely no averment as to why the petitioner no. 2 did not come forward to file the review application. The petitioner no. 2 had not even joined in filing of the review application and he had not signed any document, including the Vakalatnama executed in favour of the learned Counsel and he has signed the Vakalatnama only

after the officials of the Registry of this Court had raised an objection to this effect.

13. From the aforesaid facts, it appears that the averment regarding the petitioner no. 1 having consulted a doctor on 17.03.2023 has been made as an excuse for the delayed filing of the review application, and it does not offer an explanation making out a sufficient cause for the delay.

14. Sri. Y. S. Lohit, the learned Counsel for the petitioners has relied upon the judgments in the cases of **Kunhayammed v. State of Kerala**, (2000) 6 SCC 359 : AIR 2000 SC 2587, **S. Bagirathi Ammal v. Palani Roman Catholic Mission**, (2009) 10 SCC 464 : AIR 2008 SC 719 and **Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.**, (2019) 4 SCC 376 : AIR ONLINE 2019 SC 2218

15. In **Kunhayammed v. State of Kerala** (Supra), it was held that: -

“38. The review can be filed even after SLP is dismissed is clear from the language of Order 47 Rule 1(a). Thus the words “no appeal” has been preferred in Order 47 Rule 1(a) would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior court. Therefore, the review can be preferred in the High Court before special leave is granted, but not after it is granted....”

16. The ratio of **Kunhayammed** (Supra) was followed in **Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.**, (Supra). There can be no dispute against the aforesaid proposition of law, but it is not

applicable at the time of deciding the application under Section 5 of the Limitation Act.

17. In **S. Bagirathi Ammal v. Palani Roman Catholic Mission** (Supra), the Hon’ble Supreme Court held that: -

“11..., it is useful to refer the provisions under Order 47 Rule 1 CPC relating to review which read as under:

“1. Application for review of judgment.—(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

Explanation.—The fact that the decision on a question of law on which the judgment of the court is based has been

reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment."

A reading of the above provision makes it clear that review is permissible (a) from the discovery of new and important matter or evidence which, after the exercise of due diligence could not be produced by the party at the time when the decree was passed; (b) on account of some mistake; (c) where error is apparent on the face of the record or is a palpable wrong; (d) any other sufficient reason. If any of the conditions satisfy, the party may apply for a review of the judgment or order of the court which passed the decree or order. The provision also makes it clear that an application for review would be maintainable not only upon 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.

*12. An 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. In other words, it must be an error of inadvertence. It should be something more than a mere error and it must be one which must be manifest on the face of the record. When does an error cease to be mere error and becomes an error apparent on the face of the record depends upon the materials placed before the court. **If the error is so apparent that without further investigation or enquiry, only one conclusion can be drawn in favour of the applicant, in such circumstances, the review will lie. Under the guise of review, the parties are not entitled to rehearing of the same issue but the issue can be decided just by a perusal***

of the records and if it is manifest can be set right by reviewing the order...."

18. The petitioners have belatedly approached this Court seeking review of its judgment on the ground that at the time of advancing submissions in the Writ Petition on 07.02.2023, their learned Counsel had failed to notice and place a judgment dated 08.09.2015 reported in AIR 2015 SC 3473. Failure of the learned Counsel for the petitioners to notice a judgment while preparing his submissions and the judgment being noticed by him subsequently during preparation of submissions to be advanced in S.L.P., would not be akin to discovery of a new and important matter or evidence which, after the exercise of due diligence could not be produced by the party at the time when the decree was passed, as mentioned in Order XLVII Rule 1 C.P.C. Under the guise of review on this ground, the petitioners cannot claim a re-hearing of the matter. In any case, the aforesaid judgment does not support the petitioners' claim of condonation of delay in filing the review application.

19. The delay in filing the review application cannot be condoned without the petitioners having given an explanation showing a sufficient cause for the delay. Therefore, the application seeking condonation of delay in filing the review application cannot be allowed and the same is liable to be rejected.

20. Accordingly, the application seeking condonation of delay in filing the review application is rejected.

21. Let the review application be consigned to records.

(2023) 11 ILRA 222

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 31.10.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Civil Misc. Review Application No. 432 of 2023
In
Civil Misc. Writ Petition No. 7428 of 2023

Jag Mohan Agarwal ...Petitioner
Versus
Smt. Kanchan Kumari Jain ...Respondents

Counsel for the Petitioner:

Sri Balwinder Singh Suri, Sri Mukesh Kumar Pandey

Counsel for the Respondents:

Sri Sudeep Harkauli

A. Civil Law - Constitution of India, 1950 - Article 226 - Review - Review application by a subsequent counsel not maintainable – Writ was filed and argued by one counsel whereas the review application was filed by another counsel. Held – A review/recall/modification application filed by a subsequent counsel is not maintainable and is nothing but an attempt to delay the compliance of the judgment; therefore, the review application is liable to be dismissed with exemplary cost. The practice of engagement of a new counsel for filing review/recall/modification must be deprecated. Granting such permission would amount to gross misuse of the process of law and an attempt to raise new arguments for re-hearing of the case on merits. Mere obtaining of a “No Objection Certificate” is not sufficient for filing of a review application by a subsequent counsel. (Para 13)

Dismissed. (E-5)

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Balwinder Singh Suri along with Sri Mukesh Kumar Pandey, learned counsel for applicant/petitioner and Sri Sudeep Harkauli, learned counsel for opposite party/respondent.

2. Present review application has been filed seeking following reliefs:-

“(a) To allow this review application by setting aside the impugned judgment and order dated 03.08.2023 and hear the matter on merit in the presence of counsel of the Applicant/Petitioner.

(b) And/or to stay the effect and operation of the order, judgment dated 03.08.2023 passed in Civil Misc. Writ Petition (A) No. 7428 of 2023 (Judgement dated 03.08.2023 Reserved on 23.05.2023 and Delivered on 03.08.2023) till the Reserved on 23.05.2023 and Delivered on 03.08.2023) final disposal of the present Review Application, failing thereby will result in express prejudice and irreparable loss and injury to the Applicant/Petitioner.

(c) And/or to allow to bring on record certain legal documents which are germane and which after due diligence could not be filed at the time of passing of order and judgment by this Hon'ble Court in Civil Misc. Writ Petition (A) No. 7428 of 2023, Reserved on 23.05.2023 and Delivered on 03.08.2023.

(d) And/ or to summon the entire record of the Petition/Writ (A) No. 7428 of 2023.

(e) And/or to summon the entire lower court record as well pertaining to both proceedings- under section 10 of U.P. Act No. 16 of 2021 bearing case No. 696 of

2022 pending before the Rent Authority, Agra and Execution proceedings.”

3. Brief facts of the case are that Writ-A No. 7428 of 2023 has been filed by Sri Pankaj Agarwal, upon which a detail counter affidavit has also been filed by Sri Sudeep Harkauli, learned counsel for opposite party/respondent. Final hearing of the writ petition took place on 23.05.2023. Sri Pankaj Agarwal has argued the case on behalf of petitioner whereas it was argued by Sri Sudeep Harkauli on behalf of opposite party/respondent and ultimately, judgment was reserved on the same day. Later on it was pronounced on 03.08.2023 dismissing the writ petition.

4. Now, Sri Balwinder Singh Suri along with Sri Mukesh Kumar Pandey, Advocates has filed present review application for reviewing the order dated 03.08.2023.

5. Sri Harkauli has raised preliminary objection about the maintainability of review application. He submitted that Writ-A No. 7428 of 2023 was filed and argued by Sri Pankaj Agrawal whereas present review application has been filed by Sri Balwinder Singh Suri along with Sri Mukesh Kumar Pandey, therefore, in the light of pronouncements made by Apex Court as well as this Court, review application is not maintainable. In support of his contention, he has placed reliance upon the judgments of this Court passed in **Ram Prasad Shukla vs. Suraj Lal and Ors.; 2017 (122) ALR 144, Mohd. Kaleem vs. Sumitra Devi and Ors.; 2021 (144) ALR 651 and Ramesh Kumar Sharma vs. M/s. Gool Poput and others; 2021 (8) ADJ 123.**

6. Sri Suri, learned counsel for applicant opposed the submissions of Sri

Sudeep Harkauli, learned counsel for opposite party and submitted that review application is maintainable. In support of his contention, he placed reliance upon the judgments of this Court as well as Apex Court in the matters of **Sharda Prasad Mishra vs. State of U.P. and others (Writ-A No. 60191 of 2006) decided on 10.10.2013, Uma Nath Pandey and Ors. vs. State of U.P. and Anr.; 2009 (75) ALR 329 (Criminal Appeal No. 471 of 2009)(arising out of SLP (Crl.) No. 6382 of 2007) and United India Insurance Co. Ltd. vs. Rajendra Singh and others; (2000) 3 Supreme Court Cases 581.**

7. I have considered the rival submissions of counsel for parties and perused the records as well as judgments cited above.

8. This fact is undisputed that writ petition was filed and argued by Sri Pankaj Agarwal on behalf of petitioner. Further, present review application is filed by Sri Balwinder Singh Suri along with Sri Mukesh Kumar Pandey on behalf of applicant/petitioner, who were not the counsels in writ petition. Sri Pankaj Agarwal is also not present in Court at the time of argument of review application, therefore, issue before this Court is to decide as to whether, present review application is maintainable or not.

9. Learned counsel for applicant has placed reliance upon the judgment of this Court in the matter of **Sharda Prasad Mishra (supra)**. From the perusal of the said judgment, it is apparently clear that it is not in favour of applicant rather against him. The only fact which is pointed out by learned counsel for applicant is about “No Objection Certificate”. In the present case, there is no “No Objection Certificate” in

favour of applicant from earlier counsel. Even otherwise, mere obtaining of "No Objection Certificate" is not suffice for filing of review application by a subsequent counsel. Relevant parts of the said judgement is quoted below:-

"When the case was initially heard one Sri S.K.Singh had appeared for the respondent nos.2 to 7. This review application has been filed by the learned counsel, who was not the counsel for the respondent when the judgement was passed.

The Supreme Court in the case of Tamil Nadu Electricity Board and another vs. N. Raju Reddiar and another A.I.R. 1997 SC 1005 has held that review petition cannot be entertained at the behest of a counsel or a person, who had not appeared before the Court or was not party in the main case. Para-1 of the judgement reads as under:-

"1. It is a sad spectacle that a new practice unbecoming and not worthy of or conducive to the profession is cropping up. Mr. Mariaputham, Advocate-on-Record had filed vakalatnama for the petitioner-respondent when the special leave petition was filed. After the matter was disposed of, Mr. V. Balachandran, Advocate had filed a petition for review. That was also dismissed by this Court on 24-4-1996. Yet another advocate, Mr. S.U.K. Sagar, has now been engaged to file the present application styled as "application for clarification", on the specious plea that the order is not clear and unambiguous. When an appeal/special leave petition is dismissed, except in rare cases where error of law or fact is apparent on the record, no review can be filed; that too by the Advocate-on-Record who neither appeared nor was party in the main case. It is salutary to note that the court spends valuable time in deciding a case. Review

petition is not, and should not be, an attempt for hearing the matter again on merits. Unfortunately, it has become, in recent time, a practice to file such review petitions as a routine; that too, with change of counsel, without obtaining consent of the Advocate-on-Record at earlier stage. This is not conducive to healthy practice of the Bar which has the responsibility to maintain the salutary practice of profession. In Review Petition No.2670 of 1996 in CA No.1867 of 1992, a Bench of three Judges to which one of us, K. Ramaswamy,J., was a member, has held as under:

"The record of the appeal indicates that Shri Sudarsh Menon was the Advocate-on-Record when the appeal was heard and decided on merits. The review petition has been filed by Shri Prabir Chowdhury who was neither an arguing counsel when the appeal was heard nor was he present at the time of arguments. It is unknown on what basis he has written the grounds in the review petition as if it is a rehearing of an appeal against our order. He did not confine to the scope of review. It would not be in the interest of the profession to permit such practice. That part, he has not obtained "No Objection Certificate" from the Advocate-on-Record in the appeal, in spite of the fact that Registry had informed him of the requirement for doing so. Filing of the "No Objection Certificate" would be the basis for him to come on record. Otherwise, the Advocate-on-Record is answerable to the Court. The failure to obtain the "No Objection Certificate" from the erstwhile counsel has disentitled him to file the review petition. Even otherwise, the review petition has no merits. It is an attempt to reargue the matter on merits. On these grounds, we dismiss the review petition".

The review application is , therefore, not maintainable."

10. He further placed reliance upon the judgment of Apex Court in the matter of ***Uma Nath Pandey (Supra)***. The said judgment is also does not come in the rescue of applicant for the very simple reason that it is about the 'natural justice'. The meaning of 'natural justice' is to provide the opportunity of hearing and rebuttal to both parties. Undisputedly, present review application was filed by applicant and after exchange of pleadings, he was heard through his counsel Sri Pankaj Agarwal at length. Thereafter judgment was pronounced. Relevant parts of the said judgement is quoted below:-

“6. Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

7. The expressions "natural justice" and "legal justice" do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigants' defence.

19. Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.”

11. Lastly, he has placed reliance upon the judgment of Apex Court in the matter of ***United India Insurance Co. Ltd. (Supra)***. The said judgment is talking about 'fraud'. First of all, in writ petition, there is no allegation of fraud against respondent, therefore, a new fact cannot be brought on record by way of filing review application. Further, until review application is held maintainable, said judgement cannot be taken into consideration.

12. Sri Harkauli has relied upon the judgment of this Court in ***Ram Prasad Shukla (Supra)***, in which Court has clearly held that review application filed by a new counsel who had not argued the writ petition is not maintainable. Relevant parts of the said judgement is quoted below:-

“I also find substance in the submission of the learned counsel for the opposite party that the review petition is not maintainable in view of the fact that it has not been filed by the counsel, who had argued the writ petition. I also find substance in the submissions of the learned counsel for the opposite party that the plea of deposit under section 30(1) or 30(2) was not agitated before the trial court in the written statements. Therefore, now the petitioner cannot travel beyond the pleadings.”

13. The very same view is again taken by this Court in the matter of ***Mohd Kaleem (Supra)***, in which Court has taken specific view that a

review/recall/modification application filed by subsequent counsel is not maintainable and it is nothing but an attempt to delay the compliance of judgement, therefore, review application is liable to be dismissed with exemplary cost. Relevant parts of the said judgement is quoted below:-

“12. In view of the above, I am of the considered opinion that the review/recall/modification application by a subsequent counsel is not maintainable. It is nothing but to delay the compliance of the judgment, therefore, exemplary cost is required to be imposed upon the applicant for delaying the compliance of judgment.”

14. This issue again came before this Court in **Ramesh Kumar Sharma (Supra)** in which this Court relying upon the judgment of Apex Court, has held that review application filed by a subsequent counsel is not maintainable. Relevant parts of the said judgement is quoted below:-

“30. The fact as emanates from the record reveals that Sri Radhey Shyam Dwivedi and Rajesh Dwivedi were counsels representing the applicants. The Court noted the submission advanced by the learned counsel for the respondents in the judgment, therefore, in view of the judgment of Apex Court in the case of (Tamil Nadu Electricity Board and another) (supra), the review petition at the behest of another counsel is not maintainable. Paragraph 1 of the judgment is being extracted hereinbelow:

.....
.....

33. In the instant case, the matter was argued on behalf of applicants by original counsel, and review was filed by Sri N.B. Nigam, Advocate who was not the original counsel of the applicants, and even

after filing the review, the applicants have changed the counsel and engaged a new counsel Sri S.K. Chaturvedi. Therefore, this Court is of the view that the review application is not maintainable.”

15. I have also perused the judgment passed in **Kaniz Fatma & Others Vs. Additional District Judge & Others [2008 (70) ALR 361]**, in which Court has taken very same view that review application cannot be filed by subsequent counsel. Relevant paragraph 25 is quoted below :-

"25. I am therefore of the considered view that once the writ petition has been decided on merits, the scope of review is very limited and successive review applications are not maintainable. The first review application has been filed by a subsequent counsel Sri Khalil Ahmad without consent of the original counsel who IS alleged to have given a wrong undertaking before the Court has neither filed review application nor has appeared in the Court to admit or deny the allegations made against him. It would be laying down a bad precedent to allow successive review applications by subsequent counsel by making allegations against the original counsel engaged initially. In the first review application the Court has considered all the aspects of the matter in its judgment and order dated 20.3.2007 by holding that the matter cannot be reopened by engaging another counsel."

16. Apex Court in the matter of **Tamil Nadu Electricity Board and Others Vs. N. Raju Reddiar and others [AIR 1997 SC 1005]** has reiterated the same view that review application filed by a subsequent counsel is not maintainable. Relevant paragraph 1 is quoted below :-

"1. It is a sad spectacle that new practice unbecoming of worthy and conducive to the profession is cropping up. Mr. Mariaputham, Advocate-on-Record had filed vakalatnama for the petitioner-respondent when the special leave petition was filed. After the matter was disposed of, Mr. V. Balachandran, Advocate had filed a petition for review. That was also dismissed by this Court on April 24, 1996. Yet another advocate, Mr. S.U.K. Sagar, has now been engaged to file the present application styled as "application for clarification", on the specious plea that the order is not clear and unambiguous. When an appeal/special leave petition is dismissed, except in rare cases where error of law or fact is apparent on the record, no review can be filed; that too by the advocate on record who neither appeared nor was party in the main case. It is salutary to not that court spends valuable time in deciding a case. Review petition is not, and should not be, an attempt for hearing the matter again on merits. Unfortunately, it has become, in recent time, a practice to file such review petitions as a routine; that too, with change of counsel, without obtaining consent of the advocate on record at earlier stage. This is not conducive to healthy practice of the Bar which has the responsibility to maintain the salutary practice of profession. In Review Petition No.2670/96 in CA No.1867/92, a Bench of three Judges to which one of us, K. Ramaswamy, J., was a member, has held as under:

"The record of the appeal indicates that Shri Sudarsh Menon was heard and decided on merits. The Review Petition has been filed by Shri Prabir Chowdhury who was neither an arguing counsel when the appeal was heard nor was he present at the time of arguments. It is unknown on what basis he has written the grounds in the Review Petition as if it is a

rehearing of an appeal against our order. He did not confine to the scope of review. It would be not in the interest of the profession to permit such practice. That part, he has not obtained "No Objection Certificate" from the Advocate-on-Record in the appeal, in spite of the fact that Registry had informed him of the requirement for doing so. Filing of the "No Objection Certificate" would be the basis for him to come on record. Otherwise, the Advocate-on-Record is answerable to the Court. The failure to obtain the "No Objection Certificate" from the erstwhile counsel has disintitiled him to file the Review Petition. Even otherwise, the Review Petition has no merits, It is an attempt to reargue the matter on merits. On these grounds, we dismiss the Review Petition."

17. This Court in the matter of **Sidheswar Mishra Vs. State of U.P. & Others [2006 (9) ADJ 427]** has also reiterated the settled provisions of law and held that review application filed by a subsequent counsel is not maintainable. Relevant paragraph 14 is quoted below :-

14. The Court is not inclined to open 'Pandora's Box' for the following reasons-

Firstly: The law is well settled that recall or review application can be filed only by the counsel who had argued the case and not by a subsequent counsel who is engaged after the decision.

Secondly: The recall application in the instant case is in the nature of review application as the judgment has been delivered on merits after hearing the counsels for the parties and the prayer is to recall the judgment and hear on merits again.

Thirdly: When the recall filed by Sri Ranjeet Saxena was listed Sri Brij Lal Verma could not have been authorized by Sri Ranjeet Saxena to argue the application and the case on merits, the following reasons.

(a) Sri Ranjeet Saxena is appointed by the Corporation on its panel to argue to argue its cases and Sri B.L. Verma. The U.P. Power Corporation is a Estate within the meaning of Article 12 of the Constitution and the position of a counsel on its panel is Akur standing counsel appointed by the Government,

(b) Along with standing counsels, brief holders are also appointed by the State Government. If the Corporation had not appointed any brief holders the counsel on the panel cannot handover his government brief to any counsel who is not on the panel to argue government brief.

(c) In any event it was the duty of Sri Ranjeet Saxena to have been present to argue the recall application filed by him in order to avoid excuse again by the Corporation that case was argued by Sri B.L. Verma who is not on its panel and not by Sri Ranjeet Saxena who is on the panel of thue Corporation.

(d) It is very easy to allege by a subsequent counsel that information to his client was not given. If that be the case the recall application ought to have been filed through Sri R.D. Khare. Consequently the case after the judgment has been allotted to Sri Ranjeet Saxena by the Corporation to get recall of order and judgment dated 31.1.2006.”

18. Similar issue came before this Court in the matter of **Rajesh Kumar Tiwari vs. U.P. Shiksha Parishad and 4 Ors. (Service Single No. 7775 of 2005)**, in which after considering different judgments, this Court has held that

review/recall/modification application filed by a subsequent counsel is not maintainable. Relevant part of the said judgement is quoted below:-

“4. On perusal of aforesaid judgments, it is evident that review/recall/modification application by a subsequent counsel is not maintainable.”

19. From the perusal of aforesaid judgments, intention of the Courts are very much clear that in case such review applications are entertained, it would be unending process with permission to opening of new Pandora Box. Undoubtedly, if the case is filed and argued by a counsel, he is the only person to file review application for the reasons that he is aware about the facts and grounds argued before this Court. This cannot be agitated by a subsequent counsel who has no concern with the matter till the final disposal of the case. Therefore, such practice of engagement of new counsel for filing review/recall/modification must have been depreciated. Further, granting such permission would be gross misuse of process of law and an attempt to raise new arguments for re-hearing of case on merits.

20. Now coming to the present case. As the facts are undisputed that writ petition was filed by Sri Pankaj Agarwal whereas review application has been filed by Sri Balwinder Singh Suri along with Sri Mukesh Kumar Pandey without obtaining ‘No Objection Certificate’, therefore, in the light of judgments referred herein-above, no such review application is maintainable.

21. Therefore, review application is **dismissed** on the ground of maintainability.

22. No order as to costs.

(2023) 11 ILRA 229
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.07.2023

BEFORE

THE HON'BLE PRAKASH PADIA, J.

S.C.C. Revision No. 62 of 2023

Ratan Lal Jaiswal ...Revisionist
Versus
Smt. Sunita Devi ...Opposite Party

Counsel for the Revisionist:

Sri Suresh Srivastava, Sri Abhishek, Jyoti

Counsel for the Opposite Party:

Sri Ashvanee Kumar Srivastava, Sri Vineet Kumar Singh, Sri Vishal Pandey

**Civil Law - Small Causes Court Act, 1887-
section 25-Applicability of Act-**

Defendant/revisionist has filed an application under Order 7 Rule 11 CPC- on the ground that the suit filed by the plaintiff-opposite party is not maintainable in the Court of Judge Small Causes Court- plaintiff averment that the tenancy was for fixed -after expiry of fixed term - a notice, demanding arrear of rent, damages for use and occupation and vacant possession of the shop was made by the plaintiff- the provisions of U.P. Act No. 13 of 1972 are not applicable, the suit for recovery of arrears of rent is maintainable only in SCC Court- section 16 of the Small Causes Act- no other Court will have jurisdiction to try the suit- the SCC suit is maintainable. (E-9)

Cases cited:

1. Amit Gupta Vs Gulab Chand Kanodia, 2023
(6) ADJ 191

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard learned counsel for the defendant-revisionist and Mr. Vineet

Kumar Singh, learned counsel for the plaintiff-opposite party.

2. The present SCC Revision has been filed by the revisionist, under section 25 of the Small Causes Court Act, 1887, challenging the judgment and order dated 21.11.2022 passed by the learned Additional District & Session Judge, F.T.C.-2 (under Section 14 of the Finance Commissioner), Gorakhpur in SCC Suit No. 2 of 2021 (Sunita Devi Vs. Ratan Lal Jaiswal).

3. The facts as stated in the affidavit are that the plaintiff/Sunita Devi has instituted SCC Suit No. 2 of 2021, in the Court of Judge Small Causes Court Gorakhpur on 19.1.2021, the plaint of the said suit is annexed as annexure-1 to the affidavit. As per the plaint averment, a registered rent agreement dated 11.6.2015 was executed between the plaintiff/Sunita Devi and Ratan Lal/defendant for letting out the shop, measuring 10x14 i.e. 140 square feet. The boundaries of the shop have been mentioned in the plaint. As per the registered rent agreement, the monthly rent of the shop was Rs. 6000/-. The term of the rent agreement was from 1.7.2015 to 30.6.2020.

4. It is further stated in the plaint that the tenant/revisionist was in arrears of rent from 1.1.2020 to 30.6.2020. After expiry of term of the rent agreement, the defendant/revisionist has not vacated the shop in dispute, accordingly, a notice dated 17.9.2020 was given, terminating the tenancy and demanding arrears of rent. The suit was instituted by the plaintiff- opposite party for recovery of arrears of rent, damages for use and occupation as well as possession of the shop.

5. The defendant/revisionist has filed an application under Order 7 Rule 11 CPC on 8.7.2022, which was numbered as paper No. 25Ga, on the ground that the suit filed by the plaintiff-opposite party is not maintainable, in the Court of Judge Small Causes Court, in view of the provisions contained in Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 (hereinafter referred to as "Act of 2021").

6. An objection was filed by the plaintiff-opposite party on 22.7.2022, stating therein that in view of section 46 of the Act of 2021, all the cases and proceedings pending under the Act of 1972 at the commencement of Act of 2021 shall be continued to be enforced. Further objection has been raised that as per section 6 of the General Clauses Act, 1897, the second ordinance of 2021 was approved by the State Cabinet on 5.4.2021, replacing the provisions of Act No. 13 of 1972 and since the suit in question has been filed on 19.1.2021, hence the same is to be continued by the Judge Small Causes and the provision of Act of 2021 are not applicable.

7. The trial Court relying upon section 16 of the Provincial Small Causes Court Act, 1887, held that the suit has been filed under the provisions of Provincial Small Causes Court Act, 1887, as such, the suit is maintainable before the Judge Small Causes Court and rejected the application filed by the defendant/revisionist under Order 7 Rule 11 CPC. by the impugned order.

8. It is argued by the learned counsel for the revisionist that all the suits relating to the tenancy are governed under the provisions of Act of 2021 and jurisdiction of Judge Small Causes is also barred in

view of the provisions contained in Act of 2021. The learned counsel for the opposite party has argued that the rent of accommodation was Rs. 6000/- per month and tenancy was created through registered rent deed. As the rent was Rs. 6000/- per month, the provisions contained in U.P. Act No. 13 of 1972 will not apply. He further argued that the suit was not instituted under the provisions of U.P. Act No. 13 of 1972. It is further argued by the learned counsel for the opposite party that in view of provisions contained under section 16 of the Provincial Small Causes Court Act, 1887, the suit is cognizable by the Judge Small Causes Court and the provisions contained in Act of 2021 are not applicable. The learned counsel for the opposite party has further relied upon a judgment dated 15.5.2022 delivered by Coordinate Bench of this Court in SCC Revision No. 158 of 2022 (Amit Gupta Vs. Gulab Chand Kanodia), reported in 2023 (6) ADJ 191.

9. In the aforesaid judgment, two following questions were formulated for consideration, namely-

"(a). Whether a Small Cause Suit already instituted, since prior to coming into force of the new Tenancy Act, 2021 and so also such SCC revision arising therefrom would stand saved or the SCC suit and SCC Revision being not mentioned in the repeal and saving clause of Section 46, the proceedings of such suit and revision would stand abated; and

(b). Whether the bar created under Section 38 of the Tenancy Act is not an absolute one and so Small Cause Suit for arrears of recovery of Rent and Eviction (SCC Suit) and SCC Revision arising therefrom would still be maintainable even after the enforcement of the New Tenancy Act, 2021 qua the of tenancies not covered

by tenancy agreements provided for under Tenancy Act, 2021."

10. The Coordinate Bench of this Court, after considering the entire provisions of Act of 2021, Small Causes Court Act & Transfer of Property Act answered the question No. A in paragraph 84 which is reproduced below:-

"84. Thus to sum up on first question "(a), I hold that pending SCC suits and SCC revisions on the date of enforcement of the new Tenancy Act, 2021, shall not abate notwithstanding the provisions as contained under Section 42 of the New Tenancy Act, 2021 as no such intendment can be drawn inasmuch as, Section 6 of General Clauses Act would apply. Still further SCC suits would stand saved as where conceived of under old Rent Control Act, proceedings whereof have been saved under sub section 2 of Section 46 of the new Tenancy Act, 2021."

11. The Coordinate Bench of this Court, further answered question No. B in paragraph 107, which reads as under:-

"107. To sum up on question "(b)" I am of the view and so hold that Small Cause Suits would still be maintainable in cases of tenancies not covered under Section 4 and relating to rights accrued, if any under the Transfer Property Act, 1882 where a tenancy is unwritten, and a tenancy is on month to month basis. Overriding effect of Section 42 will give way to the Central Act, and there could be no doubt about that if the Central Act has occupied the field to certain extent."

12. It is well settled law that while deciding the application under Order 7

Rule 11 CPC only plaint averment has to be taken into consideration.

13. In the plaint, it is specifically stated that the tenancy was created through registered rent agreement dated 11.6.2015 and rate of rent was Rs. 6000/- per month.

14. As per paragraph 3 of the plaint averment the tenancy was for fixed term i.e. 1.7.2015 to 30.6.2020. After expiry of fixed term i.e. 30.6.2020, though no notice was required, but a notice, demanding arrear of rent, damages for use and occupation and vacant possession of the shop was made by the plaintiff.

15. As the provisions of U.P. Act No. 13 of 1972 are not applicable, the suit for recovery of arrears of rent is maintainable only in SCC Court, in view of the provisions contained under section 16 of the Small Causes Court Act, no other Court will have jurisdiction to try the suit.

16. The Coordinate Bench of this Court, while answering the question No. B has also held that the suit will be triable by the Judge Small Causes Court, as the Central Act has occupied the field to certain extent.

17. The suit is for recovery of rent and damages, the rent agreement was for fixed term upto 30.6.2020. It is not case of defendant that tenancy is covered under Section 4 of the Act of 2021. After 30.6.2020, the tenancy is unwritten. Hence in view of para 107 of Amit Gupta case (supra) the SCC suit is maintainable.

18. In view of the above, this Court is of the opinion that the order passed by the Additional District & Session Judge,

F.T.C.- 2 (under Section 14 of the Finance Commissioner), Gorakhpur dated 21.11.2022 in SCC Revision No. 2 of 2021 (Sunita Devi Vs. Ratan Lal Jaiswal) is absolutely perfect and valid order and does not call for any interference.

19. The revision is devoid of merits and is liable to be dismissed.

20. Accordingly, the revision is **Dismissed.**

(2023) 11 ILRA 232
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.11.2023
BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Matters Under Article 227 No. 5782 of 2023

Neelam Shukla & Ors. ...Petitioners
Versus
Balika Shukla & Ors. ...Respondents

Counsel for the Petitioners:
 Samarth Saxena, Durgesh Kumar Shukla

Counsel for the Respondents:

Interim Injunction-name of the petitioner no.1 was recorded, being widow- permanent injunction has been filed by the respondents- petitioner no.1 has executed the sale deed in favour of the petitioner nos.2 to 4 despite the stay of PA-11 entry in her favour- the petitioner no.1 could not have transferred the part of the land in dispute on the basis of PA-11 entry -because the rights accrued to the petitioner no.1 -stands suspended -therefore there is apprehension that the petitioner no.1 may further create third party rights -the said property is required to be protected -the respondents have also challenged the sale deed executed by the petitioner no.1-the interim injunction rightly granted by the appellate court.

W.P. dismissed. (E-9)

Cases cited:

1. Esha Ekta Appartments CHS Ltd.Vs Municipal Corporation of Mumbai & anr.; (2012) 4 SCC 689

2. Shree Chamundi Mopeds Ltd. Vs Church of South India Trust Association SCI CINOD Secretariat, Madras;(1992)3 SCC1

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

1. Heard Shri Samarth Saxena, learned counsel for the petitioners.

2. This petition has been filed challenging the order dated 01.09.2023 passed in Civil Appeal No.6 of 2020; Balika Shukla and Others Vs. Neelam Shukla and Others, by the Additional District Judge, Court No.1, Lakhimpur Kheri, by means of which the appeal has been allowed and the order dated 07.02.2020 passed by the trial court in Regular Suit No.1158 of 2018 has been set aside and the parties have been directed to maintain status quo in regard to the land in dispute.

3. Learned counsel for the petitioner submits that the husband of the petitioner Shri Naveen Shukla was recorded tenure holder of the land in dispute and in possession of the house in question. After his death the petitioner came into possession and her name was recorded in PA-11. The respondents filed Regular Suit No.1158 of 2018 for permanent injunction on the ground that the petitioner no.1 has remarried with one Shri Anshu, therefore she has lost her rights in the property of her husband Shri Naveen Shukla and the respondents, being sisters of Shri Naveen Shukla, are entitled for the property in

question, whereas the petitioner no.1 has not remarried. The petitioner filed a written statement and reply in suit denying the remarriage of the petitioner and considering the same the application for interim injunction was rightly and in accordance with law rejected by the trial court by means of the order dated 07.02.2020. He further submits that the respondents filed a Civil Appeal No.6 of 2020 against the said order. The petitioner filed an objection against the appeal. But without considering the same, the appeal has been allowed and the interim injunction has been granted by the appellate court, therefore the impugned order is not sustainable in the eyes of law.

4. He further submits that the findings recorded by the trial court could not have been interfered with only because two views are possible. He relies on **Esha Ekta Apartments CHS Limited Vs. Municipal Corporation of Mumbai and Another; (2012) 4 SCC 689** and **Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association SCI CINOD Secretariat, Madras;(1992)3 SCC1**.

5. On the basis of above, learned counsel for the petitioners submits that the impugned order is liable to be set aside and this petition is liable to be allowed.

6. I have considered the submissions of learned counsel for the petitioners and gone through the material placed on record of this petition.

7. As borne out from the pleadings, the recorded tenure holder of the land in dispute was the father of the respondents and husband of the petitioner no.1 Shri Naveen Shukla, Shri Vidya Ram son of Devta Deen, who died on 28.10.2017.

Thereafter the husband of the petitioner no.1 and the brother of the respondents died in an accident on 24.02.2018. Thereafter, the name of the petitioner no.1 was recorded, being widow of late Naveen Shukla under PA-11 on 09.03.2018. It appears that thereafter the petitioner no.1 remarried to one Shri Anshu son of Babu Ram. The Regular Suit No.1158 of 2018 for permanent injunction has been filed by the respondents. The specific plea has been taken by the respondents on the basis of Paper No.39-C filed before the trial court that the petitioner no.1 has remarried to Anshu, therefore she has lost her right in the land in dispute and entry dated 09.03.2018 in PA-11 has been stayed by the Tehsildar- Dharaura on 18.07.2018. Though remarriage has been denied by the petitioner no.1 in the objection but no specific denial has been made. The petitioner no.1 claims that Anshu is the relative of the petitioner but the relation has not been disclosed. The trial court rejected the application for interim injunction by means of the order dated 07.02.2020 on the ground that the respondents i.e. the plaintiffs in the suit have failed to make out a prima facie case, therefore the balance of convenience is not in their favour and there can not be any irreparable loss to them.

8. The said order was challenged by the respondents in Civil Appeal No.6 of 2020, against which an objection was also filed by the petitioners. The appellate court, after consider the pleadings and material on record, allowed the appeal on the ground that PA-11 entry made in favour of the petitioners has been stayed by the Tehsildar- Dharaura by means of the order dated 18.07.2018, even then the petitioner no.1 has executed a sale deed dated 30.07.2019 in favour of the petitioner nos.2 to 4 and the petitioner has also remarried

with Anshu son of Babu Ram, which has not specifically been denied by the petitioner no.1. This finding has been recorded on the basis of Paper No.39-C filed before the trial court, which is a Matratva Evam Bal Suraksha Card (MCP Card) showing Neelam Shukla wife of Anshu.

9. In the objection filed before the trial court, the petitioner no.1, though has denied the remarriage but it has not specifically been denied and even after stating that Anshu is her relative, the relation has not been disclosed. However in the objection filed before the appellate court this plea has also not been taken and only a plea has been taken that false and forged charge has been levelled after removing the name of the husband of the petitioner Naveen Shukla and mentioning the name of Anshu. The fact of execution of sale deed dated 30.07.2019, in spite of the stay of PA-11 entry by means of the order dated 18.07.2018 by the Tehsildar-Dharaura, has also not been denied by the petitioner, therefore, it is apparent that the petitioner no.1 has executed the sale deed in favour of the petitioner nos.2 to 4 despite the stay of PA-11 entry in her favour, whereas she could not have done so, therefore this Court is of the view that the appellate court has not committed any illegality or error in passing the impugned order dated 01.09.2023, allowing the appeal and granting the interim injunction which is necessary in the facts and circumstances of the case to save the property in dispute and avoid multiplicity of litigation in future, on the basis of the pleadings and material on record.

10. So far as the argument advanced by the learned counsel for the petitioners that if two views are possible, the appellate

court can not set aside the order passed by the trial court and take different view, this Court is of the view that after the stay of PA-11 entry in favour of the petitioner no.1, the fact which has been considered by the trial court in its order dated 07.02.2020 but no finding has been recorded in this regard, no other view is possible except that the petitioner no.1 could not have proceeded even to execute the sale deed of the property in dispute or it's any part because the PA-11 entry is not operative on account of stay, even thereafter, the petitioner no.1 has executed the sale deed in clear violation of the interim order passed by the Tehsildar.

11. The Hon'ble Supreme Court, in the case of **Esha Ekta Apartments CHS Limited Vs. Municipal Corporation of Mumbai and Another (Supra)**, relied by the learned counsel for the petitioners, has relied on the judgement passed in the case of *Wander Ltd. Vs. Antox India (P) Ltd* 1990 Supp SCC 727, in which the Hon'ble Supreme Court has held that in such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions, the paragraphs 19 and 20 of **Esha Ekta Apartments CHS Limited Vs. Municipal Corporation of Mumbai and Another (Supra)** is extracted below:-

"19. We have considered the respective submissions and carefully scrutinized the record. The scope of the appellate court's power to interfere with an interim order passed by the court of first instance has been considered by this Court

in several cases. In Wander Ltd. v. Antox Indic (F Ltd, the Court was called upon to consider the correctness of an order of injunction passed by the Division Bench of the High Court which had reversed the order of the learned Single Judge declining the respondents prayer for interim relief. This Court set aside the order of the Division Bench and made the following observations: (SC? ?. 733, para 14)

"14.... In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of, interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

20. In Skyline Education Institute (India) (P) Ltd. v. S.L. Vaswani, the three-Judge Bench considered a somewhat similar question in the context of the refusal of the trial court and the High Court to pass an order of temporary injunction, referred to the judgments in Wander Ltd. v.

Antox India (P) Ltd., N.R. Dongre v. Whirlpool Corpn. and observed: (S.L. Vaswani case, SCC p. 153, para 22)

"22. The ratio of the above noted judgments is that once the court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the court and is supported by cogent reasons, the appellate, court will be loath to interfere simply because on a de novo consideration of the matter it is possible for the appellate court to form a different opinion on the issues of prima facie case, balance of convenience, irreparable injury and equity.>

12. The Hon'ble Supreme court, in the case of **Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association SCI CINOD Secretariat, Madras (Supra)**, relied by the learned counsel for the petitioners, has held in paragraph 10 that while considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.

13. In view of above, the stay of PA-11 entry in favour of the petitioner no.1, would not be operative from the date of grant of stay order. Thus, the petitioner no.1

15. The petition is, accordingly, **dismissed**. No order as to costs.

THE HON'BLE SARAL SRIVASTAVA, J.
Matters Under Article 227 No. 8519 of 2023
(Civil)

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

1. Heard Sri Atul Dayal, learned Senior Counsel assisted by Sri Vivek Saran, learned counsel for the petitioners.

2. Petitioners have preferred this petition under Article 227 of the Constitution of India challenging the order dated 31.07.2023 passed by the Additional District Judge/F.T.C. No.2, Muzaffar Nagar rejecting the application no.58Ga under Section 3(I)(b) of the National Highways Act, 1956 (hereinafter referred to as 'Act, 1956') read with Order 11 Rule 12 of C.P.C. and application 63Ka under Section 23(3) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996') in Arbitration Case No.779 of 2011.

3. The facts in brief are that land of the petitioners being Khasra No.82 admeasuring 250 square meters, village Husainpur, Bopada, Muzaffar Nagar was acquired by the National Highway Authority of India (hereinafter referred to as 'NHAI') for expansion of National Highway No.58 by issuing a notification dated 28.11.2005 and 24.11.2006 under Section 3A of the Act, 1956. The competent authority notified under the Act, 1956 prepared a draft award determining the rate of compensation at Rs.770/- per square meter to be paid to the land owners whose land had been acquired. The draft award was approved by the NHAI vide letter dated 27.02.2009. Thereafter, the competent authority passed a final award on 26.03.2009.

4. Since the rate determined by the competent authority in respect of land was much less than the prevalent market rate of the land in the area, the petitioners preferred an application before the competent authority for referring the matter to the Arbitrator.

The application of the petitioners was registered as Land Reference Case No.55 of 2011.

5. The petitioners challenged the award mainly on the ground that the acquired land have been declared by the Sub-Divisional Magistrate, Jansath as non-agricultural land. It is further averred that acquired lands are commercial land, and therefore, the rate determined under the award is much less than the market rate of the land in the area which is about Rs.12,000 square per meter.

6. It would be apt to reproduce the relevant paragraph of the reference application of petitioners:-

“3- यह कि अर्जित की जाने वाली भूमि राष्ट्रीय राज मार्ग पर स्थित है जिसके अर्जित खसरा नम्बरान में जो 84 है, दि० 07.08.1978 में अकृषक घोषित किया जा चुका है इसी प्रकार ख०नं० 82 में भी दि० 07.08.1978 को सक्षम अधिकारी एस०डी०एम० जानराठ द्वारा अर्जित नम्बरान को अकृषक भूमि घोषित किया जा चुका है जिसमें स्थल पर भी आबादी है। जबकि उपरोक्त अभिनिर्णय के अनुसार याची की कृषि भूमि का मूल्यांकन कर अधिनिर्णय के अनुसार प्रतिकर दिया जा रहा है। जिससे प्रार्थीगण को अत्यधिक क्षति हुई है। उपरोक्त अर्जित भूमि के ख०नं० 83 में मौके पर बाग है जो काफी साल पुराना है उसको भी बाग ना मानकर कृषिभूमि मानते हुये, प्रतिकर का निधरण किया जा रहा है जो स्थल की वास्तविकता से परे है।

4. यह कि जहां-जहां आबादी है वहां सड़क के मध्य बिन्दु से दोनों ओर बराबर 22-22 मीटर की सड़क बनाने हेतु अधिकृत किया जाता है जबकि प्रस्तुत मामले में प्रार्थीगण याची की ओर सड़क के मध्य से कहीं अधिक दूरी तक अर्जित क्षेत्रफल लिया जा रहा है और सभी भूमि का मूल्यांकन बाजार भाव दर पर निर्धारित नहीं किया जा रहा है अर्जित भूमि कार्मिशियल(वाणिज्यिक) है जिसकी वास्तविकता को मौके पर इस बात से पर्खा जा सकता है कि अर्जित ख०नं० 82 में भूस्वामियों का गोदाम/वेयर हाऊस स्थित है जो कि कार्मिशियल की श्रेणी में आता है उपरोक्त खसरा नं० का प्रतिकर भी वाणिज्यिक दर से निर्धारित किया जाना चाहिए था जो

विभाग द्वारा नहीं किया गया खसरा नं० 82 के सामने खसरा नं० 216 में आबादी दुकान एवं वाणिज्यिक गतिविधियां है। इस आधार पर खसरा नं० 82 को भी वाणिज्यिक माना जाना चाहिए था।

5- यह कि अर्जित की जा रही भूमि का वर्तमान समय में बाजार भाव किसी भी दशा में 12000/-रु० प्रति वर्ग मीटर से कम नहीं है इस क्रम में अवगत कराना है कि निर्धारित सरकारी दर भी शहर व कस्बों से बाहर सीमा में निर्धारित सरकारी दर स्टाम्प रेट भी 6000/-प्रति वर्ग मीटर निर्धारित किया गया है जिससे कम फीस पर क्रय विक्रय का सम्पादन होना अवैध माना गया है। प्रार्थी की अर्जित भूमि विकसित ग्राम घासीपुरा जहां वाणिज्यिक गतिविधियां मुजफ्फरनगर से मन्सूरपुर शृंगारमिल तक स्थापित है, के अन्तर्गत भूमि को अर्जित किया जा रहा है जिससे स्थल के अनुरूप प्रार्थीगण को अर्जित समस्त भूमि का प्रतिकर 12,000/-प्रति वर्ग मीटर इस अभिनिर्णय में निर्धारित किया जाना चाहिए था जो नहीं किया गया है। बल्कि निर्धारित दर से बहुत कम प्रतिकर का अंकलन कर याची को जान बूझकर हानि पहुंचाने का प्रयास किया जा रहा है। जो असंवैधानिक है और काबिले आपत्ति है।

8- यह कि प्रार्थीगण के अर्जित खसरा नम्बर 83 84/1 में बाग व आबादी है तथा खसरा नं० 216 में दुकाने है जो अर्जित की जा रही भूमि के नक्शे में यथास्थल दर्शायी नहीं गयी है विभाग द्वारा किये जा रहे इस अर्जन कार्य से प्रार्थीगण याचीगण का गोदाम/वेयर हाऊस भी प्रभावित हो रहा है। और साथ ही गोदाम के सामने बना गार्ड रूम भी पूरी तरह से अर्जन रेखा के अन्दर है गोदाम/वेयर हाऊस का निर्माण भी प्रभावित हो रहा है इसकी क्षति का आकलन विभाग द्वारा नहीं किया गया है। जिससे प्रार्थीगण को अत्यधिक हानि हो रही है। गोदाम/वेयर हाऊस गार्ड रूम से हुई क्षति अंकन 15 लाख रुपये प्रतिकर का अर्जन से पूर्व याचीगण को विभाग द्वारा दिया जाना चाहिए था जो न देकर विभाग ने विधि विरुद्ध कार्य किया है जो असंवैधानिक है।

9- यह कि अर्जित नम्बर में आबादी मौके पर कायम है जिसकी विभाग द्वारा अनदेखी कर अभिनिर्णय बनाया गया है। जो पूरी तरह से गलत है। मौके पर आबादी के साथ वाणिज्यिक क्षमताये अर्जित भूमि में मौजूद है अर्जित भूमि का समस्त प्रतिकर वाणिज्यिक दर से ही दिलाया जाना आवश्यक है। साथ ही मध्य बिन्दु को अन्यत्र स्थान से नापकर सड़क के दोनों ओर बराबर भूमि को अर्जित कराया जाना भी न्याय संगत है। फिर भी जितनी भूमि याचीगण की प्रभावित है, उसका प्रतिकर वाणिज्यिक दर से अंकन 12,000/-रु० प्रति वर्ग मीटर की दर से दिलाया जाना विधि संगत है।

10- यह कि अभिनिर्णय के अनुसार अर्जित भूमि का प्रतिकर 770/-रु० प्रति मीटर निर्धारित किया गया जो पूरी तरह बाजार भाव के विपरित है क्योंकि अभिनिर्णय के साथ संलग्न अनेक्चर-3 के अनुसार अर्जित भूमि में दि० 13.01.05 को किये

गये विक्रय पत्र मंजुला विश्वास बहक सुशील कुमार के अनुसार 2322.67 पैसे प्रति वर्ग मीटर विक्रय मूल्य दर्शाया गया है। इसके अनुरूप भी अर्जित भूमि का प्रतिकर 770/-रु० दिया जाना न्याय संगत नहीं है। क्योंकि अर्जित भूमि के पूर्वप्रकाशन 28.11.05 को ही किया गया है। और वर्ष 2005 के विक्रय पत्र के अनुसार अर्जित भूमि का भाव 2322.67 प्रति वर्ग मीटर संलग्न सूची के अनुसार होता है। उल्लेखनीय है कि विधिक व्यवस्थाओं में माननीय उच्चतम न्यायालय द्वारा दी गई व्यवस्था के अनुसार किसी वर्ष के सर्वाधिक मूल्य को आधार मानकर 15 प्रतिशत वर्ष का मूल्यांकन अतिरिक्त करने के उपरान्त प्रतिकर की गणना की जा सकती है और अर्जन से प्रभावित किसानों को प्रतिकर दिया जा सकता है जो नहीं दिया गया है और बनाया गया अभिनिर्णय अवैधानिक होने के कारण संशोधित होकर पुनः अवार्ड घोषित किये जाने योग्य है।”

7. On the basis of pleadings in the reference, the petitioners prayed for the following relief in the reference case:-

अतः श्रीमान जी से प्रार्थना है कि उपरोक्त तथ्यों के आधार पर याचीकर्ता की याचिका स्वीकार की जाकर बाजार भाव के अनुसार प्रतिकर याची को दिलाये जाने की कृपा करें।”

8. The reference was decided by the Arbitrator under Section 3H (5) of the Act, 1956 by order dated 01.09.2011 enhancing the land rate to Rs.1000/- per square meter by a common award.

9. The petitioners being aggrieved by the award of the Arbitrator, filed an application under Section 34 of the Act, 1996 before the District Judge, Muzaffar Nagar which was registered as Arbitration Case No.779 of 2011.

10. In the aforesaid arbitration case, the petitioners filed an application 58Ga under Section 3-I(b) of the Act, 1956 read with Order 11 Rule 12 of C.P.C. praying for a direction that respondents be directed to produce documents detailed in paragraph nos.1 to 8 of the said application on record before disposal of the case.

11. For better appreciation of facts, the relevant paragraphs of the application 58Ga which refer to documents in respect of which the petitioners have prayed for a direction to respondents by the court are reproduced herein below:-

1. यह कि विपक्षी संख्या 1 को जिस नोटिफिकेशन के माध्यम से रैफरेन्सकर्ता के वाद की सुनवाई हेतु आर्बीट्रेटर नियुक्त किया। इस नोटिफिकेशन की प्रतिलिपि।

2. यह कि विपक्षी संख्या 3 को नेशनल हाईवे अथोरटी आफ इण्डिया द्वारा जिस नोटिफिकेशन के द्वारा सक्षम प्राधिकारी नियुक्त किया गया। इस नोटिफिकेशन की प्रतिलिपि।

3. यह कि विपक्षी नम्बर 3 द्वारा रैफरेन्सकर्ता के विरुद्ध अपने प्रस्तावित अभिनिर्णय दिनांकित 20.1.2009 जो दिनांक 26.3.2009 को विपक्षी नम्बर 3 द्वारा पारित किया गया में प्रस्तावित अवार्ड को अपने पत्र संख्या 101/NHAI/MZN/Camp दिनांकित 20.1.2009 के द्वारा जी०एम० नेशनल हाईवे अथोरटी आफ इण्डिया के पास प्रीएग्जामिनेशन हेतु भेजा। इस पत्र की प्रतिलिपि।

4. यह कि रैफरेन्सकर्ता की अधिग्रहित की गई भूमि के संबंध में पारित एवार्ड के संबंध में भारतीय राष्ट्रीय राज मार्ग प्राधिकरण द्वारा प्रेषित अप्रूवल लैटर (APPROVAL LETTER) संख्या D 2153 दिनांकित 27.2.2009 तथा उसके साथ फ्रेश मेजर मेन्ट रिपोर्ट मय नक्शा को अवार्ड के साथ संलग्न नहीं किया गया है। उक्त पत्र एवं रैफरेन्सकर्ता की भूमि के संबंध में फ्रेश मेजर मेन्ट रिपोर्ट मय नक्शा की प्रतिलिपि।

5- यह कि रैफरेन्सकर्ता की अधिग्रहित सम्पत्ति में खंडे वृक्षों एवं भवन की मूल्यांकन रिपोर्ट की प्रतिलिपि।

6- यह कि रैफरेन्सकर्ता की अधिग्रहित सम्पत्ति का जो प्रतिकर निर्धारित किया गया उक्त प्रतिकर की धनराशि राष्ट्रीय राजमार्ग प्राधिकरण द्वारा सक्षम प्राधिकारी के खाते में जमा कराये जाने से सम्बन्धित अभिलेख की प्रतिलिपि।

7- यह कि रैफरेन्सकर्ता की वास्तविक रूप से अधिग्रहित की गयी भूमि का क्षेत्रफल और उससे सम्बन्धित अभिलेख की प्रतिलिपि।

8- यह कि यदि सक्षम प्राधिकारी द्वारा या राष्ट्रीय राजमार्ग प्राधिकरण द्वारा रैफरेन्सकर्ता की अधिग्रहित भूमि का भौतिक कब्जा लिया गया है। इस संबंध में सक्षम प्राधिकारी द्वारा पंचनामा तैयार किया गया है, उक्त पंचनामे की रैफरेन्स उपरोक्त के अन्तिम रूप से प्रभावी निस्तारण हेतु आवश्यकता है। इस पंचनामे की प्रतिलिपि।”

12. The said application was opposed by the respondents by filing an objection dated 02.07.2022 contending inter alia that said application is not maintainable.

13. The petitioners also filed an application 63Ka under Section 23(3) of the Act, 1996 seeking certain amendments in the application under Section 34 of the Act, 1996.

14. The said application was also opposed by the respondents by filing objection 65Ga stating therein that said application is not maintainable since there is no subsequent development which has taken place, and therefore, the amendment application is misconceived and is liable to be rejected.

15. The subordinate court in rejecting the application 58Ga under Section 3-I(b) of the Act, 1956 read with Order 11 Rule 12 of C.P.C. held that proceedings under Section 34 of the Act, 1996 are summary in nature. It further held that the jurisdiction of the court in considering the application under Section 34 of the Act, 1996 is limited and restricted as the court can set aside the award only on the existence of any of the grounds mentioned under Section 34(2)(a) & (b) of the Act, 1996. Thus, the question of calling interrogatories does not arise in considering the objections under Section 34 since the purpose of calling interrogatories is to ascertain the stand of the party in respect of the disputed question of facts. It further held that as the court is not required to decide the disputed question of facts under Section 34 of the Act, 1996 based upon oral and documentary evidence on record, therefore, application 58Ga is misconceived.

16. The subordinate court took note of the judgement of Apex Court in the case of *M/s Alpine Housing Development Corporation Private Ltd. Vs. Ashok S. Dhariwal and Others* 2023 SCC Online SC 55 and held that the court in a proceeding under Section 34 of the Act, 1996 has to consider the record of Arbitral Tribunal before it. It further held that in such a proceeding it does not call for any additional evidence unless in exceptional circumstances it is necessary. It further recorded a finding that petitioners have failed to make out any exceptional circumstance so as to warrant acceptance of additional evidence in present proceedings. It held that though petitioners had ample opportunity before the Tribunal to lead the aforesaid evidence, they sat quiet for about 12 years, and now by filing the said application, they are trying to make out entirely a new case which is not permissible in law. By recording the aforesaid finding, the subordinate court dismissed the application 58Ga.

17. The subordinate court while rejecting the application 63Ka under Section 23(3) of the Act, 1996 held that under Section 23(3) of the Act, 1996, the relief of amendment of either the claim or the defence is available to the parties only during the pendency of arbitral proceedings before the Arbitrator and not before any other forum or court of law. It further held that arbitral proceedings have been terminated with the passing of the award, and proceedings under Section 34 of the Act, 1996 cannot be deemed to be proceedings before the Arbitral Tribunal by any stretch of imagination. Consequently, it held that the application under Section 23(3) of the

Act, 1996 is not maintainable and rejected the same.

18. Challenging the aforesaid order, the learned Senior Counsel for the petitioners submits that the subordinate court has committed a manifest error of law apparent on the face of the record in rejecting the application 58Ga. He submits that an application to bring additional evidence on record is maintainable if documents which are sought to be brought on record are necessary and germane to the issue involved in the case for correct and proper adjudication.

19. To buttress the aforesaid submission, he has laid emphasis upon the word 'furnishes proof' mentioned in Section 34(2) before the substitution of the said words by Act No.33 of 2019 and submits that petitioners are entitled to produce additional evidence in proceeding under Section 34 of the Act, 1996. He further submits that courts are not devoid of powers to allow said application in exceptional circumstances in view of the judgement of Apex Court in the case of *M/s Alpine Housing Development (supra)*, and as the petitioners have made out an exceptional circumstance which necessitated to bring on record the documents mentioned in application 58Ga in the interest of justice, therefore, the subordinate court has erred in law in rejecting the aforesaid application.

20. He further submits that observation by the subordinate court that by filing application 58Ga petitioners are trying to make out an entirely new case in the present proceeding is erroneous and not based upon correct appreciation of the record.

21. He further submits that the subordinate court has misinterpreted Section 23(3) of the Act, 1996 in holding that application 63Ka was not maintainable. He further submits that as the amendments sought in the application 63Ka under Section 34 of the Act, 1996 are formal in nature and do not change the nature of the case, therefore, the subordinate court has committed an error apparent on the face of record in rejecting the application 63Ka of the petitioners.

22. I have considered the argument advanced by the learned Senior Counsel for the petitioners and perused the record.

23. The Court first deals with the argument of learned counsel for the petitioners in respect of the order of the subordinate court rejecting application 58Ga.

24. In the instant case, the land of the petitioners bearing Khasra No.82 admeasuring 250 square meters village Husainpur, Bopada, Muzaffar Nagar was acquired by NHAI for expansion of National Highway No.58 by notification dated 28.11.2005 and 24.11.2006. The Special Land Acquisition Officer prepared a draft award fixing land rate @ Rs.770 per square meter. The said draft award was approved by NHAI vide letter dated 27.02.2009 and based on it, the competent authority passed the final award on 26.03.2009.

25. The petitioners being aggrieved by the final award dated 26.03.2009 preferred a reference under Section 3G (5) of the act 1956 before the competent authority mainly on the ground that the acquired land was abadi land and a lot of commercial activities were going around

the land, therefore, the land had potential for commercial use and award should have been given as per the market rate applicable to commercial land i.e. Rs.12,000/- per square meter. The relevant extract of the paragraph of the reference application assailing the award has already been extracted above.

26. The competent authority partly allowed the reference application and enhanced the land rate from Rs.770 to Rs. 1000 per square meter by order dated 01.09.2011. The petitioners being not satisfied with the award passed by the arbitrator preferred an application under Section 34 of the Act, 1996 registered as reference Case No.55 of 2011.

27. In the said case, the petitioners preferred an application under Section 3-I of the Act, 1956 read with Order 11 Rule 12 of C.P.C to take on record the documents/inventories detailed in the said application.

28. Now the question that arises for consideration is whether the court in considering the application under Section 34 of the Act, 1996 can allow such application when the power to accept such application is vested with the competent authority under Section 3-I (b) of the Act, 1956.

29. To answer the aforesaid question, it would be apposite to reproduce Section 3G and Section 3-I of the Act, 1956:-

“[3G. Determination of amount payable as compensation.— (1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.

(2) Where the right of user or any right in the nature of an easement on, any land is acquired under this Act, there shall be paid an amount to the owner and any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such acquisition an amount calculated at ten per cent, of the amount determined under sub-section (1), for that land.

(3) Before proceeding to determine the amount under sub-section (1) or sub-section (2), the competent authority shall give a public notice published in two local newspapers, one of which will be in a vernacular language inviting claims from all persons interested in the land to be acquired.

(4) Such notice shall state the particulars of the land and shall require all persons interested in such land to appear in person or by an agent or by a legal practitioner referred to in sub-section (2) of section 3C, before the competent authority, at a time and place and to state the nature of their respective interest in such land.

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government.

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration—

(a) the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to

3-I. Competent authority to have certain powers of civil court.—The competent authority shall have, for the purposes of this Act, all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) reception of evidence on affidavits;

(d) requisitioning any public record from any court or office;

(e) issuing commission for examination of witnesses.]”

30. Section 34 of the Act, 1996 as it stood before amendment by Act, No.33 of 2019 is reproduced herein below:-

“34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made

only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside, or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by

arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1— For the avoidance of any doubt, it is clarified that an award in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.]

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]..... ”

31. Section 3-I of the Act, 1956 vests with the competent authority for the purposes of this Act, all the powers of the Civil Court for trying a suit under the Code of Civil Procedure, 1908 (5 of 1908) in respect to the matters enumerated in Section 3-I(a) to (e). Under Section 3-I(b) of the Act, 1956, the competent authority is vested with the power to direct the parties in the interest of justice for the production of any document which is necessary and germane to the controversy for correct and proper adjudication of the case.

32. Section 3G(6) provides that subject to provisions of this Act, the provisions of Act, 1996 shall apply to every arbitration under this Act. So by virtue of Section 3G(6) of the Act, 1956, the provisions of Act, 1996 are made applicable to every arbitration proceedings under the Act, 1956.

33. The power to summon or to direct for production of any document is vested with the competent authority under Section 3-I(b) of the Act, 1956.

34. Section 34(2)(a) & (b) of the Act, 1996 enumerates the grounds on the existence of which the court is empowered to set aside an arbitral award. If the grounds enumerated in Section 34(2)(a) & (b) are not made out by the applicant assailing the legality of the arbitral award under Section 34, the court cannot set aside the award. In the scheme of the Act, 1996 limited grounds for setting aside an arbitral award under Section 34(2)(a) & (b) of the Act, 1996 are set out mainly for the reason that there should be least judicial intervention in the arbitral award and there should not be any delay in culminating the arbitration proceedings. Now in the light of the scheme of the Act, 1996, this Court proceeds to consider the aforesaid question posed before it in the instant case.

35. In the case of ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited and Another (2009) 17 SCC 796***, a question arose as to whether 'issues' as contemplated under Order 14 Rule 1 of C.P.C. should be framed in the application under Section 34 of the Act, 1996, the Apex Court considering the scheme of the Act 1996 and also the scope of proceedings under Section 34 of the Act, 1996, answered the said question in negative. In this respect, it would be apt to reproduce paragraphs 20 to 24 of the said judgment:-

“20. Section 36 provides that an award shall be enforced in the same manner as if it were a decree of the court, but only on the expiry of the time for making an application to set aside the

arbitral award under Section 34, or such application having been made, only after it has been refused. Thus, until the disposal of the application under Section 34 of the Act, there is an implied prohibition of enforcement of the arbitral award. The very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award.

21. We may therefore examine the question for consideration by bearing three factors in mind. The first is that the Act is a special enactment and Section 34 provides for a special remedy. The second is that an arbitration award can be set aside only upon one of the grounds mentioned in sub-section (2) of Section 34 exists. The third is that proceedings under Section 34 requires to be dealt with expeditiously.

22. The scope of enquiry in a proceeding under Section 34 is restricted to consideration whether any one of the grounds mentioned in sub-section (2) of Section 34 exists for setting aside the award. We may approvingly extract the analysis relating to “grounds of challenge” from The Law & Practice of Arbitration and Conciliation by Shri O. P. Malhotra [1st Edn., p.768, Para (I) 34-14]:

“Section 5 regulates court intervention in arbitral process. It provides that notwithstanding anything contained in any other law for the time being in force in India, in matters governed by Part I of this Act, the court will not intervene except where so provided in this Part. Pursuant to this policy, Section 34 imposes certain restrictions on the right of the court to set aside an arbitral award. It provides, in all, seven grounds for setting aside an award. In other words, an arbitral award can be set aside only if one or more of these seven grounds exists.

The first five grounds have been set forth in Section 34(2)(a). In order to

successfully invoke any of these grounds, a party has to plead and prove the existence of one or more of such grounds. That is to say, the party challenging the award has to discharge the burden of proof by adducing sufficient credible evidence to show the existence of any one of such grounds. The rest two grounds are contained in Section 34(2)(b) which provides that an award may be set aside by the court on its own initiative if the subject-matter of the dispute is not arbitrable or the impugned award is in conflict with the public policy of India."

The grounds for setting aside the award are specific. Therefore, necessarily a petitioner who files an application will have to plead the facts necessary to make out the ingredients of any of the grounds mentioned in sub-section (2) and prove the same. Therefore, the only question that arises in an application under Section 34 of the Act is whether the award requires to be set aside on any of the specified grounds in sub-section (2) thereof. Sub-section (2) also clearly places the burden of proof on the person who makes the application. Therefore, the question arising for adjudication as also the person on whom the burden of proof is placed is statutorily specified. Therefore, the need for issues is obviated.

23. Framing of issues is necessary only where different types of material propositions of fact or law are affirmed by one party and are denied by the other and it is therefore necessary for the court to identify the issues and specify the party on whom the burden to prove the same lies. When this exercise has already been done by the statute, there is no need for framing the issues.

24. In other words, an application under Section 34 of the Act is a single issue proceeding,

where the very fact that the application has been instituted under that particular provision declares the issue involved. Any further exercise to frame issues will only delay the proceedings. It is thus clear that issues need not be framed in applications under Section 34 of the Act."

36. In the case of **Emkay Global Finance Services Limited Vs. Girdhar Sondhi (2018) 9 SCC 49**, the Apex Court considered two judgments of the Delhi High Court wherein Delhi High Court refused to grant permission to the judgment debtor to lead oral evidence at the stage of objections raised against an arbitral award on the ground that if it is permitted, that will defeat the very object of the Act, 1996 i.e. the expeditious disposal of objection and minimal interference by the court which is manifest from the statement of objects and reasons of the Act, 1996. Paragraph 21 of the said judgment is reproduced herein below:-

"21. It will thus be seen that speedy resolution of arbitral disputes has been the reason for enacting the 1996 Act, and continues to be the reason for adding amendments to the said Act to strengthen the aforesaid object. Quite obviously, if issues are to be framed and oral evidence taken in a summary proceeding under Section 34, this object will be defeated. It is also on the cards that if Bill No.100 of 2018 is passed, then evidence at the stage of a Section 34 application will be dispensed with altogether. Given the current state of the law, we are of the view that the two early Delhi High Court judgments cited by us hereinabove, correctly reflect the position in law as to furnishing proof under Section 34(2)(a). So does the Calcutta High Court judgment. We may hasten to add that if the procedure followed by the Punjab and

Haryana High Court judgment is to be adhered to, the time-limit of one year would only be observed in most cases in the breach. We therefore overrule the said decision. We are constrained to observe that Fiza Developers (supra) was a step in the right direction as its ultimate ratio is that issues need not be struck at the stage of hearing a Section 34 application, which is a summary procedure. However, this judgment must now be read in the light of the amendment made in Sections 34(5) and 34(6). So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties. We, therefore, set aside the judgment of the Delhi High Court and reinstate that of the learned Additional District Judge dated 22.09.2016. The appeal is accordingly allowed with no order as to costs."

37. In the case of **Canara Nidhi Limited Vs. M. Shashikala and Others (2019) 9 SCC 462**, the Apex Court set aside the order of the High Court whereby the High Court has permitted the applicant under Section 34 of the Act, 1996 to adduce additional evidence in the absence of any grounds made out by the applicant as to the necessity of adducing the evidence. The Apex Court considered the scope of Section 34 of the Act, 1996 and also the object of providing one year time under

sub-Sections 5 and 6 of Section 34 of the Act, 1996 for disposal of the application under Section 34 of the Act, 1996.

38. A conspectus view of the reasons elaborated by the Apex Court in the light of the scheme of the Act, 1996 in all the aforesaid judgments narrates that the scope of objection against the award under Section 34 of the Act, 1996 is limited to the grounds mentioned in Section 34(2)(a) & (b) of the Act, 1996, which has been specified only with a purpose to restrict the interference of court in the award and expeditious culmination of arbitration proceedings. Therefore, to permit the framing of issues or permit to lead oral evidence as provided under Section 34 of the Act, 1996 would completely negate the object underlying the Act, 1996. The Apex Court also emphasised that the legislative intent underlying the Act, 1996 is to minimize the supervisory role of the court in the arbitration process and leave all contentious issues to be urged and reiterated before the arbitral tribunal itself. However, to subserve the interest of justice, the court has held that in exceptional circumstances, the parties in proceeding under Section 34 of the Act, 1996 may adduce additional evidence only to establish the grounds mentioned in Section 34(2)(a)(b) of the Act, 1996 for setting-aside the arbitral award.

39. Learned counsel for the petitioners has laid much emphasis upon the words 'furnishes proof' in Section 34(2)(a) as it existed before amendment in Section 34(2)(a) by Act No.33 of 2019 to contend that the petitioners can furnish proof before the court in proceeding under Section 34 of the Act, 1996, and once the petitioners have made out a case for accepting the documents as additional

evidence, the court should permit the petitioners to adduce additional evidence on record. This Court does not find merit in the said submission of the learned counsel for the petitioners for the reason that under Section 34 of the Act, 1996, the Court may set aside the arbitral award on the existence of grounds contemplated under Section 34(2)(a)(i) to (v) or Section 34(2)(b) of the Act, 1996, therefore, the word 'furnishes proof' used in Section 34(2)(a)(i) to (v) has to be interpreted in the context of Section 34(2)(a) of the Act, 1996 to achieve the object with which the word 'furnishes proof' has been used in Section 34(2)(a) of the Act, 1996.

40. The Apex Court in the cases, referred above, has held that the parties may be allowed to adduce additional evidence in exceptional circumstances where documents which parties want to bring on record were not available on record before the Arbitral Tribunal to demonstrate that the grounds enumerated in Section 34(2)(a)(i) to (v) are present calling for interference with the arbitral award to subserve the interest of justice. In the opinion of the Court, the word 'furnishes proof' has been used to permit a party to adduce additional evidence to demonstrate the existence of any of the grounds contemplated under Section 34(2)(a)(i) to (v) is present which warrants setting aside the award under Section 34 of the Act, 1996 and not beyond it. Thus, the only inevitable conclusion which can be reached is that the parties can bring on record or adduce only that additional evidence which is germane to establish the grounds available for setting aside the award under Section 34(2)(a)(i) to (v). Thus, a party cannot be allowed to lead at the stage of the application under Section 34 of the Act, 1996 additional evidence as it

would defeat the object of the Act, 1996 that there should be minimum judicial interference by the Court in the arbitral award and there should be prompt disposal of the case.

41. The Act, 1956 has adopted the procedure contemplated under the Act, 1996 by Section 3(G)(6) of the Act, 1956 by substituting 3G and 3-I of the Act, 1956 by Act 16 of 1997. To achieve the object of the Act, 1996 adopted by 1956 Act, the Act, 1956, the competent authority is vested with certain powers of the Civil Court enumerated from sub-clause (a) to (e) of Section 3-I, which also includes bestowing the power upon the competent authority to require or summon the discovery and production of any document. So, the parties have the opportunity before the Arbitral Tribunal to request the Arbitrator under Section 3-I of the Act, 1956 to summon or direct for production of any document necessary and germane to the issues involved in the proceedings for correct and proper adjudication of the dispute in the interest of justice.

42. Now coming to the judgement of Apex Court in the case of *M/s Alpine Housing Development (supra)* relied upon by the learned counsel for the petitioners, this Court is of the view that the said judgement is of no help to the petitioners since the said case is distinguishable from the facts of the present case which is evident from paragraph 21 of the judgement, wherein the Apex Court has stated the question posed before it for consideration was whether the applicant can be permitted to adduce evidence to support the grounds relating to public policy in an application filed under Section 34 of the Act, 1996?

43. To answer the said question, the Apex Court held that so far as the arbitral proceedings concluded before amendment in Section 34(2)(a) by Act no.33 of 2019 shall be dealt with by unamended act and the Apex Court found that as the case of the appellant falls in the exceptional case, therefore, it is necessary to grant opportunity to the appellant to produce additional evidence. Consequently, it allowed the application of the appellant. Paragraphs 24 and 25 of the said judgement are reproduced herein below:-

“24. The ratio of the aforesaid three decisions on the scope and ambit of section 34(2)(a) pre-amendment would be that applications under sections 34 of the Act are summary proceedings; an award can be set aside only on the grounds set out in section 34(2)(a) and section 34(2) (b); speedy resolution of the arbitral disputes has been the reason for enactment of 1996 Act and continues to be a reason for adding amendments to the said Act to strengthen the aforesaid object; therefore in the proceedings under section 34 of the Arbitration Act, the issues are not required to be framed, otherwise if the issues are to be framed and oral evidence is taken in a summary proceedings, the said object will be defeated; an application for setting aside the arbitral award will not ordinarily require anything beyond the record that was before the arbitrator; however, if there are matters not containing such records and the relevant determination to the issues arising under section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both the parties’ the cross-examination of the persons swearing in to the affidavits should not be allowed unless absolutely necessary as the truth will emerge on the reading of the affidavits filed by both the parties. Therefore, in an

exceptional case being made out and if it is brought to the court on the matters not containing the record of the arbitrator that certain things are relevant to the determination of the issues arising under section 34(2)(a), then the party who has assailed the award on the grounds set out in section 34(2)(a) can be permitted to file affidavit in the form of evidence. However, the same shall be allowed unless absolutely necessary.

25. Now so far as the submission on behalf of the appellant that the requirement of “furnishing proof” as per pre-amendment of section 34(2) (a) of the Arbitration Act shall not be applicable to the application for setting aside the award on the grounds set out in section 34(2)(b) and the submission that in the execution proceedings the subsequent development of refusing to grant permission for amalgamation of the plots can be considered and it will be open for the applicants to point out in the execution proceedings that the award is not capable of being executed is concerned, at the outset, it is required to be noted that even for establishing that the arbitral award is in conflict with Public Policy of India, in a given case, the evidence may have to be led and by leading evidence, the person who is challenging the award on that ground can establish and prove that the arbitral award is in conflict with Public Policy of India and/or the subject matter of dispute is not capable of settlement by arbitration under the law for the time being in force. However, at the same time, from the record before the arbitrator, if the same can be established and proved that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the Public Policy of India, in that case, the person may not be

permitted to file the affidavit by way of evidence/additional evidence."

44. Now in the instant case, a glance at the application 58Ga reveals that the application is vague and does not disclose the object and purpose for which the petitioners want to summon the documents referred to in application 58Ga. The said application lacks pleading as to whether these documents are needed to furnish proof to establish the grounds enumerated in Section 34(2)(a)(i) to (v). The documents which are sought to be summoned through application 58Ga, extracted above, reflect that they are not germane to the controversy in dispute nor are relevant to establish the existence of grounds contemplated under Section 34(2)(a)(i) to (v) for setting aside the award.

45. It is pertinent to note that the proceedings under Section 34 of the Act, 1996 are summary in nature and not like a regular civil suit. The court under Section 34 is empowered to set aside an award only on the existence of any of the grounds mentioned in Section 34(2)(a)(i) to (v) and Section 34(2)(b) of the Act, 1996 and not otherwise.

46. The word 'furnishes proof' is incorporated in Section 34(2)(a) to produce in exceptional cases only those documents which could prove the existence of grounds enumerated under Section 34(2)(a)(i) to (v). In the case in hand, application 58Ga lacks the necessary pleading that the documents required to be summoned through the said application are for the purpose of establishing or proving that the grounds enumerated in Section 34(2)(a)(i) to (v) are present warranting interference by the Court with the arbitral award.

47. The subordinate court in rejecting the said application has also recorded a finding that the arbitration proceeding commenced in the year 2011 and petitioners sat quiet for about 12 years in filing the said application without disclosing any reason for not filing the said application before the Arbitral Tribunal. In such view of the fact, this Court does not find any illegality in the order passed by the subordinate court in rejecting the application 58Ga.

48. Now coming to the order of the subordinate court in rejecting the application 63Ka, the subordinate court has held that the said application under Section 23(3) is not maintainable before the court in proceedings under Section 34 of the Act, 1996 inasmuch as it is the Arbitrator who is empowered under Section 23(3) of the Act, 1996 to amend or supplement the claim or defence during the arbitral proceedings.

49. In the instant case, the petitioners by means of amendment want to incorporate those grounds in the application under Section 34 which they had not pleaded in reference application under Section 3(G) before the Arbitrator. The petitioners want to incorporate the grounds for enhancement of compensation as is evident from the amendment sought by the petitioners, extracted above, which was not their case in reference application which is evident from the reference application extracted above.

50. Since the reference was made by the petitioners mainly on the ground that acquired land had the potential of commercial land, and therefore, considering this fact, the Tribunal should have awarded the compensation at the rate of Rs.12,000/- per square meter, this Court

finds that subordinate court has rightly held that it has no power under Section 34 of the Act, 1996 to allow amendment to bring out new facts which were not pleaded before the Tribunal, and it is only Arbitrator who is empowered under Section 23(3) to permit the amendment or supplement the claim or defence before it, and no such power is vested with the subordinate court dealing with the proceeding under Section 34 of the Act, 1996. Hence, this Court is of the view that the subordinate court has not committed any illegality in rejecting the application 63Ka.

51. Thus, for the reasons given above, the present petition lacks merit and is hereby *dismissed* with no order as to costs.

(2023) 11 ILRA 250

**ORIGINAL JURISDICTION
CIVIL SIDE**

**DATED: LUCKNOW 01.11.2023
BEFORE**

THE HON'BLE RAJNISH KUMAR, J.

Matters Under Article 227 No. 21911 of 2020

Km. Soni	...Petitioner
Versus	
Spl. Judge P.C. Act Ist/Addl. District Judge Lucknow & Ors.	...Respondents

Counsel for the Petitioner:

Arvind Kumar Jauhari, Amitabh Misra

Counsel for the Respondents:

Mohammad Subhan, Mohd. Wajid Irfan

Order 26-Rule 10-Commission for scientific investigation –Application allowed-once the commission was issued for scientific investigation-it was open to the petitioner to file objection and even get summoned the Commissioner for cross examination-but the petitioner failed to do so-no occasion to file the second application for rebuttal or to disprove

the report--procedure under Rule 10 of the Order 26 is to be followed as per sub-rule (2) of Rule 10A-Rule 10(1) provides that after such local inspection -and after reducing in writing the evidence taken by him- shall return such evidence with his report in writing to the Court - any of the parties to the suit may examine the Commissioner personally in open Court-application filed is rightly rejected .

Petition dismissed. (E-9)

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

1. Heard Sri Arvind Kumar Jauhari learned counsel for the petitioner and Sri Mohd Wajid Irfan learned counsel for the respondent nos.3 and 4. None appears on behalf of the respondent nos.5 and 6 despite sufficient service. The respondent nos.1 and 2 are the court concerned.

2. Learned counsel for the petitioner submits that the application filed by the petitioner under Order 26 Rule 10A C.P.C, for commission for scientific investigation has wrongly and illegally been dismissed as not maintainable, whereas the petitioner who is plaintiff in the suit has a right to file an application. The revision filed by the petitioner has also been dismissed without considering the grounds raised by the petitioner. Therefore, the petitioner is constrained to approach this Court and the impugned orders are liable to be set aside.

3. Learned counsel for the respondent nos.3 and 4 submits that the application moved for scientific investigation i.e.C-37 was allowed with the consent of the petitioner, on which the report has also been submitted by the Commissioner, and no objection to the same has been filed and after one year, another application was filed only to delay the proceedings of the regular suit filed in the year 2009. The application

filed by the petitioner has rightly been dismissed by the trial court filed in Regular Suit no.307 of 2009. The revision has also been dismissed after considering the grounds raised by the petitioner by a reasoned and speaking order. There is no illegality or infirmity in the impugned orders. The petition is liable to be dismissed.

4. Having considered the submissions of learned counsel for the parties, I have perused the records.

5. The suit for declaration and cancellation of sale deed dated 04.05.2006 and permanent injunction has been filed by the petitioner in the year 2009. The validity of the Will dated 03.01.2004 has been questioned by the defendant nos.1 and 2 in the suit i.e. the respondent nos.3 and 4 in this petition. An application for commission for scientific investigation, C-37 was moved by the respondent nos.3 and 4, which was allowed with the consent of the parties. In pursuance thereof, a report was submitted by the Commissioner which is Paper no.A-49. In the said report, the difference in the signatures of Ashok Kumar has been found. The petitioner has not filed any objection against the said report. He moved a separate application for rebuttal, which has been dismissed by means of the order dated 18.03.2016 recording a finding that the application has been moved only to delay the proceedings of the case and if the petitioner was aggrieved with the report of the scientific investigation i.e. paper no.A-49, he could have filed objection to the same or revision against the same and dismissed the application. Therefore, the contention of the learned counsel for the petitioner that the application has been dismissed as not maintainable is misconceived and not

tenable and is liable to be repelled only and accordingly repelled. This Court also does not find any illegality or error in the findings recorded by the trial court.

6. The revisional court also, after considering the grounds raised by the petitioner and affording opportunity of hearing to the parties, and considering the material on record by means of the reasoned and speaking order, dismissed the revision vide order dated 07.03.2020 passed in civil revision no.128 of 2016. The relevant findings recorded by the revisional court is extracted here-in-below:-

"10. मैने विद्वान अवर न्यायालय द्वारा पारित आलोच्य आदेश का परिशीलन किया। आलोच्य आदेश के परिशीलन एवं विश्लेषण से यह तथ्य स्पष्ट हो रहा है कि विद्वान न्यायालय / अपर सिविल जज (सी०डी०) कक्ष सं०-20, लखनऊ द्वारा पुनरीक्षणकर्ता - वादिनी की ओर से प्रस्तुत प्रार्थना पत्र सी - 51 अर्न्तगत आदेश 26 नियम 10 ए सि०प्र०सं० पर बिल्कुल सही प्रकार से निष्कर्ष निकाला है कि प्रार्थना पत्र सी -37 पर पारित आदेश के अनुक्रम में विधि विज्ञान प्रयोगशाला, महानगर, लखनऊ से मृतक अशोक कुमार के हस्ताक्षरों का वैज्ञानिक अन्वेषण पत्रावली पर कागज संख्या ए -49 प्रेषित की गयी परन्तु उक्त आख्या से यदि पुनरीक्षणकर्ता वादिनी व्यथित थी तो उसको उसके विरुद्ध अपनी आपत्ति विचारण न्यायालय के समक्ष अथवा पुनरीक्षण न्यायालय में पुनरीक्षण प्रस्तुत करना चाहिए था किन्तु उसकी ओर से ऐसा नहीं किया गया और मात्र मूल बाद जोकि वर्ष 2009 लम्बित चल रहा है, को विलम्बित करने के आशय से सी-51 प्रार्थना पत्र अर्न्तगत आदेश 26 नियम 10 ए सि०प्र०सं० प्रस्तुत किया गया प्रतीत हो रहा है और उनके द्वारा इस प्रार्थना पत्र के निस्तारण में अपने न्यायिक विवेक का प्रयोग करते हुए विधि सम्मत एवं न्यायोचित आदेश पारित किया गया है जिसमें इस पुनरीक्षण के माध्यम से पुनरीक्षणकर्ता -वादिनी कोई ऐसा तथ्य उजागर नहीं कर सकी जिसके आधार पर आलोच्य आदेश में किसी प्रकार का हस्तक्षेप किया जा सके। जब एक बार प्रस्तुत मामले में वैज्ञानिक आख्या प्राप्त की जा चुकी है तो पुनः वैज्ञानिक आख्या आहूत किए जाने से मामले के विधि सम्मत ढंग से न्याय-निर्णय करने में न्यायालय को असुविधा एवं कठिनाई उत्पन्न होने की संभावना से इंकार नहीं किया जा सकता है। विद्वान अवर न्यायालय / अपर सिविल जज (सी.डि.)

कक्ष सं०-20, लखनऊ द्वारा जो सी-51 प्रार्थना पत्र अस्वीकार किया गया है, उसमें कोई त्रुटि एवं तात्त्विक अनियमितता परिलक्षित नहीं हो रही हैं।

11. उपर्युक्त वर्णित आलोच्य आदेश के परिशीलन एवं उपरोक्त विवेचना के आधारे पर मेरा यह मत है कि विद्वान अवर न्यायालय द्वारा पारित आलोच्य आदेश पत्रावली पर उपलब्ध तथ्यों के अनुकूल है और आलोच्य आदेश पारित करने में विद्वान अवर न्यायालय / द्वारा कोई त्रुटि एवं अनियमितता कारित नहीं की गयी है। आलोच्य आदेश में इस पुनरीक्षण न्यायालय द्वारा हस्तक्षेप किया जाना विधिक रूप से अपेक्षित नहीं है और यह सिविल पुनरीक्षण बलहीन होने के कारण निरस्त होने योग्य है।"

7. The Commission for scientific investigation can be issued under Rule 10A(1) Order 26 C.P.C. Rule 10A(2) provides that provisions of Rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9. Rule 10A is extracted hereinbelow:-

"10A. Commission for scientific investigation.?(1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.

(2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9."

8. Rule 10 of Order 26 CPC provides the procedure for

Commissioner, which is extracted hereinbelow:-

"10. Procedure of Commissioner.?(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit. Commissioner may be examined in person.?(The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."

9. In view of the above, the application for commission for scientific investigation can be moved under Rule 10A(1) of Order 26 and if it is allowed, the procedure as provided under Rule 10 of the Order 26 is to be followed as per sub-rule (2) of Rule 10A. Rule 10(1) provides that after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court which shall form part of the record and as per Rule 10(2), the Court or with the permission of the Court, any of the parties to the suit may

examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made investigation. Sub Section (3) of Rule 10 provides that where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as such may as it shall thinks fit. Thus, once the commission was issued for scientific investigation on the report of the respondent nos.3 and 4 and the report was submitted, it was open to the petitioner to file objection and even get summoned the Commissioner for cross examination but the petitioner failed to do so. Once, the scientific investigation has already been done, there was no occasion to file the second application for rebuttal or to disprove the report.

10. In view of the above, this Court is of the view that the application filed by the petitioner has rightly been rejected in accordance with law by the order dated 18.03.2016 passed in Regular Suit no.307 of 2009 and the revision filed by the petitioner has been dismissed by means of the order dated 07.03.2020 by passing a reasoned and speaking order on the basis of record. There is no illegality or error in the impugned orders which may call for any interference by this Court. The petition is misconceived and lacks merit.

11. It is, accordingly, **dismissed**. No order as to costs.

(2023) 11 ILRA 253
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2023
BEFORE
THE HON'BLE MRS. MANJU RANI
CHAUHAN, J.

Writ C No. 11528 of 2023

Lakkhi Sonkar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Rajesh Kumar Singh, Sri Hari Shanker

Counsel for the Respondents:

C.S.C., Sri Dinesh Kumar Singh, Sri Pradeep Singh

Civil Law - National Food Security Act, 2013 – Sections 3, 8, 15 & 16 – Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 – Clauses 8, 13 – Essential Commodities Act, 1955 – Section 3 – Writ Jurisdiction – Article 226 – Locus Standi – Person Aggrieved – Fair Price Shop License – Cancellation and Restoration

The petitioner, Lakkhi Sonkar, challenged the order dated 14.03.2023 passed by the Additional Commissioner, Vindhyachal Division, Mirzapur, allowing the appeal of respondent no. 6, Sohrab, and restoring his fair price shop license, which was cancelled on 05.06.2020 for irregularities in foodgrain distribution and surplus stock found during an inspection on 06.05.2020. The petitioner, husband of a ration card holder, Geeta, was a complainant in the proceedings leading to the license cancellation. He argued that he was an aggrieved person under the National Food Security Act, 2013, and the restoration of the license violated his rights, relying on Jasbhai Motibhai Desai Vs Roshan Kumar. The respondents contended that the petitioner, as a complainant, lacked locus standi to challenge the appellate order, as he was not an aggrieved person under the National Food Security Act, 2013, U.P. Food Security Rules, 2015, or the U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016, which limit card holders' rights to receiving foodgrains or food security allowance. Held: (1) The writ petition was dismissed as not maintainable. (2) The petitioner, a complainant and not a ration card holder, did not qualify as a "person aggrieved" under Article 226, as he was not deprived of a legal right or suffered a legal injury, as clarified in Jasbhai Motibhai Desai Vs

Roshan Kumar and Dharam Raj Vs St. of U.P.. (3) Under the National Food Security Act, 2013 (Sections 3, 8, 15, 16), U.P. Food Security Rules, 2015 (Rules 4, 5, 7), and U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 (Clauses 8, 13), a complainant or ration card holder's rights are limited to receiving foodgrains or food security allowance and filing complaints with the District Grievance Redressal Officer, with appeals to the St. Food Commission, but they have no right to challenge the cancellation or restoration of a fair price shop license. (4) The petitioner's role was limited to initiating an inquiry, and he had no legal right to challenge the appellate order restoring respondent no. 6's license, as per Saavan Sri Vs St. of U.P., Naval Kishor Vs St. of U.P., and Shyam Babu Vs St. of U.P.. (5) A "person aggrieved" must demonstrate a direct legal injury, not mere annoyance or disappointment, and the petitioner's grievance was not legally enforceable, as per Ayub Khan Noor Khan Pathan Vs St. of Maharashtra and Ravi Yashwant Bhor Vs District Collector Raigad. (6) The statutory framework provides remedies for card holders through the District Grievance Redressal Officer and St. Food Commission, and the St. or Gaon Sabha may challenge license-related orders, but not a complainant.

Case Law Cited:

1. Jasbhai Motibhai Desai Vs Roshan Kumar, Haji Bashir Ahmad & ors., AIR 1976 SC 578
2. Dharam Raj Vs St. of U.P., 2009 0 Supreme (All) 2594; 2010 AWC 1878
3. Sriram Prasad Vs St. of U.P., 2015 0 Supreme (All) 1660
4. Babban Vs St. of U.P., 2019 0 Supreme (All) 450
5. Saavan Sri Vs St. of U.P. & ors., 2022 (156) RD 465; 2022 (V) ADJ 347
6. Gram Vikas Sewa Samiti Vs St. of U.P. & ors., 2018: AHC: 141574
7. Utkal University Vs Dr. Nursingha Charan Sarangi & ors., AIR 1999 SC 943

8. Ayub Khan Noor Khan Pathan Vs St. of Maharashtra, AIR 2013 SC 58

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. No one has appeared on behalf of the respondent no.5 even in the revised call.

2. Heard Mr. Rajesh Kumar Singh, learned counsel for the petitioner, Mr. Dinesh Kumar Singh, learned counsel for the respondent no.6 and Mr. Vijay Prakash Mishra, learned Standing Counsel for the State-respondents.

3. The petition has been filed with a prayer to quash the impugned order dated 14.03.2023 passed by the respondent no. 2 Additional Commissioner whereby the appeal filed by respondent no. 6 against order cancelling his fair price shop license, has been allowed.

4. Brief facts of the case are that respondent no. 6 namely Sohrab was appointed as Fair Price Shop Agent for the Gram Panchayat Chaurikhas Block, Tehsil & District Bhadohi. On a complaint made on behalf of fair price shop card holders, inspection was carried out on 06.05.2020 wherein surplus stock of 89 bags of wheat, each of 50 kg. and 96 bags of rice, each of 50 kg. was found. Such excess stock of wheat and rice was not in consonance with the stock register. At the time of inspection card holders, namely, Kuraisa wife of Sama, Shayra Bano wife of Jafar, Pratibha Dube wife of Onkarnath, Geeta wife of Lakkhi Sonkar (petitioner in this writ petition), Tara Devi wife of Gopinath, Rabia wife of Sarafat, Shabnam wife of Sageer, Prema Devi wife of Chhotu, Mehnaj son of Javed, Ameena Begum wife of Mateen Hasami, Jahanaara wife of Firoz

and Rehana wife of Alamgeer were present. The aforesaid card holders gave written statements regarding allegations that the respondent no. 6 was giving less foodgrains than the amount for which card holder were entitled.

5. On the basis of aforesaid spot inspection report, the license of fair price shop of respondent no. 6 was suspended by order dated 08.05.2020 and a reply was called from respondent no. 6. Pursuant to suspension order, surplus stock recovered from the shop was taken into custody and was handed over to Fair Price Shop Agent of Gram Panchayat Chak Bhuidhar. By order dated 27.05.2020, the aforesaid recovered surplus food grains was directed to be distributed amongst the card holders of village Chaurikhas.

6. The respondent no. 6, submitted a detailed reply dated 13.05.2020 denying the allegations as made against him in distribution of essential commodities and allegations of surplus stock. He submitted notarial affidavits of 12 card holders who had stated therein that the foodgrains were being distributed in accordance with law. On 05.06.2020, the respondent no. 4, after considering reply of respondent no. 6, terminated the agency of respondent no. 6 and simultaneously cancelled the agreement. While passing the aforesaid order, respondent no. 4 has recorded categorical finding that the affidavits produced by respondent no. 6 are stereo typed and apparently appears to have been prepared by respondent no. 6 himself. The respondent no. 4 has also recorded that the affidavits as produced by respondent no. 6 bearing joint signatures of the card holders as well as respondent no. 6 are under same hand writing.

7. Aggrieved by the order dated 05.06.2020, the respondent no. 6 filed appeal before the Commissioner Vindhyachal Division Mirzapur, which was transferred to the Court of Additional Commissioner, Vindhyachal Division, Mirzapur for disposal. The petitioner being husband of card holder Geeta, filed his vakalatnama dated 03.07.2020 to defend the termination order. The appeal was allowed by order dated 14.03.2023 in favour of respondent no. 6. Hence, the present petition.

8. A preliminary objection has been raised by learned Standing Counsel as well as learned counsel for respondent no. 6 regarding locus/maintainability of the writ petition as petitioner is simply a complainant.

9. Answering the preliminary objection, the counsel for the petitioner submits that the scope and ambit of aggrieved person, particularly in view of peculiar facts and circumstances of the case keeping in mind the benevolent piece of legislation i.e. National Food Security Act, 2013 and Rules 2015 framed there under and Control order dated 10.08.2016 has been elaborated in the judgment of Hon'ble Apex Court in Case of **AIR 1976 SC 578 Jashbhai Motibai Desai Vs. Roshan Kumar, Haji Bashir Ahmad and others.** The counsel for the petitioner submits that the actual aggrieved person has to be distinguished from a stranger. The Hon'ble Apex Court while dealing with the scope of aggrieved person has made criteria to distinguish the actual aggrieved person from stranger. A solid central zone of aggrieved persons and concentric nebulous zone of strangers has been conceived but providing a rider that all persons in this nebulous zone will not be treated as

stranger, some of them have to be treated as aggrieved persons. The criteria of the relevant paragraphs are quoted hereinbelow:-

36. *It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (i) 'person aggrieved'; (ii) 'stranger'; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold.*

37. *The distinction between the first and second categories of applicants, though real, is not always well-demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of 'persons aggrieved'. In the grey outer-circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a*

centrifugal direction. All persons in this outerzone may not be "persons aggrieved."

38. *To distinguish such applicants from 'strangers', among them, some broad tests may be deduced from the conspectus made above. These tests are not absolute and ultimate. Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are: Whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury, in the sense that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person "against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something"? Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on (1) *United States v. Storer Broadcasting Co.* 351 U.S.192. (2) *Kansas City Power & Light Co. v. McKay* 350 U. S.884. 6-390SCr/76 the part of the authority? Is the statute, in the context of which the scope of the words "person aggrieved" is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? or is it a statute dealing with private rights of particular individuals?*

10. An aggrieved person has to be defined, keeping in mind the fact as to

whether the petitioner is a person whose legal right has been infringed and has he suffered a legal wrong or injury, in the sense that his interest, recognised by law has been prejudicially and directly affected by the act or omission of the authority, complained of. It has also to be seen as to whether the petitioner is a person who has suffered a legal grievance, a person "against whom a decision has been pronounced" which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something.

11. On the other hand, the counsel for the respondent no. 6 submits that petitioner is not an aggrieved person rather he is a person annoyed. In support of his contention he is relied upon following judgment which is quoted herein below:-

i. Dharam Raj Vs. State of U.P. 2009 0 Supreme(All) 2594. The relevant portion of the said judgment reads as follows:-

"10. In the circumstances, the petitioner cannot have any grievance in the matter, and he is not an aggrieved person, rather he is a person annoyed.

11. In the case of R.V. London Country Keepers of the Peace of Justice, the Court has held : "A person who cannot succeed in getting a conviction against another may be annoyed by the said findings. He may also feel that what he thought to be a breach of law was wrongly held to be not a breach of law by the Magistrate.

He thus may be said to be a person annoyed but not a person aggrieved, entitle to prefer an appeal against such order."

12. According to our opinion a "person aggrieved", means a person who is

wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal in convenience. "Person aggrieved" means a person who is injured or he is adversely affected in a legal sense.

13. It is settled law that a person who suffers from legal injury only can challenge the act/action/order etc. by filing a writ petition. Writ Petition under Article 226 of the Constitution is maintainable for enforcing a statutory or legal right or when there is a complaint by the petitioner that there is a breach of the statutory duty on the part of the authorities. Therefore, there must be a judicially enforceable right for the enforcement of which the writ jurisdiction can be restored to. The court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfied the Court that he has a legal right to insist on such performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction (Utkal University etc. v. Dr. Nursingha Charan Sarangi and others, and Laxaminarayan R. Bhattad and others v. State of Maharashtra and another).

14. Legal right is an averment of entitlement arising out of law. It is, infact, an advantage or benefit conferred upo a person by a rule of law Shanti Kumar R. Canji v. Home Insurance Co. of New York, and State of Rajasthan v. Union of India and others.

15. In Jasbhai Motibhai Desai v. Roshan Kumar Hazi Bashir Ahmad and others, the Apex Court has held that only a person who is aggrieved by an order, can maintain a writ petition. The expression "aggrieved person" has been explained by the Apex Court observing that such a person must show that he has a more

particular or peculiar interest of his own beyond that of the general public in seeing that the law is properly administered. In the said case, a cinema hall owner had challenged the sanction of setting up of rival cinema hall in the town contending that it would adversely affect monopolistic commercial interest, causing pecuniary harm and loss of business from competition. The Hon'ble Apex Court observed as under:

*"Such harm or loss is not wrongful in the eye of law because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity. Judicially, harm of this description is called *damnum sine injuria*. The term *injuria* being here used in its true sense reason why law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large. In the light of the above discussion, it is demonstratively clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. Infact, the impugned order does not operate as a decision against him, much less does it wrongfully effect his title to something. He has not been subjected to legal wrong. He has suffered no grievance. He has no legal peg for a justiciable claim to hand on. Therefore, he is not a "person aggrieved" to challenge the ground of the no objection certificate."*

ii. Sriram Prasad Vs. State of U.P. 2015 0 Supreme(All) 1660. The relevant portion of the said judgment reads as follows:-

"12. This Court in Ram Baran Versus State of U.P. and others, 2010(2) AWC 1947 (LB), again reiterated the

principle that a complainant would have no locus to maintain the petition against the final order passed by the District Magistrate pursuant to direction in a petition under Article 226 of the Constitution against the Pradhan.

13. In the case of R. v. London Country Keepers of the peace of Justice, (1890) 25 Qbd 357, the Court held:

"A person who cannot succeed in getting a conviction against another may be annoyed by the said findings. He may also feel that what he thought to be a breach of law was wrongly held to be not a breach of law by the Magistrate.

He thus may be said to be a person annoyed but not a person aggrieved, entitle to prefer an appeal against such order."

14. The petitioner complainant shall have an opportunity during the course of regular enquiry to lead oral and documentary evidence if provided under the rules, but would have no locus to assail the final order passed by the authority on the complaint.

15. Having due regard to the facts and circumstances of the case, I am not inclined to interfere. The petition filed at the behest of a complainant being not maintainable is, accordingly, dismissed. "

iii. Babban Vs. State of U.P. 2019 0 Supreme(All) 450. The relevant portion of the said judgment reads as follows:-

"14. The petitioner complainant shall have an opportunity during the course of regular enquiry to lead oral and documentary evidence if provided under the rules, but would have no locus to assail the final order passed by the authority on the complaint".

15. Having due regard to the facts and circumstances of the case, I am

not inclined to interfere. The petition filed at the behest of a complainant being not maintainable is, accordingly, dismissed."

iv. Saavan Sri Vs. State of U.P. and others 2022 (156) RD 465. The relevant portion of the said judgment reads as follows:-

"34. In view of that law laid down by the Supreme Court as applied by the division bench of this Court and a long line of decisions (of learned single-Judge bench), the observations made to the contrary in Akhlaq (supra) and Smt. Muneeta (supra) giving the right of appeal to the complainant is clearly contrary to the binding principle and reasoning on that issue. In the context of disputes involving revocation of suspension of a fair price shop agreement, a 'aggrieved person' or 'person aggrieved' must be a person whose rights have been prejudiced by such order. Clearly, the present petitioner/complainant is not that person.

35. As held in Ashfaq (supra), the beneficiary cannot be a 'person aggrieved'. He only has right to receive essential commodities food grains, fuel, etc. on assured basis. However, he cannot choose his fair price shop agency. The difference between the 'person aggrieved' and a 'person annoyed' was also noted by the division bench of this Court in Dharam Raj (supra). Though, a complainant may qualify as a 'person annoyed', yet, he may never be a 'person aggrieved' (by an order passed in favour of the private respondent). Consequently, the petitioner could neither have filed an appeal and he has no locus to maintain the present petition.

36. What then survives for consideration is - if the Court may offer any consideration in such matters. Here, another learned Single Judge of this Court in Yogendra Singh Vs. State of U.P. & Ors., Misc. Single No. 23298 of 2016, vide order

27.9.2016, allowed such petition. However, it was not by way of right given to the complainant, rather, in that case, interference was made more by way of suo moto exercise of extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, on the intimation received by the petitioner who also happened to be the complainant. Therefore, the ratio in that case only provides for an exception rather than a rule to be applied in such cases.

37. Also, it cannot be overlooked, it stands generally recognized that the State Government and/or the Gaon Sabha are the collective bodies entrusted and interested in the enforcement of the rights of the beneficiaries for whose benefit the fair price shop machinery exists. They may, if not satisfied with the order of the appeal authority, approach this Court, in appropriate case. Leaving that right intact, no interference is warranted at the instance of the present petitioner, in the instant case. The objection being raised as to the procedure adopted may not allow the Court to create a locus with the present petitioner to maintain the present writ petition. It is also not a ground as may commend to the Court to set aside the fair price shop arrangement, for that reason alone. Sufficient punishment appears to have been dealt out to the private respondent by suspension served out. It is expected, the said respondent would conduct his activity in accordance with law or face fresh suspension proceedings, in face of fresh breach."

v. Gram Vikas Sewa Samiti Vs. State of U.P. and others Neutral Citation No.-2018:AHC:141574. The relevant portion of the said judgment reads as follows:-

"19. The scheme of the Act establishes the fact that the rights of the

card holders are primarily to receive the food grains, essential commodities and other benefits under various schemes. This right does not extend to make a preference to receive such food-grains from a particular person nor does it entitle the card holder interfere in the day to day running of the fair price shops.

21. The rights of ration card holders are defined, regulated but also restricted by the National Food Security Act, 2013 and the Rules framed thereunder. The card-holders can also be granted compensation or allowance for denial of the entitlements under the Act. However, card-holders cannot decide the quantum of punishment to be imposed on a defaulting fair price shop dealer, as per the provisions of the Act. This function falls in the jurisdiction of the authorities under the Act, the Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016, and the Government Orders holding the field. The preceding paragraphs catalogue the rights and remedies of eligible persons under the Act. They also detail the jurisdiction and obligation of the authorities under the Act. No further right to the ration card-holders is vested by the legislature. No additional right to the ration card holders can be granted by the courts."

12. Learned Standing Counsel has placed reliance upon the certain provisions of the relevant Act in order to support the contention of respondent no. 6 submitting that the writ petition is not maintainable. He submits that parliament, in order to provide adequate quantity of quality food at affordable prices to people to live a life with dignity and other incidental thereto, enacted the National Food Security Act, 2013. Section 3 of National Food Security Act provides that every person belonging to

priority households identified under sub section (1)10 shall be entitled to receive 5 kg. food grains per person per month from the State Government under the Targeted Public Distribution System. It also provides that the household covered under Antyodaya Anya Yojana shall be entitled to 35 kg. of food grains per household per month at prices specified in Schedule 1 subject to scheme specified by Central Government for State. Thus, from the language of the Section 3 of the National Food Security Act, it can be interpreted that the ration card holder are entitled to receive food grains as per their right under the scheme. Section 8 of the National Food Security Act provides that in case of non supply of the entitled quantities of food grains or meals to the entitled person under Chapter II, such person shall be entitled to receive such food security allowance from the concerned State Government to be paid to each person within such time and manner as may be prescribed by the Central Government. Chapter VII of the National Food Security Act, 2013 provides mechanism for ration card holder in case fair price shop owner does not distribute the essential commodities. Section 15 of the aforesaid act speaks that every State Government shall appoint or designate, for each district, an officer to be the District Grievance Redressal Officer for expeditious and effective redressal of grievances of the aggrieved person in the matter relating to the distribution of the entitled food grains or meals under Chapter II and to enforce the entitlement under this act. Sub Section (5) of Section 15 provides that officer shall hear complaints regarding the non distribution of the entitled food grains or meals and matter relating thereto and take necessary actions for redressal. Sub Section (6) provides that any complainant or the officer or authority

against whom any order has been passed by officer referred to in sub section (1), who is not satisfied with redressal of grievance may file an appeal against such order before the State Commission. The State Food Commission has been defined under section 16 of the National Food Security Act, 2013. The State Government has already stated that in case of failure of distributing essential commodity to ration card holder, the State Government shall pay food security allowance to the ration card holder as has been provided under section 8 of the said Act.

13. The Uttar Pradesh Food Security Rules, 2015 have been framed by Uttar Pradesh Government in exercise of power under section 40 of the National Food Security Act, 2013. The rule 4 of U.P. Food Security Rules, 2015 provides that State Government may appoint an Additional District Magistrate who is not engaged in the supply or distribution of food grains under the act as the District Grievance Redressal Officer. Rule 5 provides the procedure for disposal of complaint by the Additional District Magistrate and also power to direct the payment of food security allowance within such period not exceeding 30 days. Rule 7 provides that any person aggrieved with any order passed by District Grievance Redressal Officer may prefer an appeal before the commission within 30 days from the receipt of such order. "Commission" has been defined under Rule 2 (c) wherein it has been defined that State Food Commission constituted for State of Uttar Pradesh under sub rule (1) of Rule 3.

14. The right of card holders has been defined under the National Food Security Act, 2013 and procedure for complaint regarding irregularity and illegality of the

distribution of the food grains has been provided under the National Food Security Act of U.P. Food Security Rules, 2015.

15. Keeping in mind the aforesaid provisions, the learned Standing Counsel submits that petitioner being husband of the card holder has right to move complaint to the Additional District Magistrate under the Act and Rules framed therein. The petitioner has not moved any complaint to ADM regarding irregularity and illegality in distribution of food grains regarding his legal right to get the food grains or food security allowance.

16. The license of the Fair Price Shop is issued u/s 3 of the Essential Commodities Act 1955, and Fair Price Shop owner acts as an agent of the Government to run a Fair Price Shop. The Uttar Pradesh Government in exercise of power u/s 3 of the Essential Commodities Act promulgated Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) order 2016. In clause 8 of Control order 2016, the procedure for disbursement of the foodgrains to the ration card holder has been provided. Sub-clause 7 of the clause 8 order 2016, speaks that competent authority shall take prompt action in respect of violation of any condition of license including any irregularity committed by the fair price shop owner, which may include suspension or cancellation of the fair price shop owner's license. The right of appeal and the person who is entitled to file the appeal has been provided in Clause 13 of order 2016. Learned Standing Counsel further submits that it is clearly provided that against the order of suspension, cancellation or restoration of the fair price shop license, the ration card holder or any other person does not have any right to file the appeal.

Thus such person does not come under the definition of the aggrieved persons. Placing reliance upon the judgment passed by this Hon'ble Court in Case of **Saavan Sri Vs. State of U.P. 2022(V)ADJ 347**, learned Standing Counsel submits that the complainant has no right to file the appeal against revocation of suspension or denying the cancellation of Fair Price Shop license. The right of appeal has been given with respect to orders of denial or renewal of agreement to a fair price shop owner or an order of suspension or an order of cancellation of agreement of Fair price Shop. No other order or further orders has been made appealable. Thus an order of revocation of suspension of Fair Price Shop agreement is not appealable under Clause 13(3) of the Control Order 2016.

17. From reading of provisions of National Food Security Act, 2013 Rules 2015 and order 2016, it is clear that the complainant or ration card holder has not been given right to get the license of fair price shop cancelled. The procedure of the cancellation of the license of the Fair Price Shop has been provided in Control Order 2016 and complainant has only right to set the law into motion for enquiry regarding irregularity and illegality in distribution of the essential commodities. To emphasize, the learned Standing Counsel submits that ration card holder has right to make a complaint to Additional District Magistrate/District Redressal Officer for getting the food grains and food allowance in case non distribution of food grains from the fair price shop.

18. Placing reliance upon the judgment of this Hon'ble Court in case of **Dharam Raj Vs. State of U.P. 2010 AWC 1878** learned Standing Counsel submits that the complainant is not a person

aggrieved and he has no right to file writ petition, as the complainant or ration card holder does not come within the definition of aggrieved person for requesting of cancellation of the license of fair price shop.

19. Learned Standing Counsel, addressing on the issue of maintainability of the writ petition submits that a person can file writ petition, under article 226 of Constitution of India for enforcement of any of the rights conferred by part III or any other purpose, only, if the legal rights of a person is violated. Therefore, the existence of the legal right is the condition precedent to invoke the writ jurisdiction. Placing reliance upon **Utkal University Vs. Dr. Nur Singha Charan Sarangi AIR 1999 Supreme Court 943**, he submits that the legal and statutory right of the petitioner is to get only the food grains and for that purpose, a procedure has been provided in National Food Security Act and Rules framed therein. No legal right has been provided under any law to the petitioner to get the fair price shop license cancelled. It is totally the decision of State Authorities to cancel the license of fair price shop of the person who has violated the conditions of the allotment order as he acts as an agent of the government while having a license of the fair price shop. Thus the writ petition is not maintainable for the relief as prayed by the petitioner.

20. He further submits that the petitioner does not come under the definition of aggrieved person as a person who claims to be an "aggrieved person" has to first satisfy the Court that he has a legal right to insist on such performance. The legal right means entitlement arising out of legal rules. It may be defined as an advantage or a benefit conferred upon a

person by the rule of law. In case of **Ayub Khan Noor Khan Pathan Vs. State of Maharashtra AIR 2013 SC 58**, it is held that the expression “person aggrieved” does not include a person who suffers psychological or imaginary injury. The meaning of the expression “person aggrieved” will have to be ascertained with reference to the purpose and provision of the statute.

21. In case of **Naval Kishor Vs. State of U.P. 2017 (121)** it has been held that the complainant has not been denied of or deprived of any legal rights, as the order of revocation of cancellation of fair price shop license does not affect the complainant in any manner. The complainant has only right to be examined in the inquiry not to be a party in the matter.

22. The expression “person aggrieved” has been considered in the judgment of **Ravi Yashwant Bhor Vs. District Collector Raigad 2012(4) SC 407** in which it has been held that the complainant has to establish that he has been deprived of or denied of legal right and he has sustained injury to any legally protected interest. A fanciful or a sentimental grievance may not be sufficient to confer locus standi.

23. In another Division Bench judgment of **Ameen Khan Vs. State of U.P. 2008(2) AWC 2002** it has been held that the complainant only could, at the most, be examined as a witness in the enquiry but could not be permitted to become party in the matter as he does not have any locus or legal right. In recent judgment of **Shyam Babu Vs. State of U.P. 2022(6) ALJ 231** it has been held that in case any person prefers a writ petition, he has to establish that he has been

deprived of or denied of legal right and he has sustained injury to any legally protected interest only then writ petition can be entertained as maintainable.

24. To sum up, learned Standing Counsel submits that in view of law laid down in different cases as detailed above, the complainant does not come under the definition of “person aggrieved” in the context of provision of the Essential Commodities Act and Control order 2016 promulgated by the Uttar Pradesh Government. In the proceeding of the cancellation of fair price shop license, petitioner as husband of the ration card holder can only make a complaint, on which enquiry can be instituted and in the inquiry proceeding he has right to get examined. Once the Competent Authority has concluded the enquiry and passed the order, complainant has no right to challenge the order of Competent Authority and if the order has been passed by Competent Authority the fair price shop owner may file an appeal wherein the complainant is not a necessary party as he is not aggrieved person. The complainant or the ration card holder has only right to get food grains and food allowance under the National Food Security Act, 2013 and Uttar Pradesh State Food Security Rules 2015.

25. Considering the definition of aggrieved person in the aforesaid Act and Rule, the rights of aggrieved person is only to get the foodgrains or food allowance as per procedure provided under relevant Act and Rules and in case statutory right of the petitioner is infringed, proper remedy has been provided under the Act and Rules as has already been discussed in the preceding paragraphs. Thus the aforesaid writ petition is not maintainable and the relief as prayed cannot be granted to the petitioner.

26. Thus, the present petition is liable **dismissed** as not maintainable.

27. Heard learned counsel for the parties and perused the record.

28. Admittedly, the petitioner is a complainant (not even a card-holder) in the present case, who has assailed the order dated 14.03.2023 passed by respondent no. 2 Additional Commissioner whereby the appeal filed by respondent no. 6 against cancellation of his fair price shop license has been allowed. Thus, restoring the fair price shop license of respondent no. 6 considering catena of decisions as placed by counsel for the parties, the complainant would not be an aggrieved person.

29. The meaning of the expression “person aggrieved” will have to be ascertained with reference to the purpose and the provisions of the statute. One of the meanings is that person will be held to be aggrieved by a decision if that decision is materially adverse to him. The restricted meaning of the expression requires denial or deprivation of legal rights. A more legal approach is required in the background of statutes which do not deal with the property rights but deal with professional misconduct and morality.

30. Broadly, speaking a party or a person is aggrieved by a decision when, it only operates directly and injuriously upon his personal, pecuniary and proprietary rights.

31. The expression “person aggrieved” means a person who has suffered a legal grievance i.e a person against whom a decision has been pronounced which has lawfully deprived him of something or

wrongfully refused him something. The petitioner is not an aggrieved person by merely filing a complaint. The order of revocation of cancellation of fair price shop license does not affect him in any manner.

32. In the present case, it is evident that the petitioner is a complainant in a complaint against respondent no. 6, on which action has been taken against respondent no. 6. The respondent no. 6 being aggrieved by the aforesaid action on the complaint made by the petitioner has proceeded to challenge the same by means of filing an appeal which has been allowed restoring the fair price shop license to him. In these circumstances, the petitioner complainant cannot have any grievance in the matter as he is not an aggrieved person rather he is a “person annoyed”.

33. This Court is of the opinion that a “person aggrieved”, means a person who is wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. “Person aggrieved” means a person who is injured or he is adversely affected in a legal sense. It is settled law that a person who suffers from legal injury only can challenge the act/action/order by filing a writ petition. Writ Petition under Article 226 of the Constitution is maintainable for enforcing a statutory or legal right or when there is a complaint by the petitioner that there is a breach of the statutory duty on the part of the authorities.

34. Legal right is an averment of entitlement arising out of law, it is, in fact,

an advantage, or a benefit conferred upon a person by the rule of law.

35. The arguments as placed by learned Standing Counsel detailing the provisions of Essential Commodities Act 1955 and National Food Security Act, 2013 as well as U.P. Food Security Rules, 2015, it is clear that person annoyed like the complainant as well as card holders have all the remedies to move before the competent authority for redressal of their grievance regarding complaint as made by him as well as grievance of ration card holder who are entitled for the essential commodities and in case of failure of distribution of such essential commodities to ration card holder, he is also entitled for the security allowance as has been provided under the relevant act includes. In view of provisions of the relevant Act, includes the petitioner complainant is provided opportunity during course of regular enquiry to lead oral and documentary evidence if provided under the rules, but would not have no locus to assail the orders passed by authority considering his complaint.

36. Having due regards to the fact and circumstances of the case, the relevant provisions of the Acts and Rules as placed by learned Standing Counsel and catena of decisions, I am not inclined to interfere. The petition filed at the behest of complainant being not maintainable is, accordingly, **dismissed**.

(2023) 11 ILRA 265

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 19.10.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ C No. 24615 of 2023

**Committee of Management of
Chandrawati Shikshan Sanstahan & Ors.**

...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Sri Satyendra Prakash Srivastava, Sri
Gajendra Pratap (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Gautam Baghel, Sri Om Prakash
Singh

Civil Law - Societies Registration Act, 1860 - Sections 4-B & 25(2) - Constitution of India, 1950 - Article 226 -

Writ Jurisdiction - Assistant Registrar's Powers -
Validity of Membership - Fraud and Forgery -
Committee of Management - Election Disputes

The petitioners, Committee of Management of Chandrawati Shikshan Sansthan and others, challenged the order dated 17.06.2023 passed by the Assistant Registrar, Firms, Societies and Chits, Azamgarh, declaring the Committee of Management as "defunct/barred by time" w.e.f. 19.09.2022 and issuing a tentative list of General Body members for elections under Section 25(2) of the Societies Registration Act, 1860, alleging it was without jurisdiction and violated natural justice. The society, registered in 2002, enrolled eight life members in 2020, including petitioners nos. 2 to 8 and respondent no. 4, after an advertisement. Casual vacancies in 2021 were filled by electing respondent no. 4 as President and petitioner no. 2 as Manager, and a new election was held in 2022. Respondent no. 3 (Deputy Manager) and respondent no. 4 set up rival election claims, but respondent no. 4 later withdrew her claim. The Assistant Registrar found the petitioners' claim of membership enrolment fraudulent, based on forged documents and signatures, and issued a final electoral list on 14.09.2023, which was not challenged. The petitioners argued that the Assistant Registrar lacked jurisdiction under Section 4-B to determine membership validity and that the order was arbitrary, while respondents contended that the Assistant Registrar's findings of fraud were valid under Section 4-B. Held: (1) The writ petition was dismissed. (2) The Assistant Registrar had jurisdiction under Section 4-B to examine the correctness of the General Body membership list based on the register of members, minutes book, cash book, receipt book, and bank

passbook, and correctly found the petitioners' enrolment of eight members in 2020 to be fraudulent due to forged signatures and thumb impressions of deceased office bearers. (3) The petitioners' failure to challenge the final order dated 14.09.2023, which finalized the electoral college, rendered the challenge to the tentative order dated 17.06.2023 unsustainable, as the latter merged into the former. (4) Fraud vitiates all judicial and quasi-judicial acts, as per S.P. Chengalvaraya Naidu Vs Jagannath and Ram Preeti Yadav Vs U.P. Board, and the Assistant Registrar's findings of forgery, including fabricated minutes and a bank account opened in 2022 to backdate membership fees, justified declaring the Committee defunct and ordering fresh elections. (5) The petitioners' reliance on Lachi Ram Yadav Vs Asstt. Registrar and other cases was misplaced, as those dealt with election disputes under Section 25(1), not membership validity under Section 4-B. (6) No violation of natural justice occurred, as petitioner no. 2 was given an opportunity to submit objections, and the Assistant Registrar's findings were based on documentary evidence. (7) The court declined to interfere under Article 226, as the Assistant Registrar's decision was neither arbitrary nor beyond jurisdiction.

Case Law Cited:

1. Lachi Ram Yadav & ors. Vs Asstt. Registrar Firms, Chits and Societies & ors., (2015) 1 UPLBEC 830
2. Committee of Management, Anjuman Kherul Almin Allahgranj & anr. Vs St. of U.P. & ors., 2014 (1) ADJ 44
3. Board of Trustee of the Shia College Vs St. of U.P., 2015 (6) ADJ 500
4. Committee of Management, Maulana Abdul Kalaam Azad Education Society Vs Assistant Registrar, Firms, Societies & ors., 2022 (10) ADJ 58
5. Committee of Management, Darul Ulum Samadhiya & anr. Vs St. of U.P. & ors., 2023 (8) ADJ 293
6. Shailendra Singh & 2 Ors. Vs St. of U.P. & ors., 2017 (6) ADJ 602

7. S.P. Chengalvaraya Naidu (Dead) by LRs. Vs Jagannath (Dead) by LRs. & ors., (1993) Supp. 3 SCR 422

8. Ram Preeti Yadav Vs U.P. Board of High School and Intermediate Education & ors., (2003) Supp. 3 SCR 352

9. St. of A.P. & anr. Vs T. Suryachandra Rao, (2005) 6 SCC 149

10. Bhaurao Dagdu Paralkar Vs St. of Mah. & ors., (2005) 7 SCC 605

11. Hamza Haji Vs St. of Kerala, JT 2006 (8) SC 215

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Gajendra Pratap, learned Senior Counsel assisted by Shri S.P. Srivastava, learned counsel for the petitioners, learned Standing Counsel for State-respondents and Shri Gautam Baghel for respondent no.3.

PREVIOUS PROCEEDINGS IN THIS CASE

2. This Court, after hearing learned counsel for both the sides, passed following order on 03.10.2023:-

“1. Supplementary affidavit filed today is taken on record.

2. Before hearing of this case commenced, Shri Gautam Baghel, learned counsel representing the respondent no.3 has placed before this Court, a copy of the order dated 14.09.2023 passed by the Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh, which is taken on record.

3. Shri Gajendra Pratap, learned Senior Counsel was asked as to whether he proposes to challenge the said order or not,

he submitted that since the subsequent order is a consequential order, in case the order impugned dated 17.06.2023 is found to be without jurisdiction and is set aside or stayed, the subsequent order would automatically stand nullified and, therefore, he does not propose to challenge the order dated 14.09.2023. With this submission, he proceeded to argue the matter.

4. Heard Shri Gajendra Pratap, learned Senior Counsel assisted by Shri S.P. Srivastava, learned counsel for the petitioners, learned Standing Counsel for State-respondents and Shri Gautam Baghel for respondent no.3.

5. Order Reserved.“

THE ORDER UNDER CHALLENGE

3. This writ petition has been filed challenging the order dated 17.06.2023 whereby the Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh has, after recording certain findings with regard to the validity of list of members of General Body and certain elections of office bearership relied upon by both the parties, declared the Committee of the Society as “defunct/barred by time” w.e.f. 19.09.2022 and, for the purposes of holding elections in exercise of powers under Section 25(2) of the Societies Registration Act, 1860 (hereinafter referred to as ‘the Act, 1860’), he has issued a tentative list of members of General Body directing the parties to submit objections against the same with a further direction that election of the time-barred Society shall be held after finalizing the electoral college/membership list/voter list.

FACTS OF THE CASE

4. Shorn of unnecessary details, the facts of the case as per the pleadings

contained in the writ petition, are that Chandrawati Shikshan Sansthan is an educational society registered on 27.09.2002 under the Societies Registration Act, 1860 and has its registered bye-laws to run and manage its affairs by a Committee of Management, which is periodically elected every 5 years by the general body of the Society. From the very inception of the said Society and until 10.11.2020 there were in all 11 members in the Society and all of them comprised managing committee of the Society. Respondent no.3 held the office of Dy. Manager (Up-Prabandhak) in the managing committee since inception of the Society and is holding the same office until now. In the year 2020, the Society decided to enrol members of the general body and an advertisement was got published in a daily newspaper, namely, Devvrat, dated 18.10.2020 by the Manager of the Society, pursuant where to, 8 persons were enrolled as life members in the Society, which is evident from the fact that each one of them had deposited with the Society a sum of Rs.1000/-, as subscription fee for the life membership prescribed in Clause 5 of the bye-laws. The so enrolled eight members are- (1) Sanjay Kumar Singh (Petitioner), (2) Sheela Singh, (3) Neeraj Singh, (4) Dharmendra Sharma, (5) Kushal Kumar Singh, (6) Dharmendra Singh, (7) Lata Singh and (8) Indu Singh. They all became life members of the Society from 10.11.2020, the date on which they deposited the said subscription fee with the then Manager of the Society. The petitioner nos.2 to 8 and Smt. Lata Singh, respondent no.4 are those eight (8) members that have been enrolled. According to Clause 10(4) of the bye-laws of the Society, the Manager of the managing committee is authorized to receive the membership/enrolment fee etc. and Clause 5 of the bye-laws provides that

whosoever will give minimum Rs. 1000/- to the Society, would be its life member.

CONTENTIONS RAISED ON BEHALF
OF PETITIONERS

5. The submission of Shri Gajendra Pratap, learned Senior Counsel, is that in the last undisputed elections held on 20.09.2017, one Faurang Ram was elected as President, Om Prakash Singh as Manager and Mukhtar Singh (respondent No.3) as Deputy Manager and that on 10.11.2020, eight new members being petitioner nos.2 to 8 and the respondent no.4-Smt. Lata Singh were enrolled after publication of advertisement in the newspaper “Devvrat” dated 18.10.2010. A casual vacancy occurred on account of death of Faurang Ram on 10.01.2021 and another due to death of Shri Om Prakash Singh on 04.03.2021. He further submits that the casual vacancy of the office of President was filled up by electing respondent no.4-Smt. Lata Singh in the meeting of General Body of the Society dated 08.02.2021, as per the procedure provided in Clause 9 of the Bye-laws and that the other casual vacancy of the office of Manager was filled up by electing petitioner no.2-Sanjay Kumar Singh as the Manager in the meeting of general body of the Society dated 06.04.2021.

6. Learned Senior Counsel further submits that pursuant to the aforesaid proceedings, list of office bearers for the year 2022-2023 was registered by the Assistant Registrar on 30.04.2022, whereafter, respondent no.4-Smt. Lata Singh submitted before the respondent no.2 an application dated 30.06.2022, annexing therewith various documents setting up a rival election claim on the very same casual vacancies, saying that against the vacancy

in office of President, one Sri Ashutosh Singh was elected and against the vacancy in office of Manager, she was elected in the meeting of general body dated 28.03.2021 and prayed for registration of her list of office bearers. He further submits that the respondent no.3 is none else than the real brother of petitioner no.1 and he falsely engineered the dispute only to anyhow oust the petitioner no.2 from the Managing Committee, and in this evil design, he successfully manipulated respondent no.4 on his side which is evident from the fact that after the entry of respondent no.3 in the dispute, the respondent no.4 submitted an application dated 24.02.2023 alongwith her affidavit before the respondent no.2 stating therein that she had not submitted any application earlier and any such application or document with her signatures, if on records, be treated as cancelled. Thus, not only the respondent no.4 abandoned her managerial claim but also made the very same prayers in her said application/affidavit as were made by respondent no.3 in his application.

7. Further submission of learned Senior Counsel is that despite the fact that the respondent no.4 had abandoned her claim and thus left with no cause or even locus to contest or participate in the pending dispute, the respondent no.2 not only allowed her to participate but even accepted her versions, knowing fully well that the same were not only false and wrong but wrapped with full of obvious lies. Further submission is that since the term (5 years) of committee of management last elected in the year 2017 was about to expire, the petitioner No.1 committee, as an out-going committee, held next periodical elections on 28.08.2022 in which the petitioner no.2 was elected Manager, who, through his application

dated 20.09.2022, also submitted list of elected office bearers alongwith election papers and prayed for registering the same. It has also been argued that the impugned order with regard to enrolment of 8 life members is without jurisdiction, inasmuch as, it is not referable to any law whatsoever, not even to one under Section 4-B of the Act, 1860; that the findings recorded in respect of said enrolment of members suffer from errors apparent on the face of the record, inasmuch as, the same are based on consideration of wholly irrelevant material leaving aside the relevant ones; that the respondent no.2 acted arbitrarily and in violation of the principles of natural justice in cancelling membership of petitioner nos. 3 to 8 without giving them opportunity of hearing and that the impugned order rescinding order of registration of the list of office bearers is without jurisdiction as the concerned respondent does not have power of review of his order under the Act, 1860. Learned Senior Counsel has also argued with reference to Section 4-B of the Act, 1860 that the Assistant Registrar has no power to record any finding with respect to validity of membership or enrolment of any new member(s) and that no such exercise was, even otherwise, open to be undertaken by the Assistant Registrar in the present case. He further submits that only the Prescribed Authority has power to determine the valid membership or even to decide as to whether enrolment of any member(s) was according to law. He further submits that the Assistant Registrar, by the order impugned, has decided the validity of rival elections, which course was not open for him as per the settled proposition of law. He further submits that the impugned order has been passed entertaining the application dated 17.01.2023 submitted by the respondent no.3-Mukhtar Singh, the

Deputy Manager and by referring to the said application, it has been argued that adjudication made is beyond the scope of the application and, even otherwise, the said application being not maintainable, it was not liable to be entertained at all and, even if, it was found to be entertainable, adjudication of past dispute is beyond the competence of the Assistant Registrar. In support of his contentions, learned Senior Counsel has placed reliance upon the following Authorities:-

(i). Lachi Ram Yadav & Ors. v. Asstt. Registrar Firms, Chits and Societies and Others, (2015) 1 UPLBEC 830;

(ii). Committee of Management, Anjuman Kherul Almin Allahgranj And Another v. State of U.P. And Ors., 2014 (1) ADJ 44;

(iii). Board of Trustee of the Shia College v. State of U.P. (Allahabad), 2015 (6) ADJ 500.

CONTENTION OF LEARNED STANDING COUNSEL

8. Learned Standing Counsel, on the other hand, has argued that pure findings of fact have been recorded by the Assistant Registrar based upon documents produced before him and, once, the findings have been recorded that order registering the list of Managing Committee dated 30.04.2022 was obtained by fraudulent means, the Assistant Registrar was competent enough to examine the correctness of the documents filed before him and having gone into the documents, the claim of the petitioners as well as respondent no.4-Smt. Lata Singh has been rightly rejected, considering the expiry of term of the erstwhile Committee appointed in 2017 and lawful direction has been issued to hold

elections under Section 25(2) of the Act, 1860.

CONTENTION OF RESPONDENT NO. 3

9. Shri Gautam Baghel, learned counsel for respondent no.3 has vehemently opposed the writ petition and has argued that admittedly, the list of 11 members was registered in 2002 since the very inception of the Society and the undisputed elections were held on 20.09.2017. While referring to the findings recorded in the order impugned, it has been argued by Shri Baghel that under Section 4-B of the Act, 1860, the Assistant Registrar is empowered to examine the correctness of the list of members of the General Body on the basis of register of members, minutes book, cash book, receipt book of membership fees and bank passbook of the Society not only at the time of registration of Society but also at the time of its renewal or any change in the list of members of the General Body on account of induction, removal, resignation or death of any member. He further submits that by the order impugned dated 17.06.2022, only a tentative list was issued and the parties were directed to file objections against the same and, insofar as the petitioners are concerned, the petitioner no.2 preferred objections before the Assistant Registrar and after taking into consideration the said objections and after providing full opportunity of hearing to the petitioner no.2, who claims to be Manager of the petitioner no.1-Committee, a detailed order has been passed on 14.09.2023 finalizing the electoral college for the purposes of holding elections under Section 25(2) of the Act, 1860. He further submits that admittedly the order dated 17.06.2023 having been given effect to and the order dated 14.09.2023 having not been

challenged, the petitioners have no case. With regard to the merits of the claim of the petitioners, as pleaded in the writ petition, reference to the following findings of the order dated 14.09.2023 has been made:-

“श्री संजय कुमार सिंह द्वारा अपने प्रतिनिधि अधिवक्ता के माध्यम से दिनांक 08.08.2023 को समय लिए जाने के बावजूद किसी प्रकार का कोई साक्ष्य/दिनांक 04.10.2020 के पूर्व का मूल अभिलेख प्रस्तुत नहीं किया गया। श्री संजय कुमार सिंह द्वारा पूर्व में जो मूल अभिलेख कार्यालय आदेश दिनांक 17.06.2023 पारित किये जाने के पूर्व दिनांक 18.04.2023 को प्रस्तुत किये गये थे, उक्त अभिलेख कार्यालय में जमा है। श्री संजय कुमार सिंह द्वारा प्रस्तुत उक्त अभिलेखों में बैंक पासबुक बड़ौदा यू०पी० बैंक शाखा तरवां खाता संख्या 82870200000014 का खाता दिनांक 13.07.2022 को खोला गया है तथा दिनांक 14.07.2022 को नगद पैसा कुल 8000 रूपया जमा किया गया है। उक्त के अतिरिक्त पासबुक में कोई प्रविष्टि अंकित नहीं है। उक्त से यह स्वतः स्पष्ट है कि संजय कुमार सिंह व अन्य का सदस्यता शुल्क वर्ष 2020 में तत्समय प्रबन्धक रहे श्री ओमप्रकाश सिंह द्वारा न तो प्राप्त किया गया और न ही समिति के खाते में जमा किया गया बल्कि कोरोना काल के दौरान संस्था से पूर्णतया असम्बद्ध व बाहरी व्यक्ति संजय कुमार सिंह द्वारा नये सिरे से दिनांक 04.10.2020 की तिथि से स्वयं नया रजिस्टर सूचना पंजिका/कार्यवाही पंजिका तैयार करके समिति पर कब्जा करने के उद्देश्य से ओमप्रकाश सिंह के फर्जी हस्ताक्षर से स्वयं को व अन्य को समिति का सदस्य चयनित होना दर्शाकर छल-कपट एवं फ्राड के आधार पर प्रबन्ध समिति की सूची वर्ष 2022-23 का पंजीयन दिनांक 30.04.2022 को करा लिए जाने के उपरान्त समिति का अवैध ढंग से नया खाता खोलकर सदस्यता शुल्की की रसीदों ओमप्रकाश सिंह के फर्जी हस्ताक्षर से स्वयं काटकर समिति के बैंक खाते में दिनांक 14.07.2022 को जमा किया गया। कार्यालय पत्रावली में ओमप्रकाश सिंह द्वारा समय-समय पर समिति के नवीनीकरण/पंजीकरण के समय प्रस्तुत प्रपत्रों/कार्यवाहियों पर किये गये हस्ताक्षर से संजय कुमार सिंह द्वारा प्रस्तुत सदस्यता रसीदों व कार्यवाही पंजिका/सूचना पंजिका पर बनाये गये हस्ताक्षर का मिलान करने पर यह पाया गया कि ओमप्रकाश सिंह का हस्ताक्षर पूर्व में प्रस्तुत प्रपत्रों/कार्यवाहियों से भिन्न व अलग-अलग है तथा जहां-जहां संजय कुमार सिंह द्वारा प्रस्तुत

अभिलेखों/कार्यवाहियों में हस्ताक्षर बनाया गया है सब भिन्न-भिन्न नजर आ रहा है। श्री फौरंग राम का हस्ताक्षर समिति की मूल पत्रावली में उपलब्ध स्मृति पत्र पर अंकित है जबकि संजय कुमार सिंह द्वारा प्रस्तुत सूचना पंजिका/कार्यवाही पंजिका में फौरंग राम का निशानी अंगूठा लगाया गया है। उपरोक्त विवेचना से यह स्पष्ट है कि श्री संजय कुमार सिंह द्वारा कोरोना काल व समिति के अध्यक्ष एवं प्रबन्धक के निधन का फायदा उठाकर उनके फर्जी निशानी अंगूठा एवं हस्ताक्षर से नये सिरे से दिनांक 04.10.2020 की तिथि से सूचना एवं दिनांक 10.11.2020 की तिथि में प्रथम कार्यवाही स्वयं सहित 8 अन्य को सदस्य बनाये जाने का फर्जी तरीके से होना दर्शाकर समिति उपरोक्त की प्रबन्ध समिति की सूची वर्ष 2022-23 का पंजीकरण करा लिया गया था जिसे कार्यालय आदेश पत्रांक 465, दिनांक 17.06.2023 द्वारा निरस्त घोषित किया जा चुका है। अतएव पुनः संजय कुमार सिंह व अन्य द्वारा स्वयं को समिति का सदस्य बताकर प्रस्तुत आपत्ति दिनांक 07.07.2023 व अन्य स्वीकार किये जाने योग्य नहीं है।”

10. The submission, therefore, is that though the petitioners claim to have been enrolled on 10.11.2020, the bank account has been opened on 13.07.2022 and not only taking into consideration opening of the bank account and subsequent deposit of money therein, but also the documents referred to in Section 4-B of the Act, 1860, the Assistant Registrar has found that the entire case of the petitioners is based upon forgery, fabrication and fraud. Shri Baghel has also referred to the minutes of meeting dated 10.11.2020, annexed to the writ petition, which contain thumb impression of President Faurang Ram and submits that the said meeting has been shown to have been held under the Presidentship of Faurang Ram without even mentioning his name as President in the minutes and, even otherwise, Faurang Ram never used to put his thumb impression as also recorded by the Assistant Registrar in the order dated 14.09.2023 that signatures of Faurang Ram are available in the original record and by fraudulently putting alleged impression, the proceedings dated 10.11.2020 have been

fabricated which are liable to be ignored. In support of his contentions, Shri Baghel has placed reliance upon the following Authorities:-

(i). **Committee of Management, Maulana Abdul Kalaam Azad Education Society v. Assistant Registrar, Firms, Societies And Others, 2022 (10) ADJ 58;**

(ii). **Committee of Management, Darul Ulum Samadhiya And Another v. State of U.P. And Others, 2023 (8) ADJ 293;**

(iii). **Shailendra Singh And 2 Others v. State of U.P. And 3 Others reported in 2017 (6) ADJ 602.**

DISCUSSION AND FINDINGS

11. Having heard the learned counsel for the parties, I find that the main argument of the petitioners is that the order impugned is without jurisdiction and exercise undertaken by the Assistant Registrar, purported to be under Section 4-B of the Act, 1860 is wholly unwarranted. For a ready reference, Section 4-B of the Act, 1860 is quoted hereinbelow:-

“4-B (1) At the time of registration/renewal of a society, list of members of General Body of that society shall be filed with the Registrar mentioning the name, father's name, address and occupation of the members. The Registrar shall examine the correctness of the list of members of the General Body of such society on the basis of the register of members of the General Body and minutes book thereof, cash book, receipt book of membership fee and bank pass book of the society.

(2) If there is any change in the list of members of the General Body of the society referred to in sub-section (1), on

account of induction, removal, registration or death of any member, a modified list of members of General Body, shall be filed with the Registrar, within one month from the date of change.

Any change in the list of the General Body shall not be valid unless it is approved by the Managing Body.

(3) The list of members of the General Body to be filed with the Registrar under this section shall be signed by two office bearers and two executive members of the society.”

12. From a bare reading of the aforequoted provision, it reflects that whenever a dispute comes before the Assistant Registrar either with regard to registration of the Society or its renewal, or induction/enrolment of new member(s) on account of resignation or death of any member, he is under statutory obligation to examine the correctness of the list of members of the General Body of such society on the basis of register of members of the General Body and minutes book thereof, cash book, receipt book of membership fee and bank pass book of the Society. In the present case, the entire claim of the petitioners is based upon induction of new members on 10.11.2020. Having perused the minutes of meeting dated 10.11.2020 which contain thumb impression of Faurang Ram as President allegedly presiding the said meeting and having perused the specific findings recorded by the Assistant Registrar in the order dated 14.09.2023, which has not at all been challenged, rather the petitioners have specifically relinquished and waived their right to challenge the said order, as recorded in the order dated 03.10.2023 passed in the present writ petition while reserving the order, this Court is of the considered opinion that the adjudication

made by the Assistant Registrar in the order dated 14.09.2023 and the findings recorded in the said order remain intact and have attained finality.

13. The Court also takes note of the fact that while the order impugned dated 17.06.2023 merely issues a tentative list, inviting objections from respective sides, once the petitioner no.2, in individual capacity and as alleged Manager of the petitioner no.1, proceeded to submit objections before the Assistant Registrar and addressed him with full confidence and force on the basis of documents relied upon by him and thereby persuaded the Assistant Registrar to adjudicate the issue, the challenge made to the order dated 17.06.2023 would amount to take vehicle into the reverse gear, though it has moved forward in terms of merger of the order dated 17.06.2023 in the subsequent order dated 14.09.2023. The submission of Shri Gajendra Pratap that the order dated 14.09.2023 is merely a consequential order and need not to be challenged has no force and is discarded considering the nature of both the orders, one before the petitioner no.2 made his submissions and the other after he produced various documents and addressed the Assistant Registrar.

14. Insofar as reliance placed by learned Senior Counsel for the petitioners on the judgement of **Lachi Ram Yadav & Ors.** (supra) is concerned, after careful reading of the said judgement, I find that ratio laid down is against the petitioners and not in their favour. In the said case, this Court was examining the power of the Assistant Registrar to decide the membership dispute in relation to Section 15 of the Act, 1860 and while dealing with the said provision, it was found that the provision did not clothe the Assistant

Registrar with the power to adjudicate dispute regarding membership. An argument was raised in that case before this Court on behalf of the contesting respondents that such adjudication can be made in terms of Section 4 of the Act, 1860, however, this Court observed that the case was on different footings and not with reference to any power exercised under Section 4 of the Act, 1860. In the present case, the order impugned refers to exercise of power under Section 4-B of the Act, 1860 and not Section 15 thereof. Hence, the ratio laid down is against the petitioners and, therefore, the petitioners do not get any benefit out of the said decision.

15. As regards judgment of this Court in the case of **Committee of Management, Anjuman Kherul Almin Allahgranj And Another** (supra) is concerned, it was a case where Deputy Registrar had adjudicated upon validity of rival elections set up by the parties and under such circumstances, the Division Bench opined that the matter was referable to the Prescribed Authority under Section 25(1) of the Act, 1860. No such dispute has arisen in the present case and, therefore, the said judgement does not help the petitioners.

16. The third decision relied upon by the petitioners in the case of **Board of Trustee of the Shia College** (supra) extensively deals with the power of the Assistant Registrar within the scope of Section 4-B of the Act, 1860 and this Court has clearly observed that the Registrar/Deputy Registrar is conferred with the power to examine the correctness of the list of members of the General Body of the Society on the basis of register of members of the General Body and minutes book thereof, cash book, receipt book of fee and bank passbook of the Society. An

interference was made by this Court after having found that the Deputy Registrar had entered into the dispute with respect to rival elections and, therefore, this Court denounced the action. There is nothing in the said judgement which could help the petitioners in the facts and circumstances of the present case where the Assistant Registrar has arrived at the conclusion on the basis of the documents referred to under Section 4-B of the Act, 1860 and has found inclusion of members as a fraudulent act on the part of the petitioners. Hence, this judgement is also of no help to the petitioners.

17. The submission of learned Senior Counsel that the order impugned is without jurisdiction also does not have any force in view of the law laid down by this Court in the case of **Shailendra Singh And Others v. State of U.P. And Others**, reported in **2017 (6) ADJ 602 (DB)**. Reference to following 'Paragraph 24' of the judgement in the case of **Shailendra Singh** (supra) can be made in this regard:-

"24. The powers conferred under the aforesaid sections clearly demonstrate that the Registrar is the principal Executive Officer to exercise his power in respect of the affairs of the Society. Thus, his power under Section 4 cannot be divested only on the ground that under Section 25 he has the authority to refer the dispute pertaining to election and continuance of office bearers and, accordingly, even if some frivolous dispute is raised in respect of the election or continuance of the office-bearers, the same should be mandatorily referred. If there is a dispute of two parallel groups of the society, the Registrar can always examine whether the persons of rival group, who have raised the dispute, are member of the society or not. He can

record his prima facie satisfaction in this regard as to who has the authority to convene the meeting and hold elections; persons who have participated are valid members of society; elections have been held as per bye-laws of society and if he is satisfied that the dispute is genuine and it is a dispute inter se between the members of the society, then he can refer the dispute to the Prescribed Authority.”

18. The Court also cannot ignore the findings of fabrication, manipulations and forgery as recorded in the order dated 17.06.2023 and also 14.09.2023 and finds that the Assistant Registrar was fully competent to dislodge the claim of the petitioners as well as respondent no.4-Smt. Lata Singh for the said reasons.

19. It is well settled that fraud vitiates even the most solemn act. *De Grey, C.J., in Rex Vs. Duchess of Kingston* [2 Smith L.C. 687] observed that 'Fraud' is an intrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal". In *Kerr on Fraud and Mistake*, it is stated that "in applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud. It is also clear as indicated in *Kinch Vs. Walcott [1929 APPEAL CASES 482]* that it would be in the power of a party to a decree vitiated by fraud to apply directly to the Court which pronounced it to vacate it. According to Kerr, "In order to sustain an action to impeach a judgment, actual fraud must be shown; mere constructive fraud is

not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury."

(See the Seventh Edition, Pages 416-417)

20. In *Corpus Juris Secundum, Volume 49, paragraph 265*, it is acknowledged that, "Courts of record or of general jurisdiction have inherent power to vacate or set aside their own judgements". In paragraph 269, it is further stated, "Fraud or collusion in obtaining judgment is a sufficient ground for opening or vacating it, even after the term at which it was rendered, provided the fraud was extrinsic and collateral to the matter tried and not a matter actually or potentially in issue in the action. It is also stated: "Fraud practiced on the court is always ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair".

21. In *American Jurisprudence, 2nd Edition, Volume 46, paragraph 825*, it is stated, "Indeed, the connection of fraud with a judgment constitutes one of the chief causes for interference by a court of equity with the operation of a judgment. The power of courts of equity in granting such relief is inherent, and frequent applications for equitable relief against judgments on this ground were made in equity before the practice of awarding new trials was introduced into the courts of common law. Where fraud is involved, it has been held, in some cases, that a remedy at law by appeal, error, or certiorari does not preclude relief in equity from the judgment. Nor, it

has been said, is there any reason why a judgment obtained by fraud cannot be the subject of a direct attack by an action in equity even though the judgment has been satisfied."

22. The law in India is not different. In ***Paranjpe Vs. Kanade [ILR 6 BOMBAY 148]***, it was held that it is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud. In ***Lakshmi Charan Saha Vs. Nur Ali [ILR 38 Calcutta 936]***, it was held that the jurisdiction of the Court in trying a suit questioning the earlier decision as being vitiated by fraud, was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree.

23. It is not necessary to multiply authorities on this question since the matter has come up for consideration before the Apex Court on various occasions. In ***S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs & Ors. [(1993) Supp. 3 SCR 422]***, the Apex Court stated that, "*it is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decreed -- by the first court or by the highest court -- has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.*" The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to Court with a true case and prove it

by true evidence. Their Lordships stated, "The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property grabbers, tax evaders, Bank loan dodgers, and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation".

24. In ***Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education & Others [(2003) Supp. 3 SCR 352]***, the Apex Court, after quoting the relevant passage from ***Lazarus Estates Ltd. Vs. Beasley [(1956) 1 All ER 341]*** and after referring to ***S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs & Ors. (supra)*** reiterated that fraud avoids all judicial acts. In ***State of A.P. & Anr. Vs. T. Suryachandra Rao [(2005) 6 SCC 149]***, the Supreme Court after referring to the earlier decisions held that suppression of a material document could also amount to a fraud on the Court. It also quoted the observations of Lord Denning in ***Lazarus Estates Ltd. Vs. Beasley (supra)*** that "*No judgment of a Court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.*"

25. According to **Story's Equity Jurisprudence, 14th Edn., Volume 1, paragraph 263**: "Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence,

justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." In *Patch Vs. Ward [1867 (3) L.R. Chancery Appeals 203]*, *Sir John Rolt, L.J.* held that: "Fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and obtaining that decree by that contrivance."

26. The Supreme Court in *Bhaurao Dagdu Paralkar Vs. State of Maharashtra & Ors. [2005 (7) SCC 605]* held that: "*Suppression of a material document would also amount to a fraud on the court. Although, negligence is not fraud, it can be evidence of fraud.*"

27. The aforesaid Authorities have been considered by the Apex Court in the case of *Hamza Haji v. State of Kerala reported in JT 2006 (8) SC 215*.

28. The Assistant Registrar, though not a court of law, exercises quasi judicial or even administrative powers under Societies Registration Act, 1860, hence the ratio of law referred to here-in-above shall also apply to the proceedings giving rise to the instant writ petition.

29. For the aforesaid reasons, considering the findings recorded in the order dated 17.06.2023 under challenge and order dated 14.09.2023 not challenged, I do not find any good ground to invite written response from the respondents or to grant any relief to the petitioners.

30. The writ petition has no merit and is, accordingly, **dismissed**.

(2023) 11 ILRA 276
ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 08.11.2023

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Writ C No. 33655 of 2023

RADHASOAMI SATSANG SABHA,
Dayalbagh, Agra ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Ujjawal Satsangi, Sri Anurag Khanna
(Sr. Advocate)

Counsel for the Respondents:

C.S.C.

A. Revenue Law – UP Revenue Code, 2006 – Section 26 – UP Revenue Code Rule, 2016 – Rule 186 – Summary proceeding – Principle of natural justice – Applicability – Held, S. 26 of the Code contemplate issuance of notice or hearing before passing an order under it as the principles of natural justice are implicit in the proceeding u/s 26 – R. 186 contemplates that even in summary proceedings, the authorities are bound to comply with the principle of Civil Procedure Code as well as the principle of nature justice – Impugned action of the respondent was held in violation of principle of natural justice. (Para 31, 34 and 51)

B. Revenue Law – Eviction – Principle of natural justice – Non consideration of objection raised regarding jurisdiction – Permissibility – Straightway eviction order was passed – Validity challenged – Held, order impugned is vitiated for non consideration of objections raised by the petitioner. (Para 62 and 65)

C. Constitution of India – Article 226 – Writ – Alternative remedy – When it would not operate as bar – *Whirlpool Corporation's case* relied upon – Held,

alternative remedy would not operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of principle of natural justice or where order or proceedings are wholly without jurisdiction or the vires of an Act is challenged – Relegating to the petitioner to the alternate remedy would serve no purpose. (Para 68 and 71)

D. Constitution of India – Article 14 – Principle of natural justice – Definition and object – The doctrine of natural justice seeks not only to secure justice but also to prevent miscarriage of justice. Natural justice is an important concept in administrative law – It is not possible to define precisely and scientifically the expression “Natural Justice”. The principle of natural justice or fundamental rules of procedure of administrative action, are neither fixed nor prescribed in any code – By all standards, rules of natural justice are great assurances of justice and fairness. By developing the principle of natural justice, courts have devised a kind of code of fair administrative procedure. (Para 36 and 37)

E. Principle of natural justice – Basic facet and scope – Not giving sufficient time for reply and preparing the case – Effect – Held, the principle of natural justice require that before any action likely to effect a person is taken, he must be given a notice to show cause why proposed action should not be taken against him... This is one of the basic facets of natural justice and is a sine-qua-non of the right of fair hearing – The notice to be valid and effective, must be properly served on the concerned person. It must give sufficient time to enable the individual to prepare his case – Not giving sufficient time amounts to denial of notice. (Para 43)

F. Maxim – *Nemo debet esse judex in propria causa* – Meaning – No man shall be a judge in his own cause, or a

man cannot act as judge and at the same time a party or suitor; or the deciding authority must be impartial and have bias. (Para 38)

G. Maxim – *Audi Alteram Partem* – Meaning – Hear the other side, or both the sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority. (Para 38)

Writ petition allowed. (E-1)

List of Cases cited:

1. Kooper Vs Wandsworth Board of Works; (1863) 14 CB (NS) 180
2. St. of Orrisa Vs Dr. Veenapani; AIR 1967 SC 1269
3. Liberty Oil Mills Vs U.O.I.; AIR 1984 SC 1271
4. Menka Gandhi Vs U.O.I.; (1978) 1 SCC 248
5. A. K. Kraipak Vs U.O.I.; AIR 1970 SC 150
6. Olga Tellis Vs Bombay Municipal Corporation; (1985) 3 SCC 545
7. K.I. Shepherd Vs U.O.I.; AIR (1988) SC 686
8. Assistant Collector Customs Vs Vibhuti Bhushan; (1989) 3 SCC 202
9. Mohinder Singh Gill Vs Chief Election Commissioner; (1978) 1 SCC 405
10. R. Vs South West London Supplementary Benefit Appeal Tribunal, Ex 'p.' Bullen; (1976) 120 Sol Jo 437
11. Canara Bank & ors. Vs Debasis Das & ors. ; (2003) 4 SCC 557
12. Raghbir Singh Sehrawat Vs State of Haryana & ors. ; (2012) 1 SCC 792

13. Nareshbhai Bhagubhai & ors. Vs U.O.I. & ors.; (2019) 15 SCC 1

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

15. UP Power Transmission Corporation Ltd & anr. Vs CG Power and Industrial Solutions Ltd & anr.; (2021) 6 SCC 15

16. Ghanashyam Mishra & Sons Pvt. Ltd. Vs Edelweiss Asset Reconstruction Comp. Ltd.; (2021) 9 SCC 657

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. This writ petition has been filed for following prayer:

(a) *Issue a writ, order or direction by calling for records and setting aside the Impugned Notices dated 14.09.2023 passed in Case No. T202301010103629 pertaining to Khasra No. 309 and 320, Jaganpur Mustakil, Tehsil Sadar District Agra;*

(b) *Issue a writ, order or direction to the respondents not to interfere with the peaceful possession of the property situated at Khasra No. 297/473 Jaganpur Mustakil, Tehsil Sadar, District Agra, Khasra No. 309 Jaganpur Mustakil, Tehsil Sadar, District Agra, Khasra No. 310 Jaganpur Mustakil, Tehsil Sadar, District Agra, Khasra No. 311 Jaganpur Mustakil, Tehsil Sadar, District Agra, and Khasra No. 273, Khaspur Mustakil, Tehsil Sadar, District Agra and permit the Petitioner to restore the walls and gates demolished by the Respondents;*

(c) *Issue a writ, order or direction to the respondents to compensate the Petitioner for the demolition taken place at Khasra No. 297/473 Jaganpur Mustakil, Tehsil Sadar, District Agra, Khasra No. 309 Jaganpur*

Mustakil, Tehsil Sadar, District Agra, Khasra No. 310 Jaganpur Mustakil, Tehsil Sadar, District Agra, Khasra No. 311 Jaganpur Mustakil, Tehsil Sadar, District Agra, and Khasra No. 273, Khaspur Mustakil, Tehsil Sadar, District Agra and for the Police action taken against the Karsewaks on 24.09.2023 by the Respondents;

(d) *Issue a writ, order or direction for judicial enquiry against the Respondents for the action of demolition taken upon the properties of Petitioner on 23.09.2023 and 24.09.2023 and punish them for the illegal act.*

(e) *Issue any other suitable writ, order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.*

(f) *Award costs to the petitioner.*

(g) *Pass any such other order/s as may be deemed fit and proper.*

2. During the pendency of the aforesaid writ petition, an amendment application was filed by the petitioner on 27.09.2023 seeking addition of para no. 64A to 65H after para no. 64 in the writ petition and also for adding relief No. H, I & J after the relief No. 'G' and certain other amendments.

3. The amendment application filed by the petitioner was allowed by this Court vide order dated 27.09.2023 and, thereafter, the amendments were incorporated in the writ petition. Newly added relief i.e. relief No. H, I & J are quoted as under:

(h) *issue an appropriate writ, order or direction calling for the record and quashing the impugned notices dated 14.09.2023 passed in pursuance of Khasra No. 105, 252 and 256 of Village Khaspur,*

Tehsil Sadar District Agra and Khasra No. 297M of Jaganpur Mustakil, Tehsil Sadar, District Agra respectively.

(i) Issue an appropriate writ, order or direction calling for record and quashing the impugned orders dated 22.09.2023 passed in Case No. 3627/2023 (CIN No. T202301010103627) (Local Administration v Radhasoami Satsang Sabha) and Case No. 3629/2023 (CIN No. T202301010103629) (Local Administration v Radhasoami Satsang Sabha).

(j) Issue an appropriate writ, order or direction to the Respondent to ensure medical treatment and issuance of injury report/Medico legal certificate to the Karsewaks of the Petitioner, who sustained injuries in the Police Action of 24.09.2023.

4. Brief facts of the case as alleged in the writ petition are that the petitioner Radha Swami Satsang Sabha, Dayal Bagh, Agra is a religious and charitable society duly registered with its head-quarter at Dayal Bagh, Agra. The petitioner claims to be the owner in possession of land measuring 1500 acres in village Sikandrapur, Khaspur, Jaganpur and Ghatwasan, Tehsil and District Agra, out of which 1200 acres is agricultural land. In order to provide water to their agricultural field, for irrigation purpose, an agreement was entered into between the petitioner and the Government of United Provinces on 14.09.1935, giving liberty to the petitioner to pump water from river Yamuna subject to certain terms and conditions mentioned in the agreement.

5. In pursuance of the aforesaid agreement, the petitioner constructed and opened a private water course (nahar) running from river Yamuna of 3.5Km long with a maintenance track of either sides in the land of Khasra Nos. 326, 330, 364 in

village Jaganpur, Khasra No. 205 in village Sikandrapur and also through certain plots of village Khaspur and the petitioner is in continuous possession and enjoyment of the nahar and its maintenance track for more than 85 years.

6. Under a tripartite agreement between Agra Municipal Corporation, Yamuna Pollution Control Unit, U.P. Jal Nigam, Agra and the petitioner, the petitioner sold the land to the extent of 2.43 hectares in village Jaganpur for construction of sewage treatment plant and on a commitment given by the Agra Municipal Corporation to the effect that the Corporation would supply free of cost treated sewage water from the Sewage Treatment Plant to the extent of 40 MLD to the petitioner for its irrigation purposes.

7. In the year 2010, the District Administration of District Agra wanted to construct a road by illegally occupying the maintenance track in Khasra no. 205 of village Sikandrapur, Tehsil Sadar, District Agra. The petitioner, therefore, filed Original Suit No. 1435 of 2010 impleading State and Public Works Department for the relief for permanent injunction in the court of Civil Judge, Senior Division, Agra, being Suit No. 1435 of 2010 which was decreed in favour of the petitioner by a judgment and decree dated 31.03.2012. Against the aforesaid judgment, appeal was filed by the defendants in the suit and the aforesaid appeal is pending in the court of Additional District Judge, Court No. 14, Agra being appeal no. 68/2016. On 11.01.2020, the respondent no. 3 i.e. Sub Divisional Magistrate, Sadar, Agra using police force entered the premises of the petitioner forcibly and demolished the gate of the petitioner. The petitioner, thereafter, filed execution application under Order 21

Rule 32 C.P.C. seeking execution of the decree passed in his favour. Since the executing court was vacant, the petitioner approached Hon'ble High Court in proceedings under Article 227 of Constitution of India i.e. Matters under Article 227 No. 574 of 2020 where initially an order of status quo was passed by the Hon'ble Court. The aforesaid proceedings under Article 227 of the Constitution of India were later on withdrawn by the petitioner as the executing court became functional in Agra on 26.04.2023. The aforesaid execution case is still pending.

8. On the basis of report submitted by respondent no. 5 i.e. Lekhpal/Revenue Inspector, Tehsil Sadar, Agra, the respondents claimed that the property in dispute is in unauthorized possession of the petitioner, which is required to be removed. The petitioner again approached this Hon'ble Court by filing Writ petition No. 22582 of 2023 (Radha Swami Satsang Sabha v. State of U.P. and 4 others) and this Hon'ble Court vide its order dated 14.07.2023, passed an order of status quo on the spot as on today which was later on extended. Thereafter, certain FIRs were also lodged against the office bearers of the petitioner by the District Administration which was challenged by the petitioner by filing Criminal Misc. Writ Petition No. 15299 of 2023 and 15301 of 2023 which are pending consideration. In the meantime, a notice dated 14.09.2023 was received by the petitioner in Case No. T202301010103629 (hereinafter referred to as "Case No. 3629"), under Section 26 U.P. Revenue Code, 2006 regarding the Bhukhand No. 309 recorded as Rasta Shreni 6-2 in village Jaganpur, Tehsil Sadar, District Agra, mentioning therein that the petitioner has encroached the land of public utility and directing the petitioner

to remove encroachment and appear before the court of Tehsildar Sadar, Agra on 22.09.2023 to explain that why rasta was encroached by petitioner, failing which, ex-parte proceedings may be drawn against the petitioner. A similar notice dated 14.09.2023, in Case No. 3629, under Section 26 of U.P. Revenue Code, 2006 regarding Bhukhand No. 320, recorded as Rasta Shreni 6-2, village Jaganpur, Tehsil Sadar, Agra, was received fixing 22.09.2023. The aforesaid notices are annexed at page no. 197 & 198 of the paper book. On 22.9.2023, the petitioner appeared in the court of Tehsildar and prayed for 15 days time to file objection. The aforesaid application for grant of time was rejected by the Tehsildar and the petitioner was directed to file their objection and evidence, if any, in support of his case by 04:00PM on 22.09.2023. The petitioner, thereafter, filed a reply on 22.09.2023, stating therein that the respondent no. 4 Tehsildar has no jurisdiction in the matter, since the land in dispute comes within the territorial jurisdiction of Nagar Panchayat, Dayal Bagh, Agra and Provisions of U.P. Revenue Code, 2006 are not applicable and as such, the notice issued to the petitioner is without jurisdiction. Copy of the objection filed by the petitioner are annexed at page no. 200 of the paper book.

9. In the early morning of 23.09.2023, the respondents came along with police personnel and started demolishing the wall and gate of the property of the petitioner. On the evening of 24.09.2023, the carsewaks of the petitioner gathered in their field and the police force lathi charged the carsewaks of the petitioner in which several carsewaks were injured including several women and children. At this stage, the present writ petition was filed.

10. In the amended writ petition, it has been asserted by the petitioner that after the demolition and police action on 23.09.2023 and 24.09.2023, the petitioner was handed over with two more notices dated 14.09.2023 issued under Section 26 of U.P. Revenue Code, 2006 as well as two orders passed under Section 26 of U.P. Revenue Code, 2006 dated 22.09.2023, in respect of the aforesaid notices. By amendment, the petitioner has challenged the orders dated 22.09.2023 passed in Case No. T-202301010103627, (hereinafter referred to as “Case no. 3627”) and order dated 22.09.2023 passed by the respondent no. 4 in Case No. 3629 under Section 26 of the U.P. Revenue Code, 2006.

11. Though there are several reliefs claimed in writ petition by the petitioner, learned counsel for the petitioner has confined his arguments regarding the order dated 22.09.2023 passed in Case No. 3627 & Case No. 3629 in proceedings under Section 26 of the U.P. Revenue Code, 2006.

12. Since, the learned counsel for the petitioner has confined his relief only against the orders passed under Section 26 of U.P. Revenue Code, 2006 and since the original record of the aforesaid cases have been summoned and perused by this Court with the help of learned counsel for the parties, the writ petition is being decided at the admission stage itself without calling for a counter affidavit. Learned Chief Standing Counsel Sri J. N. Maurya appearing for the respondents has stated that there is no necessity of filing counter affidavit and the writ petition be decided at the admission stage itself. Therefore, with the consent of the parties, I am proceeding to decide this writ petition.

13. Learned counsel for the petitioner contended that though the petitioner was served with notice dated 14.09.2023, in Case No. 3629 in proceedings under Section 26 of U.P. Revenue Code, 2006 regarding Bhukhand No. 309, situated in village Jaganpur and Bhukhand No. 320 situated at village Jaganpur, the orders have been passed regarding the Bhukhand no. 105, 252, 256, situated at village Khaspur, Tehsil Sadar, Agra (in Case No. 3627) and regarding the Bhukhand 326, 330, 364, 371, 271, 309, 320, 297 situated at village Jaganpur (in Case No. 3629) and as such, the orders impugned are ex-parte against the petitioner without serving any notice to show cause regarding the aforesaid Bhukhand numbers. The orders impugned are passed in violation of principle of natural justice.

14. It is further contended by learned counsel for the petitioner that even in respect of Bhukhand situated at village Jaganpur for which notice was served on 14.09.2023, the petitioner appeared before the court and when came to know that the proceedings are with regard to other numbers also, prayed for grant of 15 days time to file objections and evidence in support of his case but the aforesaid application of the petitioner was rejected by respondent no. 4 and respondent no. 4 has directed the petitioner to submit his reply and file evidence in support of his case by 04:00 P.M. on 22.09.2023.

15. It is further contended by learned counsel for the petitioner that grant of a week's time to file reply and coupled with fact that the respondent no. 4 has taken cognizance of other land of the petitioner for which no notice was given to the petitioner, the insistence of the respondent no. 4 directing the petitioner to submit

reply and evidence in support of his case by 04:00PM, is nothing but denial of opportunity to the petitioner to contest the case and as such, is violative of principle of natural justice. Learned counsel for the petitioner further contended that on 22.09.2023, the objections were filed by the petitioner as to maintainability of the proceeding but the same has not been considered by the respondent no. 4 and has proceeded in undue haste to pass the order dated 22.09.2023, directing for removal of construction of the petitioner.

16. It has been contended by learned counsel for the petitioner that the petitioner has not encroached the public land and the entire proceedings against the petitioner are arbitrary and violative of principle of natural justice.

17. Per contra, learned Additional Advocate General appearing for the State made following submissions:

(a) The proceedings under Section 26 of the U.P. Revenue Code, 2006 are summary in nature and does not require an elaborate procedure for proceeding under Section 26 of the U.P. Revenue Code, 2006. Learned Additional Advocate General relied upon Section 225 A of U.P. Revenue Code, 2006 that all the questions arising for determination in any summary proceedings under this Code shall be decided upon affidavits in the manner prescribed. Sub Rule (2) of Rule 192 of Uttar Pradesh Revenue Code Rules, 2016 provides that proceeding regarding removal of obstacle under Section 26 of U.P. Revenue Code, 2006, shall be treated as summary proceedings.

(b) From the perusal of Section 26 of U.P. Revenue Code, 2006, it is clear that the section does not contemplate

issuance of any notice before proceeding under Section 26 of U.P. Revenue Code, 2006. In the present case, the order impugned has been passed after giving notice to the petitioner regarding all the Khasra numbers and as such it cannot be said that the orders have been passed in violation of principle of natural justice.

(c) On 22.09.2023, on an application moved by the petitioner, time was granted to the petitioner till 04:00P.M. to file his objections and produce all the evidence/material in support of his case but except for the objection, no material or evidence has been produced by the petitioner in support of his claim.

(d) The petitioner has encroached upon a public land and the same is liable to be removed and the respondents has rightly passed the order for removal of the encroachment made by the petitioner from the public land.

(e) The petitioner has an alternative remedy of filing revision under Section 27 of U.P. Revenue Code, 2006 before the Sub Divisional Officer and in view of availability of alternative remedy, this writ petition should not be entertained.

18. Before considering the rival submissions made by the parties, it would be appropriate to look into the statutory provisions as contained in U.P. Revenue Code, 2006.

19. Section 26 of U.P. Revenue Code, 2006 provides for removal of obstacles and is quoted as under:

“26. Removal of obstacle.- If the Tahsildar finds that any obstacle impedes the free use of a public road, path or common land of a village or obstructs the road or water-course or source of water, he may direct the removal of such obstacle

and may, for that purpose, use or cause to be used such force as may be necessary and may recover the cost of such removal from the person concerned in the manner prescribed.”

Section 225A of U.P. Revenue Code, 2006 provides for determination of question in summary proceedings and is quoted as under:

[Section 225A. Determination of questions in summary proceeding.- *Notwithstanding anything contained in other provisions of this Code, all the questions arising for determination in any summary proceeding under this Code shall be decided upon affidavits, in the manner prescribed:*

Provided that if Revenue Court or Revenue Officer is satisfied that the cross-examination of any witness, who has filed affidavit, is necessary, it or he may direct to produce the witness for such cross-examination.]

20. Section 27 of U.P. Revenue Code, 2006 provides for the revisional powers of the Sub Divisional Officer and is quoted as under:

“27. Revisional powers of Sub-Divisional Officer.- The Sub-Divisional Officer may call for the record of any case decided by the Tahsildar under Section 25 or 26, for the purpose of satisfying himself as to the legality or propriety of such decision, and may, after affording opportunity of hearing to the parties concerned, pass such orders as he thinks fit (substituted by U.P. Act No. 4 of 2016).”

21. First of all this Court has to decide whether a notice is required to be given to the petitioner in proceedings under Section 26 of U.P. Revenue Code, 2006. Contention of the learned counsel for the petitioner is

that requirement of giving notice is implicit in the provision as the order passed therein is of civil consequences affecting the rights of the petitioner. Per contra, learned Additional Advocate General submitted that from reading of provision it is clear that proceeding under Section 26 of U.P. Revenue Code, read with Section 225A, are summary in nature and Section 26 of U.P. Revenue Code, 2006 in terms do not contemplate issuance of notice to the person found to be causing obstacle impeding the free use of pathway etc.

22. The question has often arisen whether the adjudicating authority is bound to follow the principle of natural justice, even though the statute under which the adjudicating authority is exercising power do not provide for the same. The law is well settled. **Byles J. in Kooper v. Wandsworth Board of Works** reported in **(1863) 14 CB (NS) 180** observed as under: (page-194)

“(A) Long course of decisions, beginning with Dr. Bentley’s case and ending with some recent cases, establish that although there is no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.”

D. Smith (Judicial Review of administrative action, 5th Edition at page 383) state that where an statute authorizing interferes with the property or civil rights was silent on the question of notice and hearing, the courts will apply the rule as it is “of universal application and founded on the plainest principles of natural justice”. The above principle is accepted in India also.

23. In case of **State of Orrisa v. Dr. Veenapani** reported in **AIR 1967 SC 1269**,

the Hon'ble Apex Court has held that where exercise of power results in civil consequences unless the statute specifically rules out, the principles of natural justice would apply. In case of **Liberty Oil Mills v. Union of India** reported in **AIR 1984 SC 1271**, the Hon'ble Supreme Court held that it is not permissible to interpret any statutory instrument so as to exclude natural justice unless language of the instrument leaves no option to the court. Procedural fairness embodying natural justice is to be implied whenever action is taken effecting the rights of the parties. (para 15 at page 1283, 1284).

24. In case of **Menka Gandhi v. Union of India** reported in **(1978) 1 SCC 248**, it has been observed by Beg, C.J. that it is well established that even where there is no specific provision in the statute or the rules made thereunder for showing cause against action proposed to be taken against an individual which effects the right of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. (at page 402).

25. It has been further contended by learned Additional Advocate General that power under Section 26 of U.P. Revenue Code, 2006 is administrative and not judicial or quasi judicial and therefore, there is no requirement of giving notice to the person causing obstacle impeding the free path way etc. Refuting the contention of learned Additional Advocate General, learned counsel for petitioner contended that there is no difference between administrative and quasi judicial proceeding and if the result of the proceeding is of civil consequences,

affecting the right of the person observance of principles of natural justice is mandatory.

26. In case of **A. K. Kraipak v. Union of India** reported in **AIR 1970 SC 150**, (para 2001 page 156), Hegde J. propounded "the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words, they do not supplant the law of the land but supplement it. (at page no. 272).

27. In case of **Olga Tellis v. Bombay Municipal Corporation** reported in **(1985) 3 SCC 545**, the Apex Court held that any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: The action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. (Para 40 page 577).

28. In case of **K.I. Shepherd v. Union of India** reported in **AIR (1988) SC 686**, the Apex Court relying upon the aforementioned judgments held as under: (para-12 at page 693)

"12. Mullan in 'Fairness: The New Natural Justice' has stated:-

"Natural justice co-exists with, or reflected, a wider principle of fairness in

decision-making and that all judicial and administrative decision-making and that all judicial and administrative decision-makers had a duty to act fairly. "

In the case of *State of Orrisa v. Dr. (Miss) Binapani Dei & ors.*, [1967] 2 SCR 625 this Court observed:-

"It is true that the order is administrative in character but even an administrative order which involves civil consequences as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken; the High Court was, in our judgment, right in setting aside the order of the State."

In *A.K Kraipak & ors. v. Union of India & ors.*, [1970] 1 SCR 457 a Constitution Bench quoted with approval the observations of Lord Parker in *Re: (H) K (an infant) (supra)*. Hegde, J. speaking for the Court stated:

"Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is

not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry."

These observations in *A.K. Kopak's (supra)* case were followed by another Constitution Bench of this Court in *Chandra Bhavan Boarding and Lodging, Bangalore v. The State of Mysore & Anr.*, 1970 2 SCR 600. In *Swadeshi Cotton Mills v. Union of India*, [1981] 2 SCR 533 a three-Judge Bench of this Court examined this aspect of natural justice. Sarkaria, J. who spoke for the Court, stated:-

"During the last two decades, the concept of natural justice has made great strides in the realm of administrative law. Before the epoch- making decision of the House of Lords in *Ridge v. Baldwin*, it was generally thought that the rules of natural justice apply only to judicial or quasi-judicial proceedings; and for the purpose, whenever a breach of the rule of natural justice was alleged, Courts in England used to ascertain whether the impugned action was taken by the statutory authority or tribunal in the exercise of its administrative or quasi-judicial power. In India also, this was the position before the decision of this Court in *Dr. Bina Pani Dei's case (supra)*; wherein it was held that even an administrative order or decision in matters involving civil consequences, has to be made consistently with the rules of natural justice. This supposed distinction between quasi-judicial and administrative decisions, which was perceptibly mitigated in *Bina*

Pani Dei's case (supra) was further rubbed out to a vanishing point in A.K. Kraipak's case (supra) ".

On the basis of these authorities it must be held that even when a State agency acts administratively, rules of natural justice would apply. As stated, natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed so that they may be in a position (a) to make representations on their own behalf; (b) or to appear at a hearing or-enquiry (if one is held); and (c) effectively to prepare their own case and to answer the case (if any) they have to meet."

29. In case of **Assistant Collector Customs v. Vibhuti Bhushan** reported in (1989) 3 SCC 202, the Apex Court held (at page 208) "the right to notice, flows not from the mere circumstance that there is a proceeding of a judicial in nature, but indeed it goes beyond to the basic reason which gives to the proceedings, its character, and that reason is that a right of a person may be affected and there may be prejudice to that right if he is not affording an opportunity to put forward his case in the proceedings."

30. In case of **Mohinder Singh Gill v. Chief Election Commissioner** reported in (1978) 1 SCC 405, the Apex Court held (at page 440) "what is a civil consequence, let us ask ourselves, by passing verble booby-traps? 'civil consequence', undoubtedly, cover infraction of not merely property or personal rights but of civil liberties, material deprivation and non pecuniary damages. In its comprehensive commopation, everything that effects the citizen in his civil life, inflects a civil consequence".

31. Thus, in view of law laid down by Apex Court referred above, I am of the view that the contention of the learned Additional Advocate General that Section 26 of U.P. Revenue Code, 2006 does not contemplate issuance of notice or hearing before passing an order under Section 26 of U.P. Revenue Code, 2006 is not tenable as the principles of natural justice are implicit in proceeding under Section 26 of U.P. Revenue Code, 2006.

32. Furthermore, though, the Section 26 of U.P. Revenue Code, 2006 does not in so many word incorporates the observance of principles of natural justice in proceedings under Section 26 of U.P. Revenue Code, 2006, it would be relevant to refer to rule 186 of the U.P. Revenue Code, 2016 which is as under:

"186. Non-applicability of CPC (Section 214).- The provisions of the Code of Civil Procedure, 1908 shall not be applicable to the summary proceedings under the Code or these rules, but the principles enshrined in the Code of Civil Procedure, 1908 and the principles of natural justice shall be observed in the disposal of such proceedings."

33. Rules of U.P. Revenue Code 2016 has been framed in exercise of powers conferred of Section 233 of U.P. Revenue Code, 2006, Sub Clause XVII of U.P. Revenue Code, 2006 provides that State Government may by notification make rules for duties of any officer or authority having jurisdiction under this code and the procedure to be followed by him. Section 233 is quoted as under:

"233. Rules.- (1) The State Government [may, by] notification make

rules for carrying for the purposes of this Code.

(2) Without prejudice to the generality of the foregoing power, such rules may also provided for-

(i).....

(ii).....

.....

(xvii) the duties of any [officer or authority] having jurisdiction under this Code and the procedure to be followed by him;...”

34. Thus, the Rules 186 contemplates that even summary proceedings, the authorities are bound to comply with the principle of Civil Procedure Code as well as the principle of nature justice.

35. Now reverting to second submission of learned counsel for the petitioner that the orders impugned are vitiated for non observance of principles of natural justice. Refuting the submission made by learned counsel for the petitioner, learned Additional Advocate General contended that the orders impugned had been passed after complying the principles of natural justice. Learned Additional Advocate General further contended that fair hearing does not stipulate that proceeding be as formal as in a court. Natural justice is not a replica of the court procedure at the level of adjudicatory bodies. Before considering the rival submissions it would be useful to consider the ingredients of principles of natural justice.

36. Natural justice can be described as “fairplay in action”. The doctrine of natural justice seeks not only to secure justice but also to prevent miscarriage of justice. Natural justice is an important concept in administrative law. It is not possible to

define precisely and scientifically the expression “Natural Justice”. The principle of natural justice or fundamental rules of procedure of administrative action, are neither fixed nor prescribed in any code.

37. By all standards, rules of natural justice are great assurances of justice and fairness. By developing the principle of natural justice, courts have devised a kind of code of fair administrative procedure.

38. The traditional English law as well as Indian law recognized two principles of natural justice:

(1) *Nemo debet esse iudex in propria causa*: No man shall be a judge in his own cause, or a man cannot act as judge and at the same time a party or suitor; or the deciding authority must be impartial and have bias; and

(2) *Audi Alteram Partem*: Hear the other side, or both the sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority.

39. However, due to rapid development and growth of constitutional law as well as administrative law, a third principle of natural justice has also emerged i.e. speaking orders or reasoned decisions.

40. In the present case, we are mainly concerned with a violation of second and third Rule i.e. *Audi Alteram Partem* i.e. no one should be condemned unheard and also that all the orders should be supported by reasons.

41. The second fundamental principle of natural justice is *Audi Alteram Partem*

i.e. no men should be condemned unheard or both the parties must be heard before passing any order. This is the basic requirement of rule of law. It had also been described as foundational and fundamental concept. It lays down the norms which has to be implemented by all the courts and tribunals on national as well as international level. While the civil courts are bound by rules of procedure contained in Civil Procedure Code and the criminal courts by procedure as laid down in the Criminal Procedure Code, and the Indian Evidence Act. There is no such uniform body of procedure norms to be followed by adjudicatory bodies, functioning outside the regular court hierarchy. By developing the principles of natural justice, courts have devised a kind of code of fair administrative procedure.

42. Generally, no provision is found in most of the statutes requiring observance of the principles of natural justice by adjudicating authorities. Generally the maxim Audi Alteram Partem includes two elements (i) notice and (ii) hearing.

43. The principle of natural justice require that before any action likely to effect a person is taken, he must be given a notice to show cause why proposed action should not be taken against him. The authority must inform such person, the allegation against him and seek his explanation. This is one of the basic facets of natural justice and is a sine-qua-non of the right of fair hearing. This is the starting point of adjudicating process. If, this first step is missing, all the consequential action would be declared null and void. Only if the party has knowledge about the allegations levelled against him that he may be able to controvert them and defend himself effectively. Without notice, a right

of hearing will become illusory and an empty formality. The notice to be valid and effective, must be properly served on the concerned person. It must give sufficient time to enable the individual to prepare his case. Not giving sufficient time amounts to denial of notice. It depends upon facts of each case whether the individual was allowed sufficient time to make representation against the notice issued to him.

44. Coming to the facts of the present case, it has been pointed out by the learned counsel for the petitioner that a notice dated 14.09.2023 issued by the respondent no. 4 was received by the petitioner on 15.09.2023. The aforesaid notices have been annexed at page no. 195 & 196 of the paper book. From the perusal of the same, it is clear that the aforesaid notices were issued in Case No. T-202301010103629 under Section 26 of U.P. Revenue Code, 2006 regarding village Jaganpur, Tehsil Sadar, District Agra for Bhukhand No. 309 recorded as Rasta Shreni 6-2, area 0.807 hectare and regarding Bhukhand No. 320 recorded as Rasta Shreni 6-2, area 0.1040 hectare whereas, the respondents authorities have registered two separate cases i.e. Case No. T202301010103629 under Section 26 of U.P. Revenue Code, 2006 and Case No. T-202301010103627 under Section 26 of U.P. Revenue Code, 2006.

45. In paragraph no. 64A of the writ petition, it has been stated by the learned counsel for the petitioner that after the demolition and police action conducted on 23.09.2023 & 24.09.2023, the petitioner was handed over two more notices dated 14.09.2023 issued under Section 26 of U.P. Revenue Code, 2006 pertaining to Khasra No. 105, 252 & 256 of village Khaspur,

Tehsil Sadar, District Agra and Khasra No. 297M of village Jaganpur, Mustakil, Tehsil Sadar, District Agra.

46. In paragraph no. 64B of the writ petition, it has been stated that the petitioner was also given two order passed under Section 26 of U.P. Revenue Code, 2006 dated 22.09.2023. The aforesaid orders and the notices, referred above, are annexed at page no. 221 to 226 of the paper book (annexure no. 25 to the writ petition).

47. Per contra, learned Additional Advocate General contended that the petitioners were given notice regarding all the Gata Nos/Khasra for which order was passed on 22.09.2023.

48. This Court by order dated 10.10.2023 summoned the original record of the proceeding under Section 26 of U.P. Revenue Code, 2006. From the perusal of the original record, it transpires that in Case No. T202301010103629, there are five notices dated 14.09.2023 available in the original record. In the first notice regarding the Bhukhand No. 297Mi Rasta Shreni 6-2 area 0.0690 hectare, there is endorsement that the petitioners refused to take the notice. The second notice which is regarding the Bhukhand No. 271 village Jaganpur recorded as Rasta Shreni 6-2, area 0.0920 hectare, also contains an endorsement of refusal. The third notice, regarding Bhukhand No. 309 village Jaganpur, Rasta Shreni 6-2, area 0.8070 hectare and fourth notice dated 14.09.2023 regarding Bhukhand No. 320 village Jaganpur Rasta Shreni 6-2, area 0.1040 hectare are received by the petitioners, which is also admitted to the petitioner. The fifth notice regarding Bhukhand No. 326, 330Mi, 364, 371 village Jaganpur, Nahar Shreni 6-1, area 1.5330 hectare also bears

an endorsement of refusal. In Case No. T202301010103627 there is only one notice dated 14.09.2023, on record regarding Bhukhand Nos. 105, 252 & 256 village Khaspur, Sadak Bypass Shreni 6-2, area 0.2300, 1.6610 & 1.9010 hectare bearing endorsement of refusal.

49. Contention of the learned counsel for the petitioner is that only two notices were served upon the petitioner and the same were received by the petitioner and it has been further contended that there is no reason that petitioner will receive two of the notices on the same day but will refuse rest of the notices. In paragraph no. 64A of the writ petition it is mentioned that after the order was passed, two more notices were handed over to the petitioner by the respondents. Learned Additional Advocate General could not suggest any reasons to the Court as to why the petitioner who received two notices and would refuse the rest of the notices.

50. From the perusal of the orders impugned dated 22.09.2023, it is clear that though the notices were served upon the petitioner regarding two Khasra Nos. of village Jaganpur i.e. Khasra No. 309 & 320, order has been passed for Khasra Nos. 326, 330, 364, 371, 271, 309, 320, 297 of village Jaganpur and Khasra No. 105 of village Khaspur in Case No. T202301010103629 and regarding Khasra No. 105, 252 & 256 of village Khaspur in Case No. T202301010103627, thus, it is clear from the record that the petitioner was not served notice of the proposed action under Section 26 of U.P. Revenue Code, 2006 except for the two Khasra Nos. 309 & 320 of village Jaganpur, Tehsil Sadar, District Agra.

51. Thus, I am of the view that the impugned action by the respondent against the petitioner is without adequate notice to the petitioner and is in violation of principle of natural justice.

52. It has also been contended by learned counsel for the petitioner that on 22.09.2023, the petitioner appeared before the respondent no. 4 and prayed that 15 days' time may be given to the petitioner to file detailed objection to the proposed proceedings under the provisions of Section 26 of U.P. Revenue Code, 2006 as the petitioner was only served with two notices whereas the proceedings were initiated regarding other numbers of village Jaganpur and Khaspur for which no notice was served upon the petitioner. It is further submitted by learned counsel for the petitioner that the petitioner is a registered society governed by bye-laws and it was not possible for the office bearers of the society to file objections in such a short time as granted to the petitioner by the notice dated 14.09.2023.

53. Learned Additional Advocate General refuted the submissions made by learned counsel for the petitioner and submitted that by notice dated 14.09.2023, sufficient time was granted to the petitioner to submit its reply by 22.09.2023 and as such there was no illegality committed by respondent no. 3 in declining the request of the petitioner for extension of time.

54. The natural justice is nothing but procedural fairness. Considering the consequences which are likely to result if allegations are proved against the petitioner. It cannot be said that the procedure adopted by the respondent no. 4 is in consonance with the requirements of a fair trial. In **R. V. South West London**

Supplementary Benefit Appeal Tribunal, Ex 'p.' Bullen, (1976) 120 Sol Jo 437 it was held that to fail to accede to a request for an adjournment may amount to a failure to give a hearing and thus to a failure of natural justice or fairness.

55. In considering reasonableness of the request for extension of time, it is not possible to ignore that a registered society is not an individual, who has to act on its own and therefore, involving a simple process of application of mind. A registered society is governed by its bye-laws and is composed of many members. The society and the office bearers of the society has a duty to defend the society and also the individual who constituted it after observing the due procedure as provided by the bye-laws of the society which required more time in contrast to individual who has to take a decision of its own.

56. The Supreme Court in case of **Canara Bank and others v. Debasis Das and others** reported in (2003) 4 SCC 557 in paragraph no. 15 has held that the time given for the reply should be adequate so as to enable the person to make his representation. Paragraph no. 15 of the Canara Bank (Supra) is quoted as under:

“15. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should

appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate interrogate and adjudicate". In the celebrated case of *Cooper v. Wandsworth Board of Works* (1963) 143 ER 414, the principle was thus stated:

"Even God did not pass a sentence upon Adam, before he was called upon to make his defence. "Adam" says God, "where art thou has thou not eaten of the tree whereof I commanded thee that though should not eat".

Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond."

57. An attempt was made by learned Additional Advocate General to justify the rejection of request for extension on the ground that in such matters expedition is called for. Expedition is a laudable object. Since an important aspect of reasonable opportunity, in the present context, would be, whether the respondent no. 4 has any compulsion to turn down a reasonable request for extension of time. True, the

requirement of reasonable opportunity is of universal application but what will be a reasonable opportunity in different sets of circumstances is flexible concept. While the person affected must be heard, the scope and content of hearing could be suitably, moderated or tailored to the peculiar requirement of a situation. Thus, the situational modification of the opportunity has been recognized in law. Ordinarily, a reasonable opportunity must mean, the fullest possible opportunity having regard to the totality of the circumstances. In emergency conditions, or where there are other compulsions, the scope of opportunity could be reasonably restricted. It is necessary in all such situations that the respondent no. 4 to act in a manner which would strike a reasonable balance between requirement of a reasonable opportunity and the compulsion of given situation. Was there any emergency or other urgency in the present case which could have justified the rejection of reasonable request for extension?

58. I looked in vain for any such factor. Learned Additional Advocate General who sought to justify the order passed by the respondent was unable to give any satisfactory explanation, I, am therefore, unable to see any reason why the respondent no. 4 rushed through specially when the notice regarding other khasra numbers was not served upon the petitioner coupled with the fact that the petitioner is not an individual but a society. Therefore, I am of the view that the petitioner society had not been given a reasonable opportunity of being heard and, in any event, in view of the rejection of its reasonable request for extension, it could not be said by any process of reasoning that it appeared that the opportunity was

reasonable. In any event, even if, one had any reasonable doubt, if reasonable opportunity had been denied or reasonable request for extension was turned down or whether reasonable opportunity had been given or would appear to have been given, one would rather resolve the doubt in favour of person affected rather than in favour of authority which exercise the power more particularly in case like this with unusual features. A cryptic reply turning down request was wholly arbitrary.

59. It has been contended by learned counsel for the petitioner that once the application for extension of time was denied by respondent no. 4 and time was granted till 04:00P.M. to submit its reply, the petitioner filed objections before the respondent no. 4. The petitioner filed objections specifically raising plea that the respondent authorities has no jurisdiction to proceed under Section 26 of U.P. Revenue Code, 2006 as the land in question is within the jurisdiction of Nagar Panchayat Dayal Bag, Agra and provision of U.P. Revenue Code, 2006 are not applicable.

60. It has been further contended by learned counsel for the petitioner that while deciding the application under Section 26 of U.P. Revenue Code, 2006, the respondent no. 4 has not considered or given any finding to the objection raised by the petitioner. No reason has been given by the respondent no. 4 for rejecting the objection filed by the petitioner.

61. Learned Additional Advocate General refuted the submissions made by learned counsel for the petitioner. From the perusal of the original record of the case, it is clear that an objection was filed by the petitioner on 22.09.2023 which is at page no 2 of the record wherein though the

petitioner has stated that it is not possible for them to submit reply in such a time but in paragraph no. 7 of the aforesaid objection, a legal plea was raised by the petitioner that the property in dispute comes within the jurisdiction of Nagar Panchayat, Dayalbag, Agra and therefore, Chapter IV of U.P. Revenue Code, 2006 is not applicable. The notice under Section 26 of U.P. Revenue Code, 2006 is therefore, without jurisdiction.

62. In the order impugned, there is no reference to the objections raised by the petitioner as to jurisdiction and non applicability of U.P. Revenue Code, 2006 to the present proceedings. No finding has been recorded by the respondent no. 4 and has straightway passed the order for eviction.

63. The Supreme Court in case of **Raghubir Singh Sehrawat v. State of Haryana and others** reported in (2012) 1 SCC 792 has held (para 40, page 805): recommendations by Land Acquisition Officer must reflect objective application of mind to the objections filed by the land owners or other interested persons. Para 40 of the Raghubir Singh Sehrawat (Supra) is quoted as under:

“40. Though, it is neither possible nor desirable to make a list of the grounds on which the landowner can persuade the Collector to make recommendations against the proposed acquisition of land, but what is important is that the Collector should give a fair opportunity of hearing to the objector and objectively consider his plea against the acquisition of land. Only thereafter, he should make recommendations supported by brief reasons as to why the particular piece of land should or should not be acquired and

whether or not the plea put forward by the objector merits acceptance. In other words, the recommendations made by the Collector must reflect objective application of mind to the objections filed by the landowners and other interested persons.”

64. Again in case of **Nareshbhai Bhagubhai and others v. Union of India and others** reported in **(2019) 15 SCC 1** along with other case, the Supreme Court in paragraph no. 20 of the aforementioned judgment has held as under:

“20. The limited right given to a landowner/interested person to file objections, and be granted a personal hearing under Section 20-D cannot be reduced to an empty formality, or a mere eyewash by the competent authority. The competent authority was duty-bound to consider the objections raised by the appellants, and pass a reasoned order, which should reflect application of mind to the objections raised by the landowners. In the present case, there has been a complete dereliction of duty by the competent authority in passing a reasoned order on the objections raised by the appellants.”

65. Coming to the facts of the present case, what to say about consideration of limited objections which were filed as to the application of the Act and jurisdiction of the authority to proceed has not even been mentioned in the order impugned. Therefore, I am of the view that the order impugned is vitiated for non consideration of objections raised by the petitioner.

66. Thus, the order impugned has been passed in utter disregard to the principles of natural justice as notice was not given to the petitioner, time given for reply was not sufficient time and the

respondent no. 4 has erroneously rejected the application filed by the petitioner for extension of time for filing the objections. The respondent no. 4 in order impugned has not at all considered the objection which was filed by the petitioner after his application for extension of time was rejected and the order contains no reasons.

67. So far as the contention of the learned Additional Advocate General that the petitioner has alternative remedy of filing revision under Section 27 of U.P. Revenue Code, 2006 is also devoid of merits as I have already held that the order impugned has been passed in violation of principles of natural justice.

68. The Hon’ble Apex Court in case of **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others** reported in **(1998) 8 SCC 1**, (in Paragraph Nos.14 and 15 of the Judgment at Page 9 & 10) has held that alternative remedy would not operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of principle of natural justice or where order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. Paragraph Nos. 14 and 15 of the judgment in case of Whirlpool Corporation (supra) is quoted as under :-

14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. The power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the

Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of principle of natural justice or where order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

69. Recently in case of **Uttar Pradesh Power Transmission Corporation Ltd and another Vs. CG Power and Industrial Solutions Ltd and another** reported in (2021) 6 SCC 15, (in paragraph 67 of the judgment at Page 52), the Apex Court has held as under :-

67. It is well settled that availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case. The High Court may entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly (1) where the writ petition

seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv) the vires of an Act is under challenge. Reference may be made to Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. reported in AIR 1999 SC 22 and Pimpri Chinchwad Municipal Corporation and Ors Vs. Gayatri Construction Company and Ors, reported in (2008) 8 SCC 172, cited on behalf of Respondent No.1.

70. Again in case of **Ghanashyam Mishra and Sons Private Ltd through the Authorised Signatory Vs. Edelweiss Asset Reconstruction Company Ltd through the Director and others** reported in (2021) 9 SCC 657 (in Paragraph 137 at Page 726), the Apex Court has reiterated the same which is quoted as under :-

“137. As held by this Court in catena of cases including in the cases of Babu Ram Prakash Chandra Maheshwari vs. Antarim Zilla Parishad Muzaffar Nagar reported in AIR 1969 SC 556, Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors. Reported in (1998) 8 SCC 1, Nivedita Sharma vs. Cellular Operators Association of India & Ors. Reported in (2011) 14 SCC 337, Embassy Property Developments Pvt. Ltd. vs. State of Karnataka and Others reported in (2020) 13 SCC 308 and recently in the case of Kalpraj Dharamshi Vs. Kotak Investment Advisors Ltd., that nonexercise of jurisdiction under Article 226 is a rule of self-restraint. It has been consistently held that the alternate remedy would not operate as a bar in at least three contingencies, namely,

(1) where the writ petition has been filed for the enforcement of any of the Fundamental Rights;

(2) where there has been a violation of the principle of natural justice; and

(3) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.”

71. In view of the same and considering the facts and circumstances of the present case I am of the opinion that relegating to the petitioner to the alternate remedy would serve no purpose.

72. Accordingly, the writ petition, is allowed.

73. The order dated 22.09.2023 passed by respondent no. 4, passed in Case No. 3627/2023 (CIN No. T202301010103627) (Local Administration v Radhasoami Satsang Sabha) and Case No. 3629/2023 (CIN No. T202301010103629) (Local Administration v Radhasoami Satsang Sabha), are hereby quashed.

74. However, it will be open for the respondent to pass fresh orders after providing opportunity of hearing to the petitioners, in accordance with law without being prejudiced by any of the findings recorded by this Court as I have not considered the merits of the claim of the petitioner.

75. This writ petition has been allowed only on the ground of non observance of principle of natural justice and I have not considered the other reliefs claimed by the petitioner in the present writ

petition, therefore, it will be open for the petitioner to claim such other reliefs as and when the occasion arise for the same.

(2023) 11 ILRA 295
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2023
BEFORE

THE HON'BLE PRASHANT KUMAR, J.

Writ C No. 35587 of 2023

United Forum of We Bankers, Kanpur & Anr. ...Petitioners

Versus

Central Government Industrial Tribunal (Labour Court), Kanpur & Ors.

...Respondents

Counsel for the Petitioners:

Sri Ashutosh Sharma, Sri Rakesh Pande
(Sr. Advocate)

Counsel for the Respondents:

Sri Sunil Kumar Mishra

Civil Law - Industrial Disputes Act, 1947 – Sections 2(ra), 20, 33, 33A – Sastry Award, Paragraph 535 – Constitution of India, 1950 – Article 226 – Writ Jurisdiction – Transfer of Employee – Protected Workman – Mala Fide – Administrative Exigency – Judicial Review

The petitioners, United Forum of We Bankers (a trade union) and Ashish Mishra (an employee and General Secretary of the union), challenged the composite award dated 29.07.2023 by the Central Government Industrial Tribunal, Kanpur, and the transfer order dated 21.03.2022 transferring petitioner no. 2 from Kanpur to Hardoi. Petitioner no. 2, a bank clerk since 2013, alleged the transfer was mala fide, violated paragraph 535 of the Sastry Award, and constituted unfair labour practice under Section 2(ra) due to his trade union activities. The bank issued a notice of transfer on 09.03.2022, complied with Sastry Award procedures, and

argued the transfer was for administrative exigency, not mala fide, as it involved multiple employees. The Tribunal's earlier interim order cancelling the transfer was stayed by the High Court, and petitioner no. 2's special appeal was dismissed. The Tribunal's final award upheld the transfer, finding no violation of the Act or Sastry Award. Held: (1) The writ petition was dismissed. (2) The transfer order dated 21.03.2022 was valid, as it was made for administrative exigency, complied with paragraph 535 of the Sastry Award, and involved other employees, negating claims of mala fide or victimization. (3) Petitioner no. 2 was not a "Protected Workman" under Section 33(3) at the time of transfer, as his status was recognized only on 12.08.2022, post-transfer. (4) The Tribunal's award was justified, as it did not exceed the terms of reference and correctly found no violation of the Industrial Disputes Act or Sastry Award. (5) Judicial interference in transfer orders is limited to cases of mala fide, statutory violation, or arbitrariness, as per Management of Syndicate Bank Ltd. Vs Workmen and U.O.I. Vs S.L. Abbas. No evidence supported petitioner no. 2's claims of mala fide or unfair labour practice. (6) Petitioner no. 2's multiple legal proceedings, including strike notices and a criminal case, constituted an abuse of process to pursue personal agendas, not union interests. (7) Transfer is an incident of service, and employees in transferable posts have no right to insist on a particular posting, as per B. Vardha Rao Vs St. of Karnataka and Shilpi Bose Vs St. of Bihar.

Case Law Cited:

1. Arkal Govind Rajrao Vs Ciba Geigy of India Ltd., (not fully cited in judgment)
2. Bangalore Water Supply and Sewerage Board Vs A Rajappa, (1978) 2 SCC 213
3. M/s Tata Iron and Steel Company Ltd. Vs St. of Jharkhand & ors., (2015) 2 SCC 33
4. Punjab National Bank Vs U.O.I. & ors., (not fully cited in judgment)
5. Prafulla Kumar Vs Bank of India & ors., (not fully cited in judgment)

6. Air-India Corporation, Bombay Vs VSA. Rebellow & anr., (1972) 1 SCC 814
7. G.VS Triveni Prasad Vs Syndicate Bank & ors., (not fully cited in judgment)
8. Namrata Verma Vs St. of U.P. & ors., (2015) 2 SCC 49
9. Lalit Kumar Prasad Vs St. Bank of India & ors., (not fully cited in judgment)
10. Management of Syndicate Bank Ltd. Vs Workmen, (1966) Supp SCR 209
11. Bareilly Electricity Supply Co. Ltd. Vs Sirajuddin, (not fully cited in judgment)
12. B. Vardha Rao Vs St. of Karnataka, (1986) 4 SCC 131
13. Shilpi Bose Vs St. of Bihar, (1991) Supp (2) SCC 659
14. U.O.I. Vs S.L. Abbas, (1993) 4 SCC 357
15. N.K. Singh Vs U.O.I., (1994) 6 SCC 98
16. Chief General Manager, (Telecom) N.E. Telecom Circle Vs Rajendra Ch. Bhattacharjee, (1995) 2 SCC 532
17. St. of M.P. Vs S.S. Kourav, (1995) 3 SCC 270
18. S.C. Saxena Vs U.O.I., (2006) 9 SCC 583

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

1. This writ petition has been filed by an employee of a bank challenging his transfer order from Kanpur to Hardoi.

2. The brief facts of the case are that petitioner no.1 is an Employees' Union and petitioner no.2 is an employee of the bank and also an office bearer of the petitioner-Union. Petitioner no.2 had joined the bank on 18.7.2013 in the clerical cadre and was first posted at Hardoi. After completing two

years, on 30.7.2015 he was transferred to Kaushalpuri Branch in District-Kanpur. While being posted at Kanpur, he became the General Secretary of the petitioner-Union.

3. On 28.1.2021, petitioner no.2 was transferred from Kaushalpuri Branch to G.T.B. Marg Branch in the same district i.e. Kanpur. Immediately on his transfer, a notice for strike, under Section 20 of 'The Industrial Disputes Act, 1947' (for the sake of brevity, hereinafter referred to as 'the Act'), was given by the petitioner-Union, which culminated into conciliation proceeding by the Conciliation Officer. The Management of the Bank appeared in the conciliation proceeding wherein they agreed to consider the demand of the Union raised before the competent authority under the Industrial Disputes Act relating to transfer of petitioner no.2 and modified the transfer order and posted him at the Main Branch of the bank at Kanpur.

4. On 21.3.2022, the bank transferred petitioner no.2 from Kanpur to Mallawan Branch in District-Hardoi. Immediately, on the same day, again a strike notice (under Section 20 of the Act) was again given by the petitioner-Union. The notice was issued by Assistant Labour Commissioner (Central), Kanpur to the bank for reconciliation.

5. In addition to this proceeding, petitioner no.2 against his transfer, had filed a complaint with respondent no.1 i.e. Central Government Industrial Tribunal (Labour Court), Kanpur (for the sake of brevity, hereinafter referred as 'the Tribunal') invoking the provisions of Section 33A of the Act. This complaint was made on the ground that mandatory provisions of paragraph 535 of Sastry

Award (dated 16.6.1971) was not followed and sought protection under Section 33 (3) of the Act. He further alleged that his transfer was done with malafide intention and bad motive. He also mentioned that the proceedings are pending before the Assistant Labour Commissioner (Central) and the date for conciliation was fixed on 25.3.2022. He further alleged that transfer was made on the behest of the rival Union and the transfer amounts to "unfair labour practice" as defined under Section 2(ra) of the Act. The transfer has not been done in business interest or administrative exigencies of the bank, but the same has been made with colourable exercise of power to vindicate the General Secretary of the petitioner-Union, who has been espousing the cause of fellow employees. The transfer was punitive and was to victimize the petitioner for trade union activities. Along with this complaint, there was an application for interim relief, which was decided by respondent no.1 on 25.4.2022 cancelling transfer order dated 21.3.2022 giving liberty to the Management of the Bank to give posting to petitioner no.2 at a branch nearer to G.T.B. Marg Branch in District-Kanpur.

6. Aggrieved by the aforesaid order passed by respondent no.1 the bank on 25.4.2022, preferred Writ-C No.15734 of 2022 before this Court. The Hon'ble High Court was pleased to stay the effect and operation of the order dated 25.4.2022 by means of order dated 31.5.2022, which is being quoted below for ready reference :-

"1. Learned counsel for the petitioners submits that undisputedly the post on which the respondent-workman was engaged from before was transferable. Without answering the reference, the Labour Court has erred in providing for an

order staying the effect of the transfer order.

2. Matter requires consideration.

3. Request has been made on behalf of learned Senior Counsel appearing for the respondents for accommodation. It is the last session of the Court before vacation. Therefore, the prayer made is declined.

4. Respondents may file counter affidavit within a period of four weeks. Petitioners shall have two weeks' time thereafter to file rejoinder affidavit.

5. List on 26 July, 2022.

6. Till the next date of listing, operation and effect of the impugned order dated 25.04.2022, shall remain stayed, so however, that the respondent-workman is permitted to join at the transferred posting, within a period of two weeks from today."

7. This order dated 31.5.2022 passed by this Court was assailed by petitioner no.2, Ashish Mishra through intra court appeal No.485 of 2022 (Ashish Mishra vs. Bank of India and others), just to avoid the compliance of interim order dated 31.5.2022. The Special Appeal has been dismissed vide order dated 1.9.2022. This order is being quoted below for ready reference:-

"1. Interim order dated May 31, 2022 has been challenged by filing the present intra-court appeal. In the writ petition filed by the Management, challenge was to an order passed by the Labour Court cancelling the order of transfer of appellant No.1 herein.

2. The impugned order records that adjournment was being sought by the learned counsel for the respondents/appellants herein before the Writ Court, though the same was declined. The operation of the order impugned before

the Writ Court dated April 25, 2022 was stayed vide order dated May 31, 2022 till the next date of hearing and the writ petition was directed to be listed on July 26, 2022. Appellant No.1 was permitted to join at the transferred place within two weeks from that date.

3. The present appeal was filed in this Court in June, 2022 and is being adjourned primarily on the request of learned counsel for the appellants. Even today same prayer has been made.

4. We do not find any reason to adjourn the present appeal as otherwise also challenge is to an interim order passed by the learned Single Judge.

5. The appeal is, accordingly, dismissed."

8. Even after the dismissal of the Special Appeal, the petitioner (appellant therein) did not join at the transferred place.

9. After dismissal of the Special Appeal, the petitioner Ashish Mishra instead of joining at the transferred place, kept on sending number of notices threatening the employer-bank and deliberately abstained himself from complying with the transfer order. The writ petition filed by the bank being Writ Petition No.15734 of 2022 also was finally disposed of by means of order dated 9.1.2023, which is being quoted below for ready reference:-

"Rejoinder affidavit is taken on record.

Heard Shri. Anuj Srivastava, learned counsel for petitioner and Shri. Rakesh Pandey, learned Senior Counsel for the respondents.

The impugned order supposedly be passed under the provisions of Section

33-(2) and (3) of Industrial Disputes, Act, 1947. However, learned counsel for parties fairly submitted that Industrial Tribunal has not dealt with the issue in terms of provisions of Section 33-(2) and (3) of Industrial Disputes, Act, 1947, therefore, they requested that impugned order be set-aside and the matter be remanded back for reconsideration.

Learned counsel for petitioner submits that respondent no.4 has not joined at the transferred post as well as reference dated 10.7.2019 is still pending before Industrial Tribunal.

Considering the above submission and taking note of facts of the present case and as by the impugned order dated 25.4.2022, the application has not been decided in terms of Section 33-(2) and (3) of the Act, 1947, therefore the impugned order dated 25.4.2022 is set-aside and matter is remanded back for fresh consideration with further direction that Tribunal shall decide the above referred reference expeditiously, preferably within a period of three months from today.

As the impugned order has been set-aside, therefore, respondent no.4 is required to join on the transferred post and place in default, legal consequence may follow.

With the aforesaid direction and observation, writ petition stands disposed of.”

10. This writ petition was decided, whereby the matter was remanded back to respondent no.1 for fresh consideration. After remand a fresh application for interim relief was filed, which was also rejected on 20.1.2023. Thereafter, petitioner no.2 joined at Hardoi, where he was transferred, under protest on 1.2.2023, and thereafter he went on medical leave.

11. It is submitted that a notice dated 24.6.2022 was received by the respondent-Bank from Assistant Labour Commissioner, Kanpur on 29.6.2022 enclosing three complaints of United Forum of We Bankers(petitioner-Union herein). The reply of all the three complaints were filed by the Management.

12. Thereafter another show cause notice dated 30.8.2022 was sent from the Office of Assistant Labour Commissioner, Kanpur to the respondent, which was also duly replied.

13. In addition to the above proceedings, a Criminal Case No.87948 of 2023 was filed by the Labour Enforcement Officer before the Chief Metropolitan Magistrate, Kanpur who had summoned the Zonal Authorities namely, Shri Neeraj Tiwari (Zonal Manager), Shri Manoj Kumar Singh (the then Deputy Zonal Manager) and the then HR Head Shri Het Ram Verma.

14. Aggrieved by the same, the said authorities filed an application under Section 482 of Cr.P.C.(No.28718 of 2023) before this Hon'ble Court and this Hon'ble Court was pleased to pass the order dated 11.8.2023, which is being quoted below for ready reference:-

“1. Heard learned counsel for the applicants and learned A.G.A. for the State.

2. The present 482 Cr.P.C. application has been filed to quash the impugned cognizance/summoning order dated 01.05.2023 as well as entire proceedings of Criminal Case No.87948 of 2023 (State vs. Neeraj Tiwari & others), under Sections 29/31 Industrial Disputes Act, 1947, District Sambhal, pending in the court of CMM, Kanpur Nagar.

3. *Learned counsel for the applicants submits that allegation made in the F.I.R. does not show any criminality. Matter relates to Industrial Dispute Act and allegation in the complaint is that applicant did not reply of the show-cause notice as that would not amount to criminality done by the applicant.*

4. *Matter requires consideration.*

5. *Notice on behalf of opposite party no.1 has been accepted by learned A.G.A.*

6. *Issue notice to opposite party no.2 returnable at an early date.*

7. *Opposite parties may file their counter affidavits within six weeks. Rejoinder affidavit may be filed within two weeks thereafter.*

8. *List thereafter.*

9. *Till the next date of listing, no coercive action shall be taken against the applicants in Criminal Case No.87948 of 2023 (State vs. Neeraj Tiwari & others), under Sections 29/31 Industrial Disputes Act, 1947, District Sambhal, pending in the court of CMM, Kanpur Nagar.”*

15. In the interregnum, pursuant to notice of strike dated 21.3.2022, Government of India had issued a reference order dated 10.3.2023 for adjudication of the dispute by respondent no.1/Tribunal. The Presiding Officer of the Tribunal decided this reference as well as complaint of petitioner no.2 filed under Section 33A of the Act vide its common Award dated 29.7.2023.

16. The petitioner assailed this Award, by preferring the instant writ petition before this Hon'ble Court with the following prayers:-

“(a) *Issue a writ, order or direction in the nature of certiorari calling*

for the records and quash the impugned composite award publication dated 29.7.2023 (Annexure No.1) passed by respondent no.1 i.e. Central Government Industrial Tribunal, Kanpur Nagar in Industrial Dispute No.13 of 2023 {Shri Kamlesh Chaturvedi (National Convenor) United Forum of We Bankers Versus Zonal Manager, Bank of India} and in Complaint under Section 33A of the Industrial Disputes Act, 1947 dated 29.9.2022 filed by petitioner no.2;

(b) *Issue a writ, order or direction in the nature of certiorari calling for the records and quash the impugned transfer order dated 21.3.2022 issued by respondent no.4 i.e. Zonal Manager, Bank of India;*

(c) *Issue a writ, order or direction in the nature of mandamus directing and commanding the respondents to restore the position of the petitioner no.2 which was prevailing prior to issuance of transfer order, so far as posting of the petitioner no.2 is concerned;*

(d) *any other writ, order or direction which the Hon'ble Court may deems fit in the facts and circumstances of the present case; and*

(e) *Award cost of the writ petition in favour of the petitioners.”*

17. Sri Rakesh Pande, learned Senior Counsel assisted by Sri Ashutosh Sharma, learned counsel for the petitioners argued as follows:-

(a) Petitioner no.2 and the respondent-Bank fall under the definition of ‘workman’ and ‘industry’ as per the distinction clause contained in the Act and for this he relied on leading judgments on the definition of ‘workman’ which are-

(i) **Arkal Govind Rajrao v. Ciba Geigy of India Ltd.**¹

(ii) Bangalore Water Supply and Sewerage Board v. A Rajappa²

(b) The impugned award dated 29.7.2023 is self contradictory as it holds that the transfer of petitioner no.2 is contrary to the bipartite settlement and the Sastry Award and in the same breath has proceeded to record that the transfer order cannot be said to be illegal. Once it is held to be contrary to the settlement, it vitiates the transfer order. The Tribunal instead of answering the reference itself left the dispute open into the hands of the respondent bank, which has caused serious prejudice to petitioner no.2.

(c) The Tribunal had gone beyond the terms of reference and has failed to give any finding regarding violation of the provisions of the Act. In support of his submission, he has placed reliance on a judgment of Hon'ble Supreme Court passed in the matter of **M/s Tata Iron and Steel Company Limited vs. State of Jharkhand and others³**, wherein the Court has held that jurisdiction of Industrial Tribunal is limited to the points reference whereof is made, and the Tribunal should not go beyond the terms of the reference.

(d) The learned Tribunal has completely failed to appreciate, the fact of violation of paragraph 535 of the Sastry Award, and deemed status of petitioner no.2 of "Protected Workman".

(e) The findings of the Tribunal, wherein it has been held that transfer is a condition of service, is patently illegal.

(f) The impugned award was passed contrary to the directions of this Court as contained in order dated 9.1.2023 whereby order dated 25.4.2022 was set aside and the matter was remanded back for fresh consideration.

(g) The Tribunal in the impugned award has failed to consider that there was

violation of bank's own guidelines and policy regarding transfer of its employees.

(h) Transfer order of petitioner no.2 suffers from malafide on part of the Bank Management.

18. Learned counsel for the petitioners has relied on a judgment passed by Hon'ble Supreme Court in **Arkal Govind Rajrao's case (supra)** which lays down the test as to which employee falls under the managerial or supervisory category. He has further relied on **Tata Iron and Steel Co. Ltd.'s case (supra)** wherein the Hon'ble Supreme Court has remanded the matter back to the Central Government to decide the reference afresh as the earlier reference was defective.

19. Learned counsel for the petitioners has further relied on a judgment passed by Single Judge of this Court in the case of **Punjab National Bank vs. Union of India and others⁴** wherein it has been held that Section 33 of the Act gives protective umbrella to the workman.

20. Reliance has also been placed on a judgment passed by Patna High Court in the matter of **Prafulla Kumar vs. Bank of India and others⁵** wherein it has been held that Secretary of the Association of Clerks is required to be given some protection against any vindictive order of transfer. Transfer of an office bearer of an association is prone to be looked with suspicion unless the guidelines are followed to the letter and spirit. The transfer should not be in complete derogation of the guidelines.

21. Paragraph 535 of the Sastry Award is being reproduced hereinbelow for ready reference:-

535. Policy regarding transfers is a constant source of friction between the banks and the workmen now organized into unions. The cry of victimization of office bearers and "activists" of trade unions is raised wherever such transfers are mooted. We have found that such allegations are easily made but not so easily substantiated. Transfers are rendered necessary by the exigencies of administration. The proper view to take is that transfers are normal incidents of the working of a bank and they must be left to the discretion of those who guide the policy of the bank and manage its affairs. It is possible that the discretion may be abused and transfers effected on considerations other than, the needs of administration. The percentage of transfers as shown by the figures furnished by some of the banks in the course of arguments leads us to the conclusion that the question of transfer, even as it affects only a very small number of persons. This is conceded by the workmen also. Still wherever an activist of the trade union movement, as yet in its formative stage and liable to be crippled easily, is transferred a suspicion naturally arises that it is inspired by ulterior motives and the consequence thereof may be an industrial dispute. In order that such suspicions may be avoided as far as possible we adopting the Sen Award in this respect, give the following directions:-

(1) Every registered bank employees' union, from time to time, shall furnish the bank with the names of the President, Vice-President and the Secretaries of the union;

(2) Except in very special cases, whenever the transfer of any of the above-mentioned office bearers is contemplated, at least five clear working days' notice should be put up on the notice boards of the bank of such contemplated action;

(3) Any representations, written or oral, made by the union shall be considered by the bank;

(4) If any order of transfer is ultimately made, a record shall be made by the bank of such representations and the bank's reasons for regarding them as inadequate; and

(5) The decision shall be communicated to the union as well as to the employee concerned.

22. On the contrary, Sri Sunil Kumar Misra, learned counsel appearing on behalf of respondent nos.2 to 4 submitted that transfer of Ashish Mishra (petitioner no.2) does not amount to violation of any service condition of the employee, who had accepted transferable job right from beginning. The transfer of petitioner no.2 was done in exigencies of banking operations. Workman" and is not entitled to claim the benefit accruing to a "Protected Workman". It is submitted that the bank does not recognize the petitioner no.2 as an office bearer of any registered trade union as despite making several requests to the Union to submit the names of its officer bearers, time and again, but there was no response, and no names of petitioner no.1 office bearers were ever furnished to the bank, which is a violation of para 535(2a) of the Sastry Award, which reads as under :

"Every registered bank employees' union from time to time shall furnish the Bank with the names of the President, Vice-President and the Secretaries of the Union."

24. The Bank had displayed the notice dated 9.3.2022 on the Notice Board in compliance of Para 535 of the Sastry Award, which clearly mentions that "the

notice should be put up on the notice boards of the bank". The notice mentioned the proposed transfer of number of clerks including Shri Ashish Mishra on Bank's notice board. Hence, there is no violation of Para 535 of the Sastry Award in respect of transfer of petitioner no.2.

25. Learned counsel for the respondents submitted that petitioner no.2 has not submitted any proof to establish that petitioner no.1, United Forum of We Bankers (Federation) is a registered trade union. His further contention is that the word "Registered Bank Employees Union" shall mean and refer to a Union registered under the Trade Union Act, 1926 and not to Branch/Region/Zonal level units thereof. The complainant union being a regional level unit operating in the limited area with the State of U.P. do not fall under the purview of para 535 of the Sastry Award. Petitioner no.1-Union as on the date of issuance of the transfer order, had not submitted the names of the office bearers in spite of Bank's written notice to them and subsequent reminder thereof. Since there is no record of Ashish Mishra (petitioner no.2) being an office bearer of the union, the transfer order was issued to him in ordinary course and he was relieved accordingly to report on duty at the place of his transfer. Transfer of any employee of a bank lies within managerial prerogative. Petitioner no.2 was not a "Protected Workman" on the date of transfer but he was declared as "Protected Workman" by the Assistant Labour Commissioner (Central) on 12.8.2022. Hence, any benefit of "Protected Workman" will only accrue from 12.8.2022 and not prior to that. He further submitted that law is well settled that the date of dismissal of a workman is relegated to the date of such order passed by the Management, likewise, date for

confirmation of status of "Protected Workman" is to be logically reckoned from the date on which his claim for such status crossed upon the first occasion before the Management. In this scenario, petitioner no.2 can only be reckoned with as "Protected Workman" under Section 33(3) of the Act with effect from 12.8.2022.

26. The concept of harmonious relationship between employer and employee is stated in paragraph 535 of the Sastry Award. Clause 2 to paragraph 535 of the Sastry Award makes it clear that whenever transfer of office bearers is contemplated, five days' notice should be put up on the notice board of the bank. Every step as stated in paragraph 535 of the Sastry Award has been complied with by the bank in pith and substance.

27. It is further contended that the transfer of petitioner no.2 was made purely on administrative ground, since 64 clerk staffs in the zone were promoted as Zonal Banking Officers, hence, transfer of petitioner no.2 with seven other staff clerks was owing to administrative exigency. Apart from petitioner no.2, another office bearer of a recognized union of the bank was also transferred. Hence, there is no malafide intention in transfer of petitioner no.2. The transfer of petitioner no.2 was totally in sync with the Sastry Award. He further submitted that there is no provision in any of the Settlements/Awards/Guidelines which give immunity to the office bearer as "Protected Workman" by virtue of holding any post in the Trade Union. There is certain procedure which is clearly stated in the Industrial Disputes Act, 1947. Accordingly, the contention of petitioners' alleged union is vehemently denied.

28. Learned counsel for the respondents has further submitted that petitioner no.2 has been misusing his post and has initiated various proceedings in all possible Forums, Tribunals and Courts, which is a pure abuse of process of law. Following are the proceedings initiated by petitioner no.2 before different forums against his transfer order:-

(i) A notice for strike when he was transferred on 21.8.2021 which registered in cancellation of transfer order.

(ii) A notice for strike when he was transferred on 21.3.2022.

(iii) Complaint before Industrial Tribunal invoking Section 33A of the Act.

(iv) Special Appeal filed against the judgment passed in writ petition preferred by respondent nos.2 to 4.

(v) A criminal case bearing No.87948 of 2023 was filed before Chief Metropolitan Magistrate, Kanpur in which all top brass officers were arrayed as accused and have been summoned in the Court. Against this summoning Application under Section 482 Cr.P.C. No.28718 of 2023 has been filed, which is pending consideration before this Court.

29. Learned counsel for the respondents has placed reliance on a judgment passed by Hon'ble Supreme Court in **Air-India Corporation, Bombay vs. V.A. Rebellow and another**⁶, wherein it was held as under:-

"10. The employer is accordingly left free to deal with the employees when the action concerned is not punitive or mala fide or does not amount to victimisation or unfair labour practice."

30. He has further relied upon a judgment passed by Andhra Pradesh High Court in the matter of **G.V. Triveni Prasad vs. Syndicate Bank and others**⁷, wherein the Court has held as under:-

"Transfer is not a condition of service, but is merely an incidence of service. An employee, who joins service of an employer having establishments or offices all over India, can be posted in any part of the country and he cannot be heard to complain against transfer from one place to the other. If he fails to comply with or disobeys the order of transfer/posting, he does so at his own peril. Ordinarily, the Court will not interfere with the employer's prerogative to transfer and post an employee from one place or station to the other unless it is established that the action of the employer is contrary to the statutory provisions or is vitiated due to patent arbitrariness or mala fides. This proposition must be treated as settled by the judgments of the Supreme Court in B. Varadha Rao v. State of Karnataka , Abani Kanta Ray v. State of Orissa 1995 Supp. (4) SCC 169, Union of India v. S.L. Abbas , Public Services Tribunal Bar Association v. State of UP. , Union of India v. Janardhan Debanath and Kendriya Vidyalaya Sangathan v. Damodar Prasad Pandey ."

31. Further reliance has been placed on a judgment passed by Hon'ble Supreme Court in the matter of **Namrata Verma vs. State of U.P. and others**⁸, wherein Hon'ble Court has held as follows:

"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."

32. He has also relied upon the case of **Lalit Kumar Prasad vs. State Bank of India and others**⁹ passed by Division Bench of Patna High Court, wherein the Court has observed as follows:-

“Transfer and postings are normal incidence of service and no employee has a vested right to demand posting at a particular place or continuance at a location. The employer is the best judge for utility, suitability and need of an employee at a particular location. Casual interference with orders of transfer by a Court on every small infraction shall create more administrative turmoil than the court may attempt to solve by its orders.....If the power to transfer be there, an employee shall always have a grievance on one ground or the other, especially if he is transferred to a place not of his liking. To demonstrate malice in law, there has to be a level of wanton conduct, on grounds not germane and irrelevant, preceded by a course of events which indisputably only points to victimisation as a justification. Issues of deficit or surplus staff are for the bank to decide and not for the Court to usurp the role and substitute its views for that of the Bank.”

33. Heard learned counsel for the parties and perused the record.

34. A plain reading of the Sastry Award lays down that whenever transfer of any office bearers are made, a cry for victimization is also made by the Union. These allegations are easily made but are not sustainable. Transfers are necessary for exigencies of the administration. Transfers are normal incidents of working of the bank and they must be left to the discretion of those who are guided with policy of bank and manage

its affairs. Whenever office bearer of a Trade Union is transferred, a suspicion naturally arises and consequences thereof would be industrial dispute and to avoid such disputes certain steps were laid down in the Sastry Award.

35. In this case, respondent claims to have followed each and every step of the Sastry Award and hence, the petitioner cannot take benefit of paragraph 535 of the Sastry Award.

36. Section 33 of the Act defines “Protected Workman”, but in this case, petitioner no.2 was declared as “Protected Workman” by Assistant Labour Commissioner (Central) vide order dated 12.8.2022. However, the transfer order was on 21.3.2022, i.e. much prior to the date on which the petitioner was declared as “Protected Workman”, and hence, he is not entitled to get benefit of the “Protected Workman” as claimed by him.

37. Learned counsel for the petitioner has alleged malafide and stated that the transfer was nothing but was vindictive action against the trade union activities done by the petitioner. It is alleged that transfer order dated 21.3.2022 has been passed with ulterior motive of keeping the concerned workman, who is an activist of the trade union movement holding principal position in Unions of workman of the Banks, at bay away from Kanpur. In response to this, petitioner could not place any document on record to show that the order of transfer was outcome of malafide act or was vindictive in nature. There is not an iota of evidence to show that the transfer was made with any kind of malafide intention.

38. On the contrary, it was petitioner no.2, who soon after getting his transfer order, called

for a strike and tried to cripple the banking function of respondent nos.2 to 4. No Trade Union Activist can use his position for his personal gain. Petitioner could not place any document to show that the strike, which was called on 21.3.2022, was with any reason or in the interest of bank employee who are represented by petitioner No.1-Union. The entire process was nothing but to pressurize respondent nos.2 to 4 to cancel the transfer order of petitioner no.2, who had been using his post of General Secretary of the Union to address his personal agendas.

39. So far as the applicability of judgment passed in **Arkal Govind Rajrao's case (supra)** relied upon by learned counsel for the petitioners is concerned, the same has no bearing in the case in hand as it only lays down the distinction between the managerial and the supervisory post.

40. Judgment passed in **Tata Iron and Steel Co. Ltd.'s case (supra)** cited by learned counsel for the petitioners also does not have bearing in the instant case as in that case the reference made in the Industrial Tribunal was clearly defective, hence, the Hon'ble Supreme Court has remanded the matter back to the Tribunal for reconsideration.

41. In another judgment passed by this Court in **Punjab National Bank's case (supra)** and cited by learned counsel for the petitioners, it has been held that an employee would get protective umbrella of Section 33A of the I.D. Act as soon as conciliation proceeding arises, but in this case the order of transfer was passed on

21.3.2022, immediately, notice for strike was called and it was thereafter that the matter was referred for conciliation proceeding. In view of this judgment, protective umbrella under Section 33A of the I.D. Act would only come as soon as conciliation proceeding arises and in this case, the conciliation proceeding commenced after the transfer order was passed, hence, the protective umbrella under Section 33A of the I.D. Act would not be extended to petitioner no.2, taking into accounts the facts of this case.

42. Reliance has also been placed on the judgment passed in **Prafulla Kumar's case (supra)** wherein the Court has held that transfer should not be in complete derogation of guidelines but there was no bar in making the transfer of an employee.

43 Hon'ble Supreme Court in the matter of **Management of Syndicate Bank Ltd. vs. Workmen**¹⁰ has dealt with Sastry Award and has held as under:-

"Having analysed the evidence in this case, we are of opinion that the finding of the Tribunal that the transfer of Veeranna is mala fide is not supported by any evidence and it is, therefore, perverse and defective in law. There is no doubt that the Banks are entitled to decide on a consideration of the necessities of banking business whether the transfer of an employee should be made to a particular branch. There is also no doubt that the management of the Bank is in the best position to judge how to distribute its employees between the different branches. We are, therefore, of opinion that Industrial Tribunals should be very careful before they interfere with the orders made by the Banks in discharge of their managerial functions. It is true that if an order of

transfer is made mala fide or for some ulterior purpose, like punishing an employee for his trade union activities, the Industrial Tribunals should interfere and set aside such an order of transfer, because the mala fide exercise of power is not considered to be the legal exercise of the power given by law. But the finding of mala fide should be reached by Industrial Tribunals only if there is sufficient and proper evidence in support of the finding. Such a finding should not be reached capriciously or on flimsy grounds as the Industrial Tribunal has done in the present case. This view is borne out by the decision of this Court in Bareilly Electricity Supply Co. Ltd. v. Sirajuddin.11”

44. In the case of **B. Vardha Rao v. State of Karnataka**¹², the Hon’ble Supreme Court while considering the case of transfer of a Government employee has held that, transfer is an incident of service. Order of transfer not resulting in alteration of any condition of service to his disadvantage need not be interfered.

45. In **Shilpi Bose v. State of Bihar**¹³, the Hon’ble Supreme Court has observed that where competent authority issues transfer orders with a view to accommodate public servant to avoid hardship, the same cannot and should not be interfered with by the Court merely because the transfer orders were passed on the request of the employees concerned. The Court should not interfere with the transfer orders which are made in public interest and for administrative reason unless and until the order of transfer are made in violation of any mandatory statutory rules or on the ground of malafide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other.

46. The Hon’ble Supreme Court in the case of **Union of India v. S.L. Abbas**¹⁴ has held as under:-

“Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by malafide or is made in violation of any statutory provisions, the Court cannot interfere with it.....”

47. Hon’ble Supreme Court in the case of **N.K. Singh v. Union of India**¹⁵ has held as follows:

“.....Transfer of a government servant in a transferable service is a necessary incident of the service career. Assessment of the quality of men is to be made by the superiors taking into account several factors including suitability of the person for a particular post and exigencies of administration. Several imponderables requiring formation of a subjective opinion in that sphere may be involved, at times. The only realistic approach is to leave it to the wisdom of that hierarchical superiors to make that decision. Unless the decision is vitiated by mala fides or infraction of any professed norm or principle governing the B. Vardha Rao v. State of Karnataka transfer, which alone can be scrutinised judicially, there are no judicially manageable standards for scrutinising all transfers and the courts lack the necessary expertise for personnel management of all government departments.”

48. The law regarding transfer and postings, the limits for judicial interference, have been laid down by Hon’ble Supreme Court in the matter of **Chief General Manager, (Telecom) N.E. Telecom Circle v. Rajendra Ch. Bhattacharjee**¹⁶. In the

aforesaid judgment, the Hon'ble Court has held as under :-

"7. It is needless to emphasise that a government employee or any servant of a Public Undertaking has no legal right to insist for being posted at any particular place. It cannot be disputed that the respondent holds a transferable post and unless specifically provided in his service conditions, he has no choice in the matter of posting. Since the respondent has no legal or statutory right to claim his posting at Agartala, therefore, there was no justification for the Tribunal to set aside the respondent's transfer to Dimapur."

49. In the case of **State of M.P. v. S.S. Kourav**¹⁷, the Hon'ble Supreme Court has held as below:-

"....The courts or Tribunals are not appellate forums to decide on transfers of officers on administrative grounds. The wheels of administration should be allowed to run smoothly and the courts or tribunals are not expected to interdict the working of the administrative system by transferring the officers to proper places. It is for the administration to take appropriate decision and such decisions shall stand unless they are vitiated either by malafides or by extraneous consideration without any factual background foundation. In this case we have seen that on the administrative grounds the transfer orders came to be issued. Therefore, we cannot go into the expediency of posting an officer at a particular place."

50. It has further provided by the Hon'ble Supreme Court in the case of **S.C. Saxena v. Union of India**¹⁸ that a Government Servant cannot disobey a transfer by not reporting at the place of

posting and then go to Court to ventilate his grievance and that it is his duty first to report for work where he is transferred and make a representation if he has got any personal problems.

51. This Hon'ble Court in the matter of **Vijay Kumar Saxena vs. Dy. Director of Education and others**¹⁹ has held as under:-

*"Even if it is presumed that the petitioner is office-bearer of some association and there is Government policy decision laying down that no office bearer of an Association should be transferred, this Court cannot interfere in view of a decision of Supreme Court in the case of **Shilpi Bose v. State of Bihar** (supra) wherein it was held that if the transfer order has been passed in violation of Government policy decision and Guide lines the High Court should not interfere with such an order and persons aggrieved can make representation before the authority concerned. This Court also in the case of **Govind Pratap Singh v. Managing Director, U.P. State Road Transport Corporation, Lucknow**²⁰ following the above decision of Supreme Court, has laid down that this Court cannot interfere with the order of transfer merely on the ground that the petitioner is office-bearer of some Association Union and the only remedy before the employee aggrieved is to make representation before appropriate authority."*

52. In the case of **Natthi Lal v. Director, Rajya Krishi Utpadan Mandi Parishad**²¹, this Court while considering the various judgments of the Hon'ble Supreme Court has held that, normally it is not permissible for the High Court to interfere in the order of transfer.

53. This Hon'ble Court in the case of **Keshav Deo Sharma vs. Assistant Regional Manager, UPSRTC22** and others it has been held as under:-

"5. But from the record it appears that the petitioner is involved in various Union activities and is not permitting the other employees of the Corporation to run the Corporation smoothly. It is not the case of the petitioner that the petitioner cannot be transferred from one place to another. The petitioner is not able to show any document or Government Orders to this effect that the services of the petitioner is not transferable. The petitioner has also failed to assail before this Court that the order of transfer is in any way malafide and has been passed by an authority who is not competent to pass an order. Unless and until it is shown from the record that the order of transfer is a malafide or is made in violation of any statutory provision, the Court should not interfere in such orders of transfer. There is no doubt that while passing the order of transfer, the authorities must keep in mind regarding the guidelines issued from time to time . But it has got no statutory force.

x x x x

10. the transfer is an incident of service and is not to be interfered by the courts in exercise of powers under Article 226 of the Constitution of India. It can be interfered only if it is found against any statutory mandatory rules or with a malafide intention or made in colourable exercise of powers only to harass the employee concerned otherwise it is a sole discretion of the appropriate authority to transfer an employee to a particular post where it is necessary to do so. But this power has to be exercised in fair and reasonable manner and not arbitrary."

54. This Hon'ble Court in the matter of **Rajendra Prasad vs. State of U.P. and others23** has declined to interfere with the transfer order of a person who was office bearer (President of registered Union).

55. This Hon'ble Court in the matter of **Ritesh Singh vs. State of U.P. and others24** has held that transfer policy issued vide govt. order dated 11.05.2016 stipulates a provision that if an office bearer of a recognized association is transferred within a period of two years from his election to the said office, approval of an authority one rank higher while passing the transfer order is required.

56. This Hon'ble Court in the case of **Sanjay Kumar Sharma vs. State of U.P. and others25** has held as under:-

"11. Here the transfer order has been shown to have been issued on account of administrative reasons. Thus, the objection raised by the petitioner on that count cannot be sustained.

13. Thus, the respondents being aware of the requirement to transfer the petitioner appear to have followed the procedure and thereafter issued the transfer order, which has been shown to have made on account of administrative exigencies shown to have been established, at least on prima facie basis."

57. A plain reading of all the aforesaid judgments clearly lays down that when the transfer orders are made on account of administrative exigencies, no objection of any employee can be entertained. When the employee had joined the service, he knew it well that he has joined a transferable job. No employee can claim lien of a particular place. Even the office bearers of the Union are subjected to transfer, if the same is

made in administrative exigency and not being made to vindicate their activism or the transfer is made in malafide manner.

58. In this case, the petitioner could not place any document or evidence to show that the transfer was made in malafide manner just to vindicate activism of petitioner no.2. On the contrary, it was petitioner no.2 misusing his post as General Secretary of the Union in order to push his personal agenda, had filed a number of cases/complaints before different forums which is just to put pressure on the respondents to ensure that his transfer is set aside. As General Secretary of Trade Union, he is supposed to be the voice of the employees and should not use his post for his personal gain.

59. On perusal of documents filed along with the present writ petition, it transpires that to stop one transfer of petitioner no.2, the entire Trade Union as well as petitioner no.2 himself has filed 4-5 different proceedings. Such act of petitioner no.2 is nothing but pure abuse of process of law, for his personal reasons. In fact, to stop transfer of an employee, a notice for strike was called by the petitioner-Union, which could cripple the banking system of respondent-Bank. The petitioners had gone ahead and filed a complaint against the bank before the Industrial Tribunal under Section 33A of the Act. Further, on their behest a criminal case has been instituted against the officers of the bank before the Chief Metropolitan Magistrate, Kanpur Nagar. The act of the petitioners was in no way justified and ended up in multiplicity of litigations in various forums. No trade union activist can use his position to push his personal agenda. The entire action of the petitioners was nothing but pure abuse of process of law.

60. The transfer of petitioner no.2 was not a sole transfer but was done along with other employees of the bank. It is a trite law that the Court should not interfere with the transfer orders, which are made in administrative reasons, and no Court should interfere unless the transfer is malafide or is made in violation of any statutory provisions. Petitioner no.2 has no legal or statutory right to claim his posting at a particular place. The wheels of administration should be allowed to run smoothly and the Courts or Tribunals are not expected to interdict the working of the administrative system. In this case, the transfer was made purely on the administrative ground and hence, the same cannot be interfered with.

61. The impugned award passed by respondent no.1 i.e. Tribunal is perfectly justified and the transfer of petitioner no.2, which has been made on administrative exigency, cannot be interfered with and, accordingly, the writ petition is dismissed.

(2023) 11 ILRA 310
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2023
BEFORE

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

Writ A No. 10788 of 2023

Masood Ahmad Khan	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:

Sri Siddharth Khare, Sri Kauntey Singh, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Manas Bhargava, Sri Nipun Singh

Service Law – Suspension Order – Jurisdiction to Initiate Fresh Inquiry – Manipulation of Date of Birth – Prior Termination Order Quashed – Effect of Absence of Liberty to Proceed Afresh

The petitioner challenged a suspension order dated 21.06.2023 passed by the Chairman, Nagar Palika Parishad, Nethaur, Bijnor, pending a departmental inquiry into allegations of manipulating his date of birth in the service book. The petitioner's earlier termination order dated 16.09.2019, based on similar allegations, was quashed by the High Court on 05.11.2019 in Writ - A No. 15338 of 2019, for lack of departmental inquiry and on the finding that there was no cutting or overwriting in the petitioner's service book. The petitioner contended that the respondents lacked jurisdiction to initiate fresh proceedings on the same charge, as no liberty was granted to proceed afresh.

Held: The High Court's earlier order quashing the termination was primarily due to the absence of a departmental inquiry and reliance on an unauthorized report, not an adjudication on the merits of the charge. The observation that there was no cutting or overwriting in the service book did not preclude a fresh inquiry into whether the petitioner manipulated his date of birth in another manner, as the charge was based on a discrepancy between educational records (showing 25.05.1957) and the service book (showing 25.05.1965). The absence of express liberty to proceed afresh did not bar the respondents from initiating disciplinary proceedings, as per the principles laid down in *Devendra Pratap Narain Rai Sharma Vs St. of U.P.* (AIR 1962 SC 1334). The suspension order was upheld, but the inquiry was directed to be concluded within three months, with the petitioner entitled to subsistence allowance during suspension. The issue of manipulation by cutting or overwriting was held to be closed, but other forms of manipulation could be inquired into, subject to evidence. The plea that the Lokayukta's recommendations barred judicial review under Section 17(2) of the U.P. Lokayukta Act, 1975, was rejected, as it does not apply to the High Court's jurisdiction under Article 226 of the Constitution.

Writ Petition Disposed of.

Case Law Discussed:

1. Devendra Pratap Narain Rai Sharma Vs St. of U.P., AIR 1962 SC 1334
2. Dwarkachand Vs St. of Raj., ILR (1957) Raj 1049
3. Kanak Chandra Bairagi Vs Supdt. of Police, Sibsagar, ILR (1955) Assam 191
4. Mohan Singh Chaudhary Vs Divisional Personnel Officer, Northern Railway, Ferozepore Cantt., ILR (1957) Pun 1833

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

This writ petition is directed against an order of suspension from service pending inquiry dated 21.06.2023 passed against the petitioner by the Chairman, Nagar Palika Parishad, Nethaur, District Bijnor.

2. In order to set the record straight, it is observed at the outset that the petitioner had mistakenly filed, along with the writ petition, a copy of the suspension order relating to another employee, also dated 21.06.2023, in place of the impugned suspension order. This was the result of a clerical error and the error being technical, was permitted to be rectified by bringing on record a copy of the impugned order (relating to the petitioner) vide order dated 17.07.2023. The said order has been brought on record through a supplementary affidavit dated 18.07.2021.

3. Heard Mr. Ashok Khare, learned Senior Advocate assisted by Mr. Kauntey Singh, learned Counsel for the petitioner, Ms. Monika Arya, learned Additional Chief Standing Counsel on behalf of respondent Nos. 3 & 4 and Mr. Manas Bhargava, learned Counsel representing the Lokayukta, Uttar Pradesh.

4. The submission of Mr. Ashok Khare, learned Senior Advocate is that the impugned order, ordering suspension and initiation of departmental proceedings passed by the Chairman, Nagar Palika Parishad, Nethaur, Bijnor is without jurisdiction, because on identical grounds, the services of the petitioner had earlier been terminated by the Chairman, Nagar Palika Parishad, Nethaur, Bijnor vide an order of 16th September, 2019, which was quashed by this Court on ground that no departmental inquiry was held, and further that there was no cutting or overwriting regarding the petitioner's date of birth entered in his service book, as evident from an extract of the service book brought on record with the counter affidavit. It is pointed out by Mr. Khare that this Court not only quashed the earlier order terminating the petitioner's services, but also recorded a finding that there is no cutting or overwriting evident from the extract of the petitioner's service book brought on record along with the counter affidavit. On the foot of this fact, it is urged by the learned Senior Advocate that this Court proceeded to quash the order dated 16.09.2019 terminating the petitioner's services not only on ground of denial of opportunity or the absence of an inquiry being held against him, but also on the basis of a finding about the charge that in the extract of the service book brought on record by the respondent themselves, there is no cutting or overwriting to be found about the petitioner's date of birth. This Court, by the judgment and order dated 05.11.2019 passed in Writ - A No. 15338 of 2019, quashed the order dated 16.09.2019, terminating the petitioner's services and directed his reinstatement, with all consequential benefits. It is urged that no liberty was granted to the respondent-Nagar Palika Parishad to proceed afresh on the

same charge against the petitioner. Therefore, according to Mr. Khare, there is no jurisdiction with the respondents to place the petitioner under suspension and proceed against him on the same charge of manipulating his date of birth in the service book.

5. It appears that the present order of suspension is a sequel to a report dated 24.03.2023 submitted by the Lokayukta of Uttar Pradesh to the State Government on a complaint made by one Wasiuddin against Smt. Firoza Khatoon, the Chairman, Nagar Palika Parishad, Nethaur, Bijnor, Dharmdev, the Executive Officer of the aforesaid Nagar Palika Parishad, the petitioner - Mansoor Ahmad Khan, Ghanshyam Singh, Tax *Amin* and Shabina Anjum, a Peon with the Nagar Palika Parishad. The findings of the Lokayukta at page no. 53 of the Paper Book, relating to the petitioner, carried in paragraph No. 11 (iii), read to the following effect :

iii- श्री मसूद अहमद के शैक्षणिक अभिलेख व सेवा अभिलेख में अंकित जन्मतिथि में स्पष्ट रूप से लगभग 08 वर्ष का अन्तर होने के कारण उनकी सेवाएं दिनांक 16.09.2019 को समाप्त की गयी। माननीय उच्च न्यायालय द्वारा रिट याचिका संख्या- 15338/2019 में पारित आदेश दिनांकित 05.11.2019 द्वारा सेवा समाप्ति संबंधित आदेश दिनांकित 16.09.2019 अपास्त किये जाने के कारण श्री मसूद अहमद, लिपिक को सवेतन सभी परिणामित लाभों के साथ दिनांक 19.11.2019 को आरोपी लोक सेवक श्रीमती फिरोजा खातून द्वारा बहाल किया गया। माननीय उच्च न्यायालय के आदेश दिनांकित 05.11.2019 के विरुद्ध आरोपी लोक सेवक श्रीमती फिरोजा खातून द्वारा कोई अपील प्रस्तुत न करना तथा तत्काल श्री मसूद अहमद को समस्त लाभ के साथ बहाल करना यह प्रदर्शित करता है कि आरोपी लोक सेवक द्वारा अपने पदीय दायित्व का निर्वहन शुद्ध अन्तःकरण से ईमानदारी व निष्ठापूर्वक नहीं किया गया है।

6. The order dated 16.09.2019 passed by the Chairman, Nagar Palika Parishad,

Nethaur, Bijnor shows that in fact, it is not an order of termination of services. It is an order ceasing the petitioner's services on the ground that he had already crossed the age of superannuation. The order of 16th September, 2019 was passed on the basis of recommendations of a committee set up by the District Magistrate, Bijnor to *examine* Wasiuddin's complaint that the petitioner's date of birth was manipulated and incorrect, that he had managed to show wrongly in his service records. The committee appointed by the District Magistrate had returned a finding that the petitioner's date of birth in his school records i.e. Madarsa Islamia Arabia Mohalla Bandukchiyan, Kasba Dhampur relating to Class V, showed his date of birth to be 25.05.1957. This finding was recorded by the aforesaid committee on the basis of a report by the headmaster of the aforesaid Madarsa dated 25.07.2019. It was mentioned there that the petitioner had passed his Class V from the said Madarsa. It appears that the Additional District Magistrate (Administration) Bijnor, acting on behalf of the District Magistrate, Bijnor, addressed a memo dated 03.09.2019, asking the Chairman that the petitioner ought to have retired on 31.05.2017, going by his date of birth found by the committee appointed by him, and yet he was continuing in service, illegally drawing on the State exchequer. The Chairman, as would appear from the order dated 16.09.2019, without holding any kind of an inquiry or instituting disciplinary proceedings against the petitioner, acted on the communication of the Additional District Magistrate (Administration) Bijnor dated 03.09.2019, and ordered that the petitioner's services would end with immediate effect, as he had crossed the age of superannuation on 31.05.2017. It was also directed that salary drawn after the

said date would be calculated and recovered from the petitioner's post-retiral benefits. A perusal of the order passed by this Court on 05.11.2019 in Writ - A No. 15338 of 2019 would show that this Court was of opinion that the order determining petitioner's services could not have been passed without the Nagar Palika Parishad holding an inquiry, and merely acting on the communication dated 03.09.2019 from the Additional District Magistrate (Administration) Bijnor, addressed to the Executive Officer. The relevant findings of this Court read :

To this submission, no plausible objection could be taken by Sri Manu Saxena learned counsel for the respondent-Nagar Palika Parishad. He has placed reliance on the alleged report of the Principal which finds reference in the communication dated 03.09.2019 sent by the Additional District Magistrate (Administration), Bijnor to the Executive Officer, Nagar Palika Parishad. The documents appended as Annexure C.A. No.1 to C.A. No.4 (pages 11 to 22) of the counter affidavit are the documents appended by the complainant in his complaint. None of the documents are record of enquiry made at the ends of the Nagar Palika Parishad. The reliance placed on the letter of the Principal dated 15.03.2019 appended at page no.'18' of the paper book is misplaced as the said letter has been issued to one Wasiuddin under the Right to Information Act' 2005.

It is further relevant to note that the extract of the service book appended as Annexure No.C.A. '5' makes it clear that the date of birth of the petitioner entered therein is 25.05.1965. The assertion of the petitioner that there is no cutting or overwriting in the service book of the petitioner is substantiated from the extract

of the service book brought on record with the counter affidavit. In absence of any departmental enquiry into the said complaint made at the ends of the Nagar Palika Parishad, the order of cancellation of appointment of the petitioner passed by the Chairman, Nagar Palika Parishad, Nahtaura, Bijnor, based on the communication dated 03.09.2019 by the Additional District Magistrate (Administration), Bijnor cannot be sustained.

The office order dated 16.09.2019 passed by the Chairman, Nagar Palika Parishad, Nahtaur, Bijnor is hereby quashed. The communication dated 03.09.2019 cannot be made basis for terminating the services of the petitioner and the same is liable to be ignored as such.

7. It is, no doubt, true that this Court quashed the order dated 16.09.2019 dispensing with the petitioner's service on ground that he had already crossed the age of superannuation, which, in turn, is based on a case that he manipulated his date of birth in the service record. It is also true that the order of this Court carries a remark that a perusal of the extract of the service book, appended as C.A. 5 to the counter affidavit, indicates the petitioner's date of birth to be 25.05.1965, and further that the petitioner's assertion, that there is no cutting or overwriting in his service book, is substantiated on a perusal of the record annexed to the counter affidavit. The order, in substance, however, proceeds on the basis that without the Nagar Palika Parishad holding an inquiry to determine the petitioner's services, it could not be done acting on the communication dated 03.09.2019 from the Additional District Magistrate (Administration). It is also trite to say that this Court did not expressly grant permission to the Nagar Palika

Parishad to proceed against the petitioner afresh. Now, the submission of the learned Senior Advocate for the petitioner, that the effect of the findings recorded by this Court in the judgment and order dated 05.11.2019 leaves the Nagar Palika Parishad with no jurisdiction to proceed against the petitioner, in their disciplinary jurisdiction, does not appear to be correct. The reason is that this Court essentially disapproved the movement order given to the petitioner by the Nagar Palika Parishad on the basis of an inquiry held by the District Magistrate's office and the communication from the Additional District Magistrate, without the Nagar Palika Parishad themselves holding an inquiry in the matter. Certainly, the Nagar Palika Parishad, Nethaur, Bijnor are the petitioner's employers and before taking a decision in the matter, if the petitioner had manipulated his date of birth in his service records, they ought to have held an inquiry. They could have held an inquiry simplicitor to determine the petitioner's date of birth, but more logically, it had to be disciplinary proceedings, because there was not just the question what the petitioner's date of birth is; it involved an allegation that the petitioner had manipulated his date of birth in the service records to his advantage.

8. The remark in this Court's order dated 05.11.2019 that Mr. Khare has emphasized much, to the effect that there is no 'cutting' or 'overwriting' in the petitioner's service book, as appears from the extract of the service book brought on record with the counter affidavit filed by the respondent in Writ - A No. 15338 of 2019, in the opinion of this Court, does not close all avenues of inquiry. The reason is that the charge against the petitioner appears to be based on the petitioner's educational records from the Madarsa

where he had studied, prima facie evidencing his date of birth, on a certification by its Headmaster, as 25.05.1957, that had been manipulated and entered in the service book instead, as 25.05.1965. The manipulation could be done by the petitioner by 'scoring off' or 'overwriting' or in some other manner, particularly, as he had charge of all the service records, including his own. Therefore, to infer from the remarks of this Court in the judgment that the factum of there being no 'cutting' or 'overwriting' in the extract of a copy of the service book gives a quietus to the issue, would be flawed reasoning. This Court's order dated 05.11.2019 cannot be held to exclude the scope of any inquiry being undertaken by the Nagar Palika Parishad in its disciplinary jurisdiction to determine whether the petitioner had, indeed, manipulated and caused an incorrect date of birth to be entered in his service records.

9. The other contention advanced by Mr. Khare, that once this Court had declined to grant liberty to the Nagar Palika Parishad to proceed in the matter afresh, there is no scope for any further inquiry or disciplinary proceedings being taken against the petitioner with regard to the allegation/charge of manipulating his date of birth in his service records, also does not appear to be well-founded. Reference in this connection may be made to the decision of the Supreme Court in **Devendra Pratap Narain Rai Sharma v. State of U.P. and others**¹. In that case, the appellant before the Supreme Court was an Inspector-Qanungo in the Revenue Department of the State of Uttar Pradesh. By an order dated 21.04.1952, he was placed under suspension pending inquiry into certain charges by the Collector. In June, 1952, the Collector recommended to

the Land Reforms Commissioner that the appellant be reverted to the post of Naib Tehsildar. The Commissioner further recommended to the State Government that the appellant be dismissed from service. The State Government dismissed the appellant from service by an order of 16th September, 1953. The appellant brought a suit in the Court of the Civil Judge, Lucknow, challenging the validity of the order of dismissal, primarily on ground that he was denied an opportunity of hearing and showing cause. The Trial Judge dismissed the suit, but this Court, on appeal, reversed the decree. This Court held that reasonable opportunity was not afforded to the appellant, either before the recommendation was made for the imposition of penalty or before the infliction of punishment. The action was, therefore, violative of Article 311 of the Constitution of India. This Court, therefore, granted a declaration that the appellant's dismissal from service was void, inoperative and illegal, and the appellant must be deemed to be continuing in service. The appellant was reinstated to his original post on 30.03.1959. The appellant, upon reinstatement, applied to the Accountant General for payment of salary and allowances due to him. The Accountant General informed the appellant that he was entitled to draw pay and allowances with effect from the date of his reinstatement. The appellant's claim for arrears of pay and allowances for the period 21.04.1952 to 28.04.1959 was referred to the State Government, who would decide about the terms and conditions of the appellant's reinstatement. The Accountant General, accordingly, informed the appellant that action would be taken on receipt of instructions from the State. The appellant was, again, suspended vide an order dated 11.07.1959 issued by the Board of

Revenue. The appellant was denied salary for the period that he remained out of service, but held entitled to subsistence allowance alone. It was, however, provided that the period that he remained out of service will be time during which he would earn ₹1/- per month as token pay, and that the said period would be treated as one spent on duty for the purpose of pension. The appellant, on occasion, challenged the order placing him under suspension pending inquiry afresh and the order directing inquiry as well, regarding the charges while posted at Garautha, District Jhansi through a writ petition. He also prayed for a direction that his full salary be paid. This Court held that the inquiry was not barred, though the order fixing the petitioner's salary at ₹1/- per month by the Board of Revenue for the period of time that he remained out of service was quashed, with a direction for consideration of the matter afresh, in the light of relevant rules, after hearing the petitioner.

10. On appeal to the Supreme Court, it was held by their Lordships in **Devendra Pratap Narain Rai Sharma** (*supra*) :

7. In our view, the State Government was competent to direct a fresh enquiry against the appellant for dereliction of duty even if such dereliction was in the period relating to which proceedings were previously started and the appellant had been dismissed from service. The appellant was not in the earlier proceedings exonerated by the High Court in respect of the alleged misconduct charged against him, and, in any event, charge against him in the second enquiry was different from the charge in the first enquiry. The High Court had in the suit challenging the order passed in the first enquiry expressly observed that on the

question as to misconduct and the punishment, no opinion was expressed. The suit filed by the appellant was decreed only on the ground that he had not been afforded a reasonable opportunity of showing cause against the charge against him and also the punishment decided to be imposed upon him.

8. Authorities on which reliance was placed by counsel for the appellants, namely, *Dwarkachand v. State of Rajasthan* [ILR (1957) Raj 1049] , *Kanak Chandra Bairagi v. Supdt. of Police, Sibsagar* [ILR (1955) Assam 191] and *Mohan Singh Chaudhariv. Divisional Personnel Officer, Northern Railway, Ferozepore Cantt.* [ILR (1957) Pub 1833] , do not support the plea that the second enquiry is, in the circumstances of the case, barred. An adjudication on the merits by a quasi-judicial body may or may not debar commencement of another enquiry in respect of the same subject-matter. But in this case we are concerned with the scope of the High Court order. The binding effect of a judgment depends not upon any technical consideration of form, but of substance. The High Court in the appeal filed by the appellant in Suit No. 163 of 1954 did not exonerate the appellant from the charges. The High Court decreed the suit on the ground that the procedure for imposing the penalty was irregular, and such a decision cannot prevent the State from commencing another enquiry in respect of the same subject-matter consistently with the provision of Articles 310 and 311. In *Dwarkachand case* in a previous enquiry the public servant concerned had been exonerated; and in *Mohan Singh Chaudhari case* [ILR (1957) Pub 1833] a decision by the civil court declaring illegal an order dismissing a public servant by an officer not authorised in that behalf was held binding on all the

parties in proceedings under Article 226 till such decision was set aside in accordance with law. In *Kanak Chandra case* [ILR (1955) Assam 191] it was held that an order in exercise of powers of revision by the Governor under the authority reserved to him setting aside an order of censure passed by a subordinate authority and dismissing the public servant concerned from service did not amount to a second departmental enquiry. These cases do not lend support to the proposition that after an order passed, in an enquiry against a public servant imposing a penalty is quashed, by a civil court, no further proceeding can be commenced against him even if in the proceeding in which the order quashing the enquiry was passed, the merits of the charge against the public servant concerned were never investigated.

9. If the State Government was competent to order a fresh enquiry, we see no reason why it would be incompetent to direct suspension of the appellant during the pendency of the enquiry.

11. No doubt, **Devendra Pratap Narain Rai Sharma** is a case where the order had been quashed, because the Court had set aside the dismissal order on ground of denial of opportunity and non holding of inquiry. There was no adjudication on merits. But, what is relevant are that the remarks of their Lordships to the effect that ‘an adjudication on merits by a quasi-judicial body’ may or may not debar commencement of another inquiry in respect of the same subject matter. The question here is, if the remarks of this Court that there was no ‘cutting’ or ‘overwriting’ in the service book of the petitioner, based on a perusal of the extract of service book brought on record with the counter affidavit, exhausts the entire scope of the charge against the petitioner. As

already said, the charge against the petitioner is about manipulating his date of birth in his service records, which is founded on a comparison of the date of birth in his service book and that in his school certificate. Apparently, the manipulation need not necessarily come about as a result of any scoring out or overwriting of the date of birth in his service book by the petitioner. The petitioner’s date of birth could have been recorded by a manipulation done otherwise than through ‘cutting’ or ‘overwriting’. Interestingly, in this case, the order that was quashed by this Court did not come about on the basis of proceedings drawn by the Nagar Palika Parishad, which may reflect with precision the manner in which the petitioner is said to have manipulated his date of birth in his service records, when action was taken earlier.

12. Now, from a perusal of the suspension order and the remarks of the Lokayukta, it appears that the charge has stemmed from a difference between the petitioner’s date of birth by as much as eight years between that recorded in his service book and the one in his educational certificates. In view of these facts, the fact that this Court did not grant liberty to proceed afresh against the petitioner while quashing the order on ground of denial of opportunity and acting on an unauthorized report, together with a remark that there was no manipulation by ‘cutting’ or ‘overwriting’ in the service book, in the opinion of this Court, would not at all debar the Nagar Palika Parishad from proceeding afresh in their disciplinary jurisdiction to inquire into the charge whether, indeed, the petitioner has manipulated his date of birth in his service book. Of course, the charge would have to be clear in its terms and cannot be about the manipulation being

done through 'overwriting' or 'cutting', a fact upon which this Court has pronounced with finality. The manipulation done in any other fashion would be open to inquiry, strictly in accordance with law, where the Nagar Palika Parishad would have to establish the charge against the petitioner by evidence led before the Inquiry Officer.

13. It is made clear that nothing said in this order would be construed as an expression on merits, regarding the validity or worth of the charge, either way, and the Inquiry Officer would be free to determine the charge on the basis of evidence led before him. Of course, as already said, the issue of 'scoring out' or 'overwriting' the petitioner's date of birth in the service book shall not be inquired into.

14. Before parting with this matter, it must be mentioned that it was urged by Mr. Manas Bhargava, learned Counsel for the Lokayukta, on instructions received, that the impugned order being one passed pursuant to recommendations by the Lokayukta, cannot be questioned before this Court, in view of the provisions of Section 17(2) of the Uttar Pradesh Lokayukta and Up-Lokayuktas Act, 1975, which read :

17(2) No proceedings of the Lokayukta or the Up-Lokayukta shall be held bad for want of form and except on the ground of jurisdiction, no proceedings or decision of the Lokayukta or the Up-Lokayukta shall be liable to be challenged, reviewed or quashed or called in question in any Court.

15. This Court must remark that the Lokayukta functions under the Act of 1975. The reference in Section 17(2) excluding the jurisdiction of the Court to review or

quash the order of Lokayukta or Up-Lokayukta, except on ground of jurisdiction, cannot be pleaded as a bar to this Court's jurisdiction under Article 226 of the Constitution. The reference to 'Court' or bar to the Court's jurisdiction under Section 17(2) of the Act would apply to Courts of ordinary jurisdiction; not the High Court exercising its writ jurisdiction under Article 226 of the Constitution.

16. In the result, this Court holds that there is no good ground to interfere with the impugned order, but directs that the inquiry against the petitioner be concluded within a period of three months hence, wherein the petitioner shall cooperate. The petitioner, during the period of suspension, shall be paid his subsistence allowance regularly. In the event of delay in concluding the disciplinary proceedings beyond the period of three months, it would be open to the petitioner to move this Court again, questioning his continued suspension from service on the ground of delay.

17. This writ petition stands **disposed of** in terms of the orders aforesaid.

18. There shall be no order as to costs.

(2023) 11 ILRA 318
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.2023
BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 19776 of 2019

Babita Thakur		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:

Sri P.K. Upadhyay, Sri Vikram Yadav

Counsel for the Respondents:

C.S.C.

A. U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 – Rule 2(c)(iii) – Compassionate Appointment – Divorced Daughter:

Exclusion of divorced daughter from compassionate appointment is unconstitutional and violative of Articles 14 and 16. A daughter, whether married, unmarried, widowed or divorced, does not lose her status as a dependent daughter. Divorced daughter stands on stronger footing than widowed daughter, as she is completely severed from her ex-husband's estate except alimony. *Smt. Vimla Srivastava v. State of U.P.*, Writ-A No.60881 of 2015, decided on 04.12.2015 (Paras 3, 6, 7, 8, 9, 10).

B. Constitution of India – Articles 14, 15 & 16 – Gender Discrimination – Marital Status Irrelevant:

Marital status cannot disqualify a daughter from compassionate appointment. Discrimination based on marriage or its dissolution (divorce/widowhood) is arbitrary. Once "unmarried daughter" was struck down as unconstitutional, the benefit extends to all daughters, including divorced daughters, irrespective of subsequent amendments. *Neha Srivastava v. State of U.P.*, Special Appeal Defective No.863 of 2015, decided on 23.12.2015; SLP (C) No.22646 of 2016 dismissed on 23.07.2019 (Paras 3, 7, 8, 9).

C. Dying-in-Harness Rules – Beneficial Legislation – Retrospective Application of Judicial Pronouncements:

Judgment in *Smt. Vimla Srivastava* (supra) striking down "unmarried" became law of the land from 04.12.2015. State bound to apply it even before 2021 amendment incorporating "daughter". Rejection of divorced daughter's claim post-2015 but pre-amendment is illegal. (Paras 9, 11).

D. Compassionate Appointment – Object and Scope:

Intended to alleviate immediate

financial distress of family. Exclusion of divorced daughter defeats the beneficial purpose, especially when widowed daughter was already included. (Paras 6, 10).

Writ Petition Allowed – Impugned Order Quashed, Matter Remitted for Fresh Decision within Two Months.

List of Cases Cited:

1. *Smt. Vimla Srivastava v. State of U.P.*, Writ-A No.60881 of 2015, decided on 04.12.2015 (Paras 3, 6, 7, 8, 9).

2. *Neha Srivastava v. State of U.P.*, Special Appeal Defective No.863 of 2015, decided on 23.12.2015 (Para 3).

3. *State of U.P. v. Neha Srivastava*, SLP (C) No.22646 of 2016, dismissed on 23.07.2019 (Para 3).

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

1. Heard Sri P.K. Upadhyay, learned counsel for the petitioner and Ms. Archana Tyagi, learned Additional Chief Standing Counsel for the State-respondents.

2. Petitioner's claim for compassionate appointment has been rejected only on the ground that she was a divorced daughter and divorced daughter did not come within the definition of unmarried daughter as stood in the relevant rules framed for compassionate appointments namely UP Government Servant Dying in Harness Rules, 1974 (amended from time to time).

3. The order impugned dated 12.09.2019 has been assailed on the ground that the division bench judgment of this Court in *Writ Petition No.60881 of 2015 (Smt. Vimla Srivastava v. State of U.P. & anr.)* decided on 04.12.2015, rendered words and expressions "unmarried

daughter" as totally unconstitutional being discriminatory and arbitrary and, therefore, violative of Article 14 read with Article 16 of the Constitution of India. This judgment was later on followed in ***Special Appeal Defective No.863 of 2015 (Neha Srivastava vs. State of UP & anr) decided on 23.12.2015*** and further special leave petition against the judgment of Neha Srivastava came to be dismissed (SLP (C) No.22646 of 2016) on 23.07.2019.

4. *Per contra*, defending the order impugned, it is argued by Ms. Archana Tyagi, learned Additional Chief Counsel that the Court addressed the issue of claim *qua* 'married daughter' and 'unmarried daughter' and not the 'divorced daughter' as this expression not included in the rules. She further submits that the Dying in Harness Rules, 1974 came to be amended only in the year 2021 and now word 'daughter' is incorporated under 2c(iii) of the said rules. She submits that the amendments shall not have retrospective effect and now here onwards only the 'divorced daughter', if at all, can be considered.

5. In rejoinder, learned Advocate appearing for the petitioner submits that Dying in Harness Rules, 1979 is a piece of beneficial legislation and, therefore, it is to be interpreted in light of the law laid down by division bench of this Court in the case of ***Smt. Vimla Srivastava (supra)*** followed in ***Smt. Neha Srivastava (supra)***.

6. Having heard learned counsel for the respective parties and the judgments cited before this Court, what I have come to notice is that earlier the provision 2c(iii) carried the words and expressions 'unmarried daughter', 'married daughter', 'widowed daughter' and 'widowed

daughters-in-law'. Thus, there was no mention of 'divorced daughter'. The very intendment behind the legislation to incorporate the 'widowed daughter' in the amended provision has been to treat her back as member of the family of dependent and therefore exclusion of words and expressions 'divorced daughter' does not appeal to reason. Whether the daughter has gone widow on account of death of her husband or has been divorced, they stand on a same footing rather, it would be more appropriate to say that divorced daughter stands on a better footing because widowed daughter may get share in the properties of the deceased husband whereas the divorced daughter is completely divorced from everything belong to her ex-husband including his estate except the permanent alimony that she may get. This Court in ***Vimla Srivastava's*** case while considered this aspect of the matter that the use of words and expressions 'unmarried daughter' to the exclusion of 'married daughter' was not a constitutionally sound provision as the married daughter stood discriminated against. The Court made note of the arguments :-

"The basic rationale and the foundation for granting compassionate appointment is thus the financial need of the family of a deceased government servant who has died in harness and it is with a view to alleviate financial distress that compassionate appointment is granted.

The submission which has been urged on behalf of the petitioners in challenging Rule 2 (c) (iii), insofar as it confines the zone of eligibility only to unmarried daughters, is two fold. Firstly, it has been submitted that in matters of public employment, marital status cannot disqualify an applicant and any discrimination on the ground of marital

status would be violative of Articles 14 and 15 of the Constitution. Secondly, it has been urged that there can be no discrimination between a son and a daughter in the grant of compassionate appointment and any discrimination on the ground of gender violates Article 15 of the Constitution. "

7. The principle upon which the word and expression 'unmarried daughter' was held to be unconstitutional was that it hit the very basis for which Article 14 & Article 16 stood. Relevant part of the judgment in the case of **Smt. Vimla Srivastava** (*supra*) is reproduced hereinunder:

"The principles underlying Articles 14 and 15 of the Constitution have an important bearing on gender identity. In C.B. Muthamma vs. Union of India³, the Supreme Court considered the legality of a rule in the Indian Foreign Service (Conduct and Discipline) Rules under which a woman member of the service was required to obtain the permission of the Government before her marriage was solemnized and could be required to resign from service after her marriage, if the Government was satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service. The Supreme Court held that "If a married man has a right, a married woman, other things being equal, stands on no worse footing". In the meantime the Central Government had indicated that the rule was being reconsidered and its deletion was being gazetted. "

8. The Court further held that *"assumption that after marriage, a daughter cannot be said to be a member of the family of her father or that she ceases*

to be dependent on her father irrespective of social circumstances cannot be countenanced." The Court then referred to Division Bench judgment in *Isha Tyagi vs. State of UP & ors* passed in Writ-C No.41279 of 2014 wherein it was held that *"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. Dealing with the aspect of the marriage, the Division Bench held that "Marriage does not have and should not have a proximate nexus with identity. The identity of a woman as a woman continues to subsist even after and notwithstanding her marital relationship. The time has, therefore, come for the Court to affirmatively emphasise that it is not open to the State, if it has to act in conformity with the fundamental principle of equality which is embodied in Articles 14 and 15 of the Constitution, to discriminate*

against married daughters by depriving them of the benefit of a horizontal reservation, which is made available to a son irrespective of his marital status." Then vide paragraph 28, the Court held rule 2(c) to be unconstitutional to the extent it excluded 'married women' and finally struck down the word 'unmarried'. Paragraph 28 is reproduced hereinunder:

"28. We, accordingly, strike down the word 'unmarried' in Rule 2(c)(iii) of the Dying-in-Harness Rules."

9. This above judgment was delivered on 04.12.2015 and was followed in *Neha Srivastava (supra)* which was decided on 23.12.2015 and against which special leave petition was dismissed on 23.07.2019, i.e. prior to 12.09.2019 when the decision was taken by the authority rejecting the claim of the present petitioner. Once the judgment was pronounced by this Court holding unmarried daughter as only category of dependent daughter of the deceased for the purposes of compassionate appointment under the dying in harness rules to be unconstitutional, it became law of the land and the State Government was to immediately act upon the same. The Court has dealt with the words and expression 'daughter' and so for the reasons that have been shown for holding the words and expression 'unmarried daughter' to be unconstitutional would equally apply to the 'divorced daughter' and 'widowed daughter'. The State in its wisdom correctly now has incorporated the word 'daughter'.

10. Thus a daughter does not lose her identity and status as daughter of her parents for marriage or subsequent dissolution of marriage whether by mutual consent or divorce. A daughter

would remain a daughter of her parents whether married, unmarried, divorced or widowed. Further, I hold that a divorced daughter holds a better claim to be offered compassionate appointment than a widowed daughter as such a daughter falls back upon her parents for survival.

11. In the circumstances, therefore, I am not able to sustain the order impugned whereby the petitioner's claim has come to be rejected only on the ground that she was a divorced daughter. A daughter has to be considered for the purposes of compassionate appointment of deceased employee whether married or unmarried, widowed or divorced, in light of the judgment of the case of *Smt. Vimla Srivastava (supra)* and whether amendment or no amendment by the State Government, petitioner's claim for compassionate appointment should not have been rejected on the ground it has been rejected.

12. Accordingly, the order impugned dated 12.09.2019 passed by the Additional District Magistrate (Finance and Revenue), Bijnor is hereby quashed. Matter is remitted to be decided afresh qua claim of the petitioner for compassionate appointment in light of the discussions and observations made hereinabove.

13. The appropriate order shall be passed within a period of two months from the date of presentation of certified copy of this order and if petitioner is found eligible for compassionate appointment, the same shall be given to her within next thirty days' time.

14. With the aforesaid observations and directions, this petition stands allowed.

(2023) 11 ILRA 323
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2023
BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ A No. 25057 of 2008

Shiv Kumar Bajpai ...Petitioner
Versus
U.P.S.R.T.C. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Bhanu Bhushan Jauhari, Sri Kuldeep Singh, Sri Sachindra Dwivedi

Counsel for the Respondents:

Sri A.K. Saxena, S.C.

Service Law – Departmental Proceedings – Negligence – Motor Accident Claims Tribunal (M.A.C.T.) Award – Effect on Disciplinary Action – Criminal Acquittal – Estoppel – Indian Evidence Act, 1872, Sections 17 & 31 – Motor Vehicles Act, 1988 - Section 168 – Indian Penal Code, 1860 - Sections 279 & 304-A.

Petitioner, a bus driver with U.P.S.R.T.C., faced departmental proceedings for alleged negligence in a 1995 accident. Despite an inquiry report finding no guilt, the Regional Manager imposed punishment based on an M.A.C.T. award disbelieving petitioner's St.ment, though U.P.S.R.T.C.'s written St.ment before M.A.C.T. supported petitioner's non-negligence. Petitioner was acquitted in a related criminal case under Sections 279, 304-A I.P.C. *Held:* M.A.C.T. findings are limited to fixing compensation liability and cannot solely justify departmental punishment. U.P.S.R.T.C.'s admission of petitioner's non-negligence in M.A.C.T. proceedings operates as estoppel under Sections 17, 31 of the Indian Evidence Act, 1872. Criminal acquittal, indicating no

negligence, outweighs M.A.C.T. award for disciplinary purposes. Impugned orders quashed; deducted amount to be refunded with 6% interest.

Writ petition allowed.

Case Law Discussed: None specifically cited.

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Third supplementary affidavit filed today is taken on record.

2. Heard Shri Bhanu Bhushan Jauhari, learned counsel for the petitioner, Shri A.K. Saxena, learned counsel for the respondents and perused the record.

3. The petitioner was Driver of a Bus run by the Uttar Pradesh State Road Transport Corporation (hereinafter referred to as 'the U.P.S.R.T.C.'). An accident took place on 15.07.1995 and, raising allegations against the petitioner that he was negligent in driving the bus, departmental proceedings were initiated against him. At the same time, a Motor Accident Claim Petition, being Case No. 710 of 1995, was filed by the dependants of the deceased victim against U.P.S.R.T.C. before Motor Accident Claims Tribunal (hereinafter referred to as 'the M.A.C.T.'). An inquiry report was submitted by the inquiry officer of U.P.S.R.T.C. in the departmental proceedings recording no established guilt of the petitioner, however, while awarding punishment to him in terms of deduction of a sum of Rs. 2,11,000/- from his payables and stoppage of two increments, the Regional Manager of U.P.S.R.T.C. placed reliance upon the judgment/award passed by the M.A.C.T. in the aforesaid compensation case, particularly, the statement of the petitioner

who appeared as a witness on behalf of U.P.S.R.T.C. before the Tribunal and stated that accident had not taken place by his bus. The Tribunal took a view that the said statement was falsely made and, ultimately, passed award of compensation against U.P.S.R.T.C. on 27.01.1998.

4. It is contended by Shri Jauhari that the petitioner was not a party to the Motor Accidents Claim Petition and, though his statement was dis-believed by the M.A.C.T., the U.P.S.R.T.C., in its written statement took a clear stand that the petitioner was not negligent in driving the bus and the reason behind occurrence of accident was presence of numerous passengers on the spot and that when the petitioner stopped the bus, a passenger, while trying to enter into it through window, fell down and came under the left rear tyre of the bus, got himself injured and was sent for medical treatment but, ultimately, died. It is further contended that a criminal case under Sections 279, 304-A I.P.C. was registered against the petitioner arising out of same accident and the Court of Judicial Magistrate-I, Shahjahanpur, by order dated 01.05.2008, acquitted him by recording a clear finding that the prosecution had failed to establish his guilt beyond doubt. Further contention is that after two days from the date of order of acquittal, the departmental Appellate Authority dismissed the appeal on 03.05.2008, however, copy of the acquittal order could not be filed before the Appellate Authority as there was no sufficient time gap between acquittal and dismissal of appeal.

5. In sum and substance, the contention is that the petitioner, not being a party to the Motor Accident Claim Petition, he did not get opportunity to file an appeal against the award of Tribunal and, the

U.P.S.R.T.C., on the other hand accepted the award of compensation and did not challenge the same before Appellate Court. The submission is that except the award of the M.A.C.T., there was no other material before the U.P.S.R.T.C. to hold the petitioner guilty and, once, in the criminal case, the petitioner's guilt has not been established, the orders impugned cannot sustain.

6. Shri A.K. Saxena, learned counsel for U.P.S.R.T.C. submits that the Punishing Authority has recorded dis-satisfaction against the inquiry report, inasmuch as, there was sufficient material before the Authorities, particularly, the judgment of M.A.C.T., to form an opinion that the petitioner was guilty and no contrary view could be taken by the Department against order of a Court of law. However, he does not dispute the fact that the petitioner has been acquitted in the criminal case by the Court of Judicial Magistrate after passing of the first punishment order and before dismissal of his departmental appeal.

7. Having heard learned counsel for the parties, I find that merely because the petitioner appeared a witness of U.P.S.R.T.C. in the proceedings before the M.A.C.T. and a statement was made by him that accident had not been caused by his bus and the said statement was disbelieved by the M.A.C.T., the petitioner, not being a party to the Claim Petition, had no occasion to file an appeal against the award. Apparently and significantly, the U.P.S.R.T.C. came up before M.A.C.T. shielding the act of its driver not only by filing written statement stating that the petitioner was not negligent in driving the bus, but also explained the circumstances under which the accident had taken place and also produced the petitioner as its own

witness to avoid its liability to pay compensation by denying accident. Therefore, U.P.S.R.T.C. could not take a final contrary view in the departmental proceedings to the detriment of the interest of the petitioner. Even otherwise, no contrary view was taken in the departmental inquiry report which was in favour of the petitioner. What persuaded the Authorities to punish the petitioner was simply and only the judgment of M.A.C.T.

8. Now to examine the effect of Award passed by M.A.C.T. on the departmental proceedings, I find that there are two final judgments before this Court, as on today, one is the award passed by the M.A.C.T. and the other is the judgment of acquittal passed by the Court of Criminal Jurisdiction.

9. The Motor Vehicles Act, 1988 was enacted as AN ACT TO CONSOLIDATE AND AMEND LAW RELATING TO MOTOR VEHICLES and, as per Section 168 of the Act, the Tribunal is empowered to hold inquiry into the claims arising out of use of motor vehicles involved in an accident. The Claims Tribunals function under the provisions of Act, 1988 and are competent to award compensation in a given case of accidental injuries or death. During the course of exercise of power to determine appropriate compensation, even if a finding is arrived at by the Tribunal that the Driver was negligent in driving the vehicle, it would be read only for the purposes of awarding compensation against the employer and not beyond that and certainly not in a service matter where the department proceeds against its own driver to award punishment on the allegation/charge of misconduct. The Court is of the considered opinion that the scope of judgment of M.A.C.T. is only to fix the

liability of compensation either upon owner of the vehicle or the concerned insurance company, as the case may be. There is no other scope of that judgment.

10. Insofar as the judgment of criminal court is concerned, punishment under Sections 279, 304-A I.P.C. can be awarded, only when death is caused by negligence. For a ready reference, Sections 279 and 304-A I.P.C. are reproduced as under:-

“279. Rash driving of riding on a public way.- Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.”

304A. Causing death by negligence.- Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

11. In the present case, alleged negligence on the part of the petitioner was certainly attributable to driving of bus and the acquittal order clearly shows that prosecution failed to establish the guilt of the petitioner beyond doubt i.e. to say that he was not found negligent in driving the bus which infact was the stand of U.P.S.R.T.C. itself before M.A.C.T.

12. As regard the law of admission and the significance attached to any admission made during any proceedings,

reference to Sections 17 and 31 of the Indian Evidence Act, 1872 can be made. The same are reproduced below:-

“17. Admission defined.—An admission is a statement, [oral or documentary or contained in electronic form], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.”

31. Admissions not conclusive proof, but may estop.—Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

13. In view of Section 17 of the Act, 1872, the statement/admission contained in the written statement filed by U.P.S.R.T.C. before M.A.C.T. would suggest an inference as to “NO NEGLIGENCE” of the petitioner which was a fact in issue or a relevant fact during the course of proceedings before the M.A.C.T., and, though, the said admission may not be treated to be a conclusive proof, it would certainly operate as estoppel against U.P.S.R.T.C., the employer in the departmental proceedings judging allegation/charge of misconduct against the petitioner. Hence, the U.P.S.R.T.C. is bound by its admission contained in the written statement that the driver (petitioner) was not negligent in driving the bus and, as such, it cannot use the finding of the Tribunal alone to hold the petitioner as guilty of misconduct. In the opinion of the Court, more strict proof of negligence was required to be established by the U.P.S.R.T.C. to hold the petitioner as guilty in departmental proceedings, if, at all, it was serious to award major or minor penalty. No such exercise was carried, rather departmental inquiry report too reads

in favour of the petitioner. In overall circumstances, if, at all, weight to any judgment can otherwise be attached, this Court would give more significance to the judgment of acquittal of the petitioner in comparison to the award interpreting his statement recorded before M.A.C.T., particularly when, U.P.S.R.T.C. did not assail the award but accepted the same as per its own wisdom and choice. There being no other material before the Court, I find that the orders impugned cannot sustain.

14. The writ petition succeeds and is allowed. The orders impugned dated 31.05.2007 and 03.05.2008 are hereby quashed.

15. Since the amount directed to be deducted under the punishment order has already been deducted, the respondents are directed to refund the same to the petitioner within a period two months from today, alongwith simple interest @ 6% p.a. from the date of deduction till the date of payment.

(2023) 11 ILRA 326
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.10.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 10623 of 2023

Swami Prasad Maurya	...Applicant
Versus	
State of U.P. & Anr.	...Opp. Parties

Counsel for the Applicant:

Saurabh Yadava, Divya

Counsel for the Opp. Parties:

G.A.

(अ) फौजदारी कानून - भारतीय दंड प्रक्रिया संहिता, 1973 - धारा 482 - अंतर्निहित शक्तियां, भारतीय दंड संहिता, 1860 - धारा 153 - बल्वा कराने के आशय से प्रकोपन देना - यदि बल्वा किया जाए- यदि बल्वा न किया जाए, धारा 295 - किसी वर्ग के धर्म का अपमान करने के आशय से उपासना के स्थान को क्षति करना या अपवित्र करना, धारा 298 - धार्मिक भावनाओं को ठेस पहुँचाने के विमर्शित आशय से शब्द उच्चारित करना आदि, धारा 505 - लोक रिष्टि-कारक वक्तव्य - न्यायिक निर्णय विधि को विधायिका द्वारा बनाए गए संविधियों के अनुसार नहीं पढ़ा जाना चाहिए, अपितु उन्हें उन तथ्यों के प्रकाश में ही पढ़ा जाना चाहिए, जिनके परिप्रेक्ष्य में वह निर्णय दिया गया है - संहिता की धारा 482 के अंतर्गत शक्ति का प्रयोग अपवाद है न कि नियम - किसी भी ग्रंथ/अभिलेख में किए गए कथन सही परिप्रेक्ष्य में ही पढ़े तथा रखे जाने चाहिए तथा कहीं से भी कोई एक अंश बिना सम्पूर्ण संगत तथ्यों के रखना सम्पूर्ण सत्य कथन नहीं है तथा कुछ परिस्थितियों में ऐसा कथन असत्य कथन भी हो सकता है - जब श्री राम चरित मानस की कोई चौपाई उद्धरित की जाए तो यह अनिवार्य है कि यह भी ध्यान में रखा जाए कि उसमें कहा कथन किस पात्र ने कैसी परिस्थिति में किस व्यक्ति से कहा। (पैरा - 14,20,24)

(ब) भारतीय दंड प्रक्रिया संहिता, 1973 - धारा 196 (1-क)(क) - कोई न्यायालय भा०द०सं०, 1860 की धारा 153(ख) या धारा 505 की उप-धारा (2) या उप-धारा (3) के अधीन दण्डनीय किसी अपराध का संज्ञान केंद्रीय सरकार या राज्य सरकार या जिला मजिस्ट्रेट की पूर्व स्वकृति से ही लेगा अन्यथा नहीं - अभिनिर्धारित - प्रार्थी के विरुद्ध कथित अपराध धारा 505 की उप-धारा(1) के अधीन आते हैं तथा उक्त अपराध के लिए धारा 196 में अभियोजन स्वीकृति लेने की आवश्यकता नहीं है। (पैरा - 35)

प्रार्थी द्वारा श्री राम मानस पर दिए गए बयान - पूरे भारत में कुछ अन्य नेतागण ने एक राय होकर श्री राम चरित मानस की प्रतियां जलाई - समस्त ब्राह्मण संगठनों व हिन्दू समाज के प्रति गंदी-गंदी गालियां दीं - अपमान जनक शब्दों का प्रयोग किया - समस्त मानस प्रेमियों के प्रति अभद्रता की - जन मानस में काफी आक्रोश एवं अशांति का वातावरण उत्पन्न हो गया - हिन्दू धर्म के विभिन्न वर्गों में शत्रुता एवं वैमनस्य का भाव पैदा हो गया। (पैरा - 31)

अभिनिर्धारित:- स्वतंत्र समीक्षा अथवा स्वस्थ आलोचना का तात्पर्य यह नहीं है कि ऐसे शब्दों का प्रयोग किया जाए जिससे लोग अपराध कारित करने को प्रेरित होने लगे। आवेदक के कार्यों से लोगों में विद्रोह हुआ, पवित्र ग्रंथ श्री रामचरितमानस को नुकसान पहुँचाया गया और उसका अपमान किया गया। इसे उनके धर्म का अपमान माना गया। आवेदक के बयान एक वर्ग को दूसरे वर्ग के खिलाफ अपराध करने के लिए उकसाने के इरादे से दिए गए प्रतीत होते हैं, इस प्रकार, आवेदक ने धारा 153, 295, 298 और 505 (1) (सी) आईपीसी के तहत अपराध किया है। प्रार्थी कथित

आरोपों के लिए दोषी है या नहीं, यह इस न्यायालय को इस स्तर पर नहीं देखना है और यह विचारण के दौरान साक्ष्य लेकर विचारण न्यायालय तय करेगा। (पैरा - 28, 32, 33)

प्रार्थना पत्र निरस्त किया जाता है। (E-7)

उद्धृत मामलों की सूची:-

1. पी. ए. रंजीत बनाम पुलिस निरीक्षक, तिरुपनथल पुलिस स्टेशन और अन्य, सीआरएल. ओ.पी. (एमडी) नंबर 8893/2019 और सीआरएल एमपी (एमडी) नंबर 5643/2019 में मद्रास उच्च न्यायालय (मदुरै बेंच)
2. उत्तर प्रदेश राज्य बनाम ललई सिंह यादव, (1976) 4 SCC 213
3. एस. वीराबद्रन चेट्टियार बनाम ई.वी. रामास्वामी नायकर, ए.आई.आर 1958 एस सी 1032
4. चक्र बेहरा बनाम बालकृष्ण महापात्र, एआईआर 1963 उड़ीसा 23
5. कर्णाटक राज्य बनाम एम देवेन्द्रप्पा, (2002) 3 एससीसी 892
6. केंद्रीय जांच ब्यूरो बनाम आर्यन सिंह आदि, 2023 एससीसी ऑनलाइन एससी 379
7. बूदा करात बनाम राज्य (एससीटी दिल्ली), 2022 एससीसी ऑनलाइन दिल्ली 1775 पृष्ठ 162

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

1. प्रार्थी के विद्वान अधिवक्तागण श्री जहाज सिंह कश्यप श्री सौरभ यादव तथा श्री आलोक रंजन एवं विपक्षी. उत्तर प्रदेश राज्य की तरफ से विद्वान अतिरिक्त महाधिवक्ता श्री विनोद कुमार शाहीए विद्वान शासकीय अधिवक्ता डा० विजय कुमार सिंह तथा विद्वान अतिरिक्त शासकीय अधिवक्ता प्रथम श्री अनुराग वर्मा को सुना तथा पत्रावली का अवलोकन किया।

2. धारा 482 दण्ड प्रक्रिया संहिता के अन्तर्गत प्रस्तुत इस प्रार्थना पत्र द्वारा प्रार्थी ने मु०अ०सं०80 सन् 2023 अन्तर्गत धारा 153, 295, 298 तथा 505 भारतीय दण्ड संहिताएथाना कोतवाली नगरए जनपद प्रतापगढ़ के संदर्भ में

प्रस्तुत आरोप पत्र संख्या.237 दिनांक 05.04.2023, उक्त के सन्दर्भ में विद्वान मुख्य न्यायिक मजिस्ट्रेट/विशेष न्यायाधीश एम.पी./एम.एल.ए प्रतापगढ़ द्वारा मुकदमा संख्या.11811 सन् 2023 में पारित आदेश दिनांक 12.07.2023, जिसके द्वारा उपरोक्त अपराध का संज्ञान लिया गया तथा प्रार्थी तथा सह. अभियुक्त राकेश कुमार वर्मा को विचारण हेतु तलब किया गया तथा उपरोक्त आपराधिक वाद की सम्पूर्ण कार्यवाही को निरस्त किए जाने की प्रार्थना की है।

3. दिनांक 31.01.2023 को प्रार्थी . जो एक राजनीतिक दल का नेता है, डा० आर.के. वर्मा. विधायक रानीगंज तथा कुछ अन्य नेतागण के विरुद्ध लिखाई गई प्रथम सूचना रिपोर्ट में कहा गया है कि अभियुक्तगण द्वारा एक राय होकर श्री राम चरित मानस की प्रतियां जलाई गई व समस्त ब्राह्मण संगठनों व हिन्दू समाज के प्रति गंदी.गंदी गालियां दी तथा अपमानजनक शब्दों का प्रयोग करके समस्त मानस प्रेमियों के प्रति अभद्रता की गई, जिससे जन मानस में काफी आक्रोश उत्पन्न हुआ और अशांति का वातावरण उत्पन्न होने की आशंका उत्पन्न हुई।

4. विवेचना के दौरान शिकायतकर्ता ने विवेचक के समक्ष दिए गए अपने बयान से प्रथम सूचना रिपोर्ट के कथनों का समर्थन किया। गवाह विक्रम प्रताप सिंह तथा सुनील कुमार गुप्ता ने कहा कि प्रार्थी तथा अन्य नामित अभियुक्त के द्वारा श्री राम चरित मानस पर दिए गए बयान के कारण पूरे भारत में कुछ अन्य नेतागण ने एक राय होकर श्री राम चरित मानस की प्रतियां जलाई, धार्मिक स्थानों को अपवित्र किया और समस्त ब्राह्मण संगठनों व हिन्दू समाज के प्रति गंदी.गंदी गालियां दीं, अपमान जनक शब्दों का प्रयोग किया तथा समस्त मानस प्रेमियों के प्रति अभद्रता की, जिससे जन मानस में काफी आक्रोश एवं अशांति का वातावरण उत्पन्न हो गया, इस कारण से हिन्दू धर्म के विभिन्न वर्गों में शत्रुता एवं वैमनस्य का भाव पैदा हो गया।

5. विवेचना के दौरान शिकायतकर्ता ने विवेचक को एक पेन ड्राइव दी, जिसको देखने पर विवेचक ने पाया कि प्रार्थी द्वारा श्री राम चरित मानस की चौपाई “ढोल गंवार सूद्र पसु नारी, सकल ताड़ना के अधिकारी व “पूजिअ बिप्र सील गुन हीना, सूद्र न गुन गन ज्ञान प्रवीणाए आदि चौपाइयों पर आपत्ति की गई। केस डायरी में विवेचक ने यह भी अंकित किया है कि उपरोक्त बयान लिखे जाने के बाद जब उसने वादी मुकदमा के घर जाकर उससे अन्य व्यक्तियों के संबंध में

पूछताछ किया तो उसने बताया कि वह अन्य व्यक्तियों के बारे में नहीं जानता है। किन्तु नामित अभियुक्तगण द्वारा श्री राम चरित मानस पर बयान देने के परिणामस्वरूप ही पूरे प्रदेश में एक राजनैतिक दल के नेताओं एवं कार्यकर्ताओं द्वारा श्री राम चरित मानस की प्रतियां जलाई गई एवं अपमान किया गया, जिससे हिन्दू धर्म के विभिन्न वर्गों में शत्रुता एवं द्वेष की भावना पैदा हुई। विवेचक ने यह भी अंकित किया है कि अभियुक्तगण द्वारा कथित अपराध अपने विधान परिषद सदस्य एवं विधान सभा सदस्य के रूप में कर्तव्यों के निर्वहन करने के दौरान कारित नहीं किया गया है। अपितु राजनैतिक लाभ लेने के लिए कारित किया गया है।

6. विवेचना के उपरान्त विवेचक ने दिनांक 05.04.2023 को आरोप पत्र प्रस्तुत करते हुए कहा कि अभियुक्तगण द्वारा मीडिया एवं ट्विटर के माध्यम से श्री राम चरित मानस की चौपाइयों पर दिए गए बयान के कारण पूरे भारत में विरोध प्रदर्शन किया गया, जिसमें उनके कार्यकर्ताओं द्वारा श्री राम चरित मानस की प्रतियां जलाई गई एवं अपमानित किया गया, जिससे विभिन्न वर्गों में शत्रुता एवं वैमनस्य पैदा हुआ। अभियुक्तगण के विरुद्ध अपराध अन्तर्गत धारा 153, 295, 298, 505 भा०दं०वि० बखूबी साबित है।

7. उक्त आरोप पत्र के अनुक्रम में विद्वान मुख्य न्यायिक मजिस्ट्रेट/विशेष न्यायाधीश एम.पी./एम.एल.ए प्रतापगढ़ ने मुकदमा संख्या.11811 सन् 2023 में दिनांक 12.07.2023 को आदेश पारित किया, जिसमें कहा गया है कि केस डायरी में उपलब्ध गवाहों के बयान अन्तर्गत धारा 161 दं०प्र०सं० तथा पत्रावली पर उपलब्ध साक्ष्य से अभियुक्तगण के विरुद्ध प्रथम दृष्टया अपराध अन्तर्गत धारा 153, 295, 298, 505 भा०दं०सं० कारित किया जाना दृष्टिगत होता है। इस आधार पर न्यायालय ने उपरोक्त अपराधों का संज्ञान लेते हुए अभियुक्तगण को विचारण हेतु तलब करने के लिए समन प्रेषित किए और उन्हें दिनांक 01.08.2023 को प्रस्तुत होने का आदेश दिया।

8. आरोप पत्र एवं संज्ञान तथा तलबी आदेश एवं कार्यवाही के निरस्तीकरण की प्रार्थना के समर्थन में प्रार्थी के विद्वान अधिवक्ता ने पहला तर्क दिया कि प्रथम सूचना रिपोर्ट अथवा किसी भी बयान या आरोप पत्र में कथित आरोप कारित होने की तिथि, समय अथवा स्थान अंकित नहीं किया गया है, जिससे आरोप अस्पष्ट हो जाते हैं।

9. प्रार्थी के विद्वान अधिवक्ता का अगला तर्क है कि पत्रावली पर उपलब्ध सामग्री से कथित अपराधों का कारित किया जाना प्रथम दृष्टया प्रतीत नहीं होता है तथा संग्रहीत सामग्री के आधार पर प्रार्थी के विरुद्ध मुकदमा चलाए जाने का कोई आधार नहीं है। उन्होंने यह भी कहा कि श्री राम चरित मानस की प्रतियां जलाए जाने की बात किसी भी साक्षी ने अपने बयान में नहीं कही है।

10. प्रार्थी के विद्वान अधिवक्ता ने यह भी तर्क दिया कि प्रार्थी का कथन उसके स्वयं का कथन नहीं था तथा उसने मात्र श्री राम चरित मानस की चौपाइयों का उद्धरण दिया था। प्रार्थी के विद्वान अधिवक्ता ने यह भी कहा कि प्रार्थी भारत का नागरिक है और संविधान के अनुच्छेद 19(1)(A) के अन्तर्गत उसे अभिव्यक्ति की स्वतंत्रता का मौलिक अधिकार प्राप्त है। प्रार्थी ने विवादित कथन अपने उपरोक्त मौलिक अधिकार के अन्तर्गत दिया था।

11. प्रार्थी के विद्वान अधिवक्ता ने अगला तर्क यह दिया कि प्रार्थी के विरुद्ध अभियोजन चलाए जाने की स्वीकृति केंद्रीय सरकार, राज्य सरकार या जिला मजिस्ट्रेट द्वारा नहीं दी गई है तथा ऐसी परिस्थिति में धारा 196 दं०प्र०सं० के प्रावधानों के अनुसार कोई भी न्यायालय धारा 505 के अधीन दण्डनीय अपराध का संज्ञान नहीं ले सकता है।

12. उक्त के उत्तर में विद्वान अतिरिक्त महाधिवक्ता तथा विद्वान अतिरिक्त शासकीय अधिवक्ता ने कहा कि विद्वान अधिवक्ता प्रार्थी द्वारा उठाए गए बिन्दु धारा 482 दं०प्र०सं० के अन्तर्गत इस न्यायालय को प्राप्त क्षेत्राधिकार की सीमाओं से परे हैं। धारा 482 दं०प्र०सं० के अन्तर्गत न्यायालय को लघु विचारण नहीं करना होता है तथा मात्र यह देखना होता है कि क्या अभियुक्तगण के विरुद्ध इस स्तर पर अभियोजन द्वारा कथित अपराधों के लिए विचारण चलाए जाने हेतु प्रथम दृष्टया मामला बन रहा है या नहीं। इस स्तर पर न्यायालय को न तो कथनों की सत्यता का परीक्षण करना होता है और न ही साक्ष्यों की विवेचना करनी होती है।

13. प्रार्थी के विद्वान अधिवक्ता ने पी. ए. रंजीत बनाम पुलिस निरीक्षक, तिरुपनथल पुलिस स्टेशन और अन्य, सीआरएल. ओ.पी. (एमडी) नंबर 8893/2019 और सीआरएल एमपी (एमडी) नंबर 5643/2019 में मद्रास उच्च न्यायालय (मदुरै बेंच) के माननीय एकल न्यायाधीश वाली एक पीठ के निर्णय दिनांक 12.11.2021 को प्रस्तुत

किया, जहां याचिकाकर्ता ने राजा राजाराज चोल द्वारा शुरू की गई जाति व्यवस्था के बारे में एक सार्वजनिक बैठक में कहा कि चोल युग के शासन के कारण भूमि लोगों की जोत से ले ली गई थी और वे भूमिहीन गरीब हो गए थे; कि चोल युग ने देवदासी प्रणाली की शुरुआत की, जो वर्तमान स्थिति का मूल कारण था; कि वे मवेशियों को खा रहे हैं, जो समाज के अन्य वर्गों द्वारा पूजनीय है। उन्होंने कहा कि चोल युग इतिहास में काला युग है। वह जाति व्यवस्था का भी जिक्र कर रहे थे, जिसे राजनीतिक दलों द्वारा अपनाया गया है, जो जाति के आधार पर चुनाव के लिए उम्मीदवारी का नामांकन करते हैं। उन्होंने उपस्थित लोगों को डॉण अंबेडकर की पुस्तक पढ़ने और उमर फारूक का अनुसरण करने की भी सलाह दी। उपरोक्त विशेष तथ्यों के दृष्टिगत मद्रास उच्च न्यायालय ने कहा कि याचिकाकर्ता ने केवल सिस्टम पर एक शिकायत व्यक्त की थी और उसे आपराधिक अभियोजन के लिए इससे आगे नहीं बढ़ाया जा सकता है। उक्त निर्णय विशिष्ट तथ्यों पर आधारित हैं तथा प्रस्तुत प्रकरण में लागू होने वाला कोई सिद्धान्त इसमें प्रतिपादित नहीं किया गया है।

14. प्रार्थी के विद्वान अधिवक्ता ने माननीय सर्वोच्च न्यायालय के निर्णय उत्तर प्रदेश राज्य बनाम ललई सिंह यादव, (1976) 4 SCC 213 को भी प्रस्तुत किया, जो उत्तर प्रदेश सरकार द्वारा दंड प्रक्रिया संहिता की धारा 99-ए के अन्तर्गत अंग्रेजी में प्रकाशित पुस्तक “**Ramayan – A True Reading**” और हिंदी में प्रकाशित इसके अनुवाद को जप्त करने के लिए पारित एक आदेश को उच्च न्यायालय द्वारा निरस्त किए जाने के आदेश के विरुद्ध अपील थी। माननीय सर्वोच्च न्यायालय ने अपने निर्णय में धारा 99-ए की आवश्यकताओं का विश्लेषण किया। उक्त निर्णय में प्रतिपादित सिद्धान्त प्रस्तुत प्रकरण के निर्णय में लागू नहीं होंगे क्योंकि यह विधि का सुस्थापित सिद्धान्त है कि न्यायिक निर्णय विधि को विधायिका द्वारा बनाए गए संविधियों के अनुसार नहीं पढ़ा जाना चाहिए अपितु उन्हें उन तथ्यों के प्रकाश में ही पढ़ा जाना चाहिए, जिनके परिप्रेक्ष्य में वह निर्णय दिया गया है।

15. प्रार्थी के विद्वान अधिवक्ता ने माननीय सर्वोच्च न्यायालय के निर्णय एस. वीराबद्रन चेट्टियार बनाम ई.वी. रामास्वामी नायकर, ए.आई.आर 1958 एस सी 1032 को भी प्रस्तुत किया जिसमें आरोप यह था कि धार्मिक सुधारक होने का दावा करने वाले एक नेता ने टाउन हॉल में एक सार्वजनिक बैठक अपने भाषण में स्पष्ट रूप से कहा कि उनका इरादा भगवान गणेश की मूर्ति को तोड़कर हिंदू समुदाय की

भावनाओं का अपमान करना था और उन्होंने टाउन हॉल मैदान में सार्वजनिक रूप से भगवान गणेश की मूर्ति को तोड़ दिया। शिकायत में आरोप लगाया गया कि भगवान गणेश की छवि को तोड़ने का उक्त कार्य हिंदू समुदाय के कुछ वर्गों की धार्मिक भावनाओं का अपमान करने के इरादे से किया गया था, जो भगवान गणेश को पूजा में रखते हैं, और शिकायत किए गए कार्य भारतीय दंड संहिता की धारा 295 और 295-ए के अंतर्गत अपराध हैं। मजिस्ट्रेट ने आपराधिक प्रक्रिया संहिता की धारा 203 के अंतर्गत शिकायत को खारिज करते हुए कहा कि आरोपी द्वारा कथित तौर पर तोड़ी गई गणेश की मिट्टी की आकृति पवित्र नहीं है तथा इसकी किसी भी वर्ग के व्यक्तियों द्वारा पूजा नहीं की जाती थी। मजिस्ट्रेट ने यह भी कहा कि सिर्फ इसलिए कि यह आकृति भगवान गणेश से मिलता जुलता था तथा एक वर्ग द्वारा पूजा में रखा गया था, यह पवित्र मानी जाने वाली वस्तु नहीं बन सकता है तथा अगर कोई व्यक्ति ऐसी मूर्ति के साथ छेड़छाड़ करता है तो यह अपराध नहीं है। सत्र न्यायालय और उच्च न्यायालय ने मजिस्ट्रेट के निर्णय को निरस्त नहीं किया।

16. अपील में माननीय सर्वोच्च न्यायालय ने कहा कि नीचे के न्यायालय में विद्वान न्यायाधीश ने “*किसी भी वर्ग के व्यक्तियों द्वारा पवित्र मानी जाने वाली किसी भी वस्तु*” शब्दों को यह कहते हुए कि केवल मंदिरों में मूर्तियों या त्योहारों के अवसरों पर जुलूस में ले जाने वाली मूर्तियों को उन शब्दों में शामिल किया जाना है, बहुत सीमित अर्थ दिया है। भारतीय दंड संहिता की धारा 295 में अर्थों को सीमित करने के ऐसे कोई स्पष्ट शब्द नहीं हैं, और विद्वान न्यायाधीश ने स्पष्ट रूप से सीमा के उन शब्दों को प्रयोग करने में गलती की है। बाइबल या कुरान या गुरु ग्रंथ साहिब जैसी पवित्र पुस्तकें भी स्पष्ट रूप से उन सामान्य शब्दों के दायरे में हैं। यदि अधीनस्थ न्यायालय धारा 295 में महत्वपूर्ण शब्दों की अपनी व्याख्या में सही थे, तो ऐसी पवित्र पुस्तकों को जलाना या अन्यथा नष्ट करना या अपवित्र करना, दंड कानून के दायरे में नहीं आएगा। माननीय सर्वोच्च न्यायालय ने कहा कि इस तरह की सीमित व्याख्या विधियों की व्याख्या के सभी सुस्थापित सिद्धांतों के विरुद्ध है। कोई भी वस्तु, चाहे वह कितनी भी तुच्छ क्यों न हो, यदि किसी भी वर्ग के व्यक्तियों द्वारा पवित्र मानी जाती है, तो वह दंड धारा के अर्थ के अंतर्गत आती है। यह बिल्कुल आवश्यक नहीं है कि वस्तु पवित्र होने के लिए वास्तव में उसकी पूजा की जानी चाहिए थी। किसी वस्तु को व्यक्तियों के एक वर्ग द्वारा उनके द्वारा पूजा किए बिना भी पवित्र माना जा सकता है। इस धारा का उद्देश्य विभिन्न धर्मों या पंथों के व्यक्तियों की धार्मिक

मान्यताओं का सम्मान करना है। न्यायालयों को ऐसे मामलों में बहुत सतर्क रहना होगा, और विभिन्न विश्वासों वाले व्यक्तियों के विभिन्न वर्गों की भावनाओं और धार्मिक भावनाओं का उचित ध्यान देना होगा, भले ही वे उन मान्यताओं को साझा करते हों या नहीं, या वे न्यायालय की राय में तर्कसंगत हैं या नहीं।

17. उपरोक्त निर्णय किसी भी तरह से आवेदक के मामले में मदद नहीं करता है। अपितु इसमें कहे गये सिद्धान्त प्रथम दृष्टया प्रार्थी को आरोपित करने के आधार प्रदान करते हैं।

18. प्रार्थी के विद्वान अधिवक्ता ने माननीय सर्वोच्च न्यायालय द्वारा **चक्र बेहरा बनाम बालकृष्ण महापात्र, एआईआर 1963 उड़ीसा 23** में दिए गए निर्णय को प्रस्तुत किया, जिसमें याचिकाकर्ताओं को धारा 298 भा०दं०सं० के अन्तर्गत इस आरोप पर दोषी ठहराया गया था और 15 रुपये के जुर्माने की सजा सुनाई गई थी, कि उन्होंने ग्रामीणों की धार्मिक भावनाओं को चोट पहुंचाने के इरादे से अशुभ दिनों में दो देवताओं की पूजा की। माननीय उच्चतम न्यायालय ने कहा कि यदि कोई अनधिकृत व्यक्ति किसी अशुभ दिन पर किसी मंदिर में पूजा करता है तो यह कुछ परिस्थितियों में अन्य व्यक्तियों के नागरिक अधिकारों का अतिक्रमण हो सकता है, लेकिन याचिकाकर्ताओं को धारा 298 भा०दं०सं० के अन्तर्गत अपराध का दोषी ठहराने के लिए अभियोजन पक्ष को सकारात्मक रूप से स्थापित करना होगा कि यह कृत्य उनकी धार्मिक भावनाओं को चोट पहुंचाने के इरादे से किया गया था। याचिकाकर्ताओं ने अपने पुजारी के माध्यम से उचित तरीके से पूजा की। किए गए अनुष्ठानों में कोई कार्य नहीं था जो संभवतः किसी अन्य व्यक्ति की भावनाओं को चोट पहुंचा सकता था। पूजा करते समय याचिकाकर्ताओं के धार्मिक उत्साह को कभी चुनौती नहीं दी गई। वे देवताओं को प्रसन्न करना चाहते थे, क्योंकि गांव में मवेशियों की बीमारी का प्रसार था। उनकी कार्रवाई चाहे कितनी भी अनधिकृत क्यों न हो, उनका किसी भी अन्य सह-ग्रामीणों की धार्मिक भावनाओं को चोट पहुंचाने का कोई इरादा नहीं था।

19. उपरोक्त निर्णय भी प्रकरण के विशेष तथ्यों पर आधारित है तथा अभियुक्तों की दोषसिद्धि उच्च न्यायालय ने इस आधार पर निरस्त किया कि उन्होंने उचित तरीके से पूजा करके देवताओं को प्रशन्न करने की चेष्टा की थी। उक्त निर्णय प्रस्तुत मामले के तथ्यों पर लागू नहीं होता है तथा इसका लाभ प्रार्थी को नहीं मिलेगा।

20. इसके उत्तर में विद्वान अतिरिक्त महाधिवक्ता ने माननीय सर्वोच्च न्यायालय के निर्णय **कर्णाटक राज्य बनाम एम देवेन्द्रप्पा, (2002) 3 एससीसी 892**, को प्रस्तुत किया जिसमें माननीय सर्वोच्च न्यायालय ने कहा कि संहिता की धारा 482 के अंतर्गत शक्ति का प्रयोग अपवाद है न कि नियम। यह धारा उच्च न्यायालय को कोई नई शक्तियां प्रदान नहीं करती है। यह केवल उस अंतर्निहित शक्ति को बचाता है जो संहिता के अधिनियमन से पहले न्यायालय के पास थी। इसमें तीन परिस्थितियों की परिकल्पना की गई है जिनके अंतर्गत अंतर्निहित अधिकार क्षेत्र का प्रयोग किया जा सकता है, अर्थात्,

- (i) संहिता के अंतर्गत पारित किसी आदेश को प्रभावी बनाने के लिए,
- (ii) न्यायालय की प्रक्रिया के दुरुपयोग को रोकने के लिए, और
- (iii) अन्यथा न्याय के उद्देश्यों को सुरक्षित करने के लिए।

अंतर्निहित क्षेत्राधिकार के प्रयोग को नियंत्रित करने के लिए कोई नियम बनाना न तो संभव है और न ही वांछनीय है। संहिता की धारा 482 के अंतर्गत उच्च न्यायालय के पास जो शक्तियां हैं, वे बहुत व्यापक हैं और इसके प्रयोग में बहुत सावधानी की आवश्यकता होती है। न्यायालय को यह सुनिश्चित करने के लिए सावधान रहना चाहिए कि इस शक्ति का प्रयोग करने में उसका निर्णय ठोस सिद्धांतों पर आधारित है। एक वैध अभियोजन को समाप्त करने के लिए अंतर्निहित शक्ति का उपयोग नहीं किया जाना चाहिए। किसी राज्य का सर्वोच्च न्यायालय होने के नाते उच्च न्यायालय को आम तौर पर ऐसे मामले में प्रथम दृष्टया निर्णय देने से बचना चाहिए जहां पूरे तथ्य अधूरे और धुंधले हैं, खासकर जब साक्ष्य एकत्र नहीं किए गए हैं और न्यायालय के समक्ष पेश नहीं किए गए हैं और इसमें शामिल मुद्दे पर्याप्त सामग्री के बिना उनके वास्तविक परिप्रेक्ष्य में नहीं देखे जा सकते हैं।

21. माननीय सर्वोच्च न्यायालय के एक अन्य निर्णय **केंद्रीय जांच ब्यूरो बनाम आर्यन सिंह आदि, 2023 एससीसी ऑनलाइन एससी 379** में अवधारित है कि धारा 482 दं०प्र०सं० के अंतर्गत शक्तियों का उपयोग करते हुए न्यायालय को लघु विचारण (मिनी ट्रायल) करने की आवश्यकता नहीं है। इसमें अभियोजन/जांच एजेंसी को आरोपों को साबित करने की आवश्यकता नहीं है। दं०प्र०सं० की धारा 482 के

अंतर्गत शक्तियों का उपयोग करते समय न्यायालय के पास बहुत सीमित अधिकार क्षेत्र है और मात्र यह विचार करने की आवश्यकता है कि शक्या आरोपी के विरुद्ध आगे बढ़ने के लिए कोई पर्याप्त सामग्री उपलब्ध है, जिसके लिए आरोपी पर मुकदमा चलाने की आवश्यकता है या नहीं।

22. **बृंदा करात बनाम राज्य (एनसीटी दिल्ली), 2022 एससीसी ऑनलाइन दिल्ली 1775 पृष्ठ 162**, में दिल्ली उच्च न्यायालय ने कहा कि एक नेता द्वारा जो भी कार्य किया जाता है आम आदमी उसके पदचिन्हों पर चलता है और जो भी मानक वह अपने कृत्यों से निर्धारित करता है। उसका अनुसरण उसके अनुयायियों द्वारा किया जाता है। जो लोग जन नेता हैं और उच्च पदों पर आसीन हैं, उन्हें अत्यंत ईमानदारी और उत्तरदायित्व के साथ व्यवहार करना चाहिए। भारत जैसे लोकतंत्र में चुने गए नेताओं की जिम्मेदारी न केवल अपने निर्वाचन क्षेत्र के मतदाताओं के प्रति है। बल्कि पूरे समाज धाष्ट्र और संविधान के प्रति भी है। इस प्रकार नेताओं को ऐसे कृत्यों या भाषणों में शामिल होना शोभा नहीं देता है जो समुदायों के बीच दरार पैदा करते हैं, तनाव पैदा करते हैं, और समाज में सामाजिक ताने-बाने को बाधित करते हैं।

23. यद्यपि धारा 482 दं०प्र०सं० के अन्तर्गत आरोप पत्र के निरस्तीकरण की प्रार्थना तय करते समय इस न्यायालय को मामले के गुण-दोष पर विचारण नहीं करना होता है तदपि चूंकि प्रार्थी के विद्वान अधिवक्ता ने यह तर्क किया है कि प्रार्थी ने मात्र श्री राम चरित मानस की चौपाइयों का उद्धरण देते हुए विवादित कथन किया था तथा उसको संविधान के अनुच्छेद 19 (1)(A) के अन्तर्गत ऐसा कथन करने का मौलिक अधिकार था, यह स्पष्ट करना आवश्यक हो जाता है कि भारतीय संविधान का अनुच्छेद 19 उचित प्रतिबंधों के साथ भाषण और अभिव्यक्ति की स्वतंत्रता प्रदान करता है। उचित प्रतिबंधों में सार्वजनिक व्यवस्था, शालीनता या नैतिकता या न्यायालय की अवमानना, मानहानि या अपराध के लिए उकसाना शामिल है। नफरत फैलाने वाले भाषण संप्रदाय विशेष के खिलाफ अपराधों को भी उकसाते हैं। अभिव्यक्ति की स्वतंत्रता का मौलिक अधिकार किसी भी व्यक्ति को यह अधिकार नहीं देता है कि वह ऐसा कोई कृत्य करे जो एक दंडनीय अपराध की श्रेणी में आ सकता हो।

24. जहां तक प्रार्थी के विद्वान अधिवक्ता का यह कथन है कि प्रार्थी ने श्री राम चरित मानस की चौपाइयों का उद्धरण करते हुए कोई असत्य बात नहीं कही थी, न्यायालय का

मत है कि किसी भी ग्रंथ/अभिलेख में किए गए कथन सही परिप्रेक्ष्य में ही पढ़े तथा रखे जाने चाहिए तथा कहीं से भी कोई एक अंश बिना सम्पूर्ण संगत तथ्यों के रखना सम्पूर्ण सत्य कथन नहीं है तथा कुछ परिस्थितियों में ऐसा कथन असत्य कथन भी हो सकता है। उदाहरण के लिए कोई भी विधि अथवा विधिक प्राविधान अथवा न्यायिक निर्णय भी हमेशा पूरे ही पढ़े जाते हैं तथा विधि के प्रावधानों का अथवा न्यायिक निर्णयों का कोई अंश बिना, उसके समस्त संगत प्रावधानों के नहीं प्रस्तुत किया जा सकता है। इसी प्रकार जब श्री राम चरित मानस की कोई चौपाई उद्धरित की जाए तो यह अनिवार्य है कि यह भी ध्यान में रखा जाए कि उसमें कहा कथन किस पात्र ने कैसी परिस्थिति में किस व्यक्ति से कहा।

25. प्रार्थी द्वारा कही गई चौपाई 'ढोल गंवार सूद्र पसु नारी, सकल ताड़ना के अधिकारी' समुद्र ने श्री रामचंद्र जी से इस आशय के साथ कही कि वह स्वयं एक जड़बुद्धि है तथा वह इस कारण से की गई भूल की क्षमा मांग रहा है ऐसी परिस्थिति में स्वयं को जड़बुद्धि मानने वाले एक पात्र द्वारा कहा गया कथन जब समस्त संगत तथ्यों के संदर्भ के बिना प्रस्तुत किया जाता है तो यह सत्य का सही विरूपण नहीं कहा जा सकता है।

26. उक्त चौपाई की व्याख्या करते हुए कुछ विद्वानों ने कहा है कि यहां 'ताड़ना' शब्द का अर्थ सीख अथवा शिक्षा देना है तथा चौपाई का सही अर्थ यह है कि इसमें कहे गए सभी प्रकार के पात्र भी सीख (शिक्षा) पाने के अधिकारी हैं।

27. इसी प्रकार से दूसरी विवादित चौपाई “पूजिअ बिप्र सील गुन हीना, सूद्र न गुन गन ज्ञान प्रवीना” के विषय में भी विद्वानों के विभिन्न मत हैं। विशेषतः विप्र के अर्थ को लेकर कुछ विद्वानों का मानना है कि विप्र से तात्पर्य ऐसे व्यक्तियों से है जिन्हें ब्रह्म ज्ञान है तथा यह किसी जाति विशेष में जन्म लिए व्यक्तियों को इंगित नहीं करता है।

28. प्रार्थी का मत इससे भिन्न हो सकता है, क्योंकि यह सही है कि प्रार्थी को भी अन्य व्यक्तियों की तरह उक्त ग्रंथ की अपनी एक स्वतंत्र समीक्षा करने का अधिकार है, किन्तु स्वतंत्र समीक्षा अथवा स्वस्थ आलोचना का तात्पर्य यह नहीं है कि ऐसे शब्दों का प्रयोग किया जाए जिससे लोग अपराध कारित करने को प्रेरित होने लगे।

29. जहां तक प्रार्थी के विद्वान अधिवक्ता का यह तर्क है कि प्रथम सूचना रिपोर्टए बयान अथवा आरोप पत्र में आरोप

की तिथि समय व स्थान अंकित नहीं किया गया है। यह कमियां आरोप पत्र के निरस्तीकरण का आधार नहीं हो सकती हैं। क्योंकि इस स्तर पर न्यायालय को मात्र यह देखना है कि क्या प्रथम दृष्टया आरोप कारित होना प्रतीत होता है और अभियुक्तगण के विचारण का पर्याप्त आधार है अथवा नहीं।

30. प्रार्थी के विरुद्ध धारा 153, 295, 298, 505 भा०द०सं० के अपराध कारित करने का आरोप जिनके प्राविधान निम्नवत है:-

“धारा 153 :-बलवा कराने के आशय से स्वैरिता से प्रकोपन देना . यदि बलवा किया जाए, यदि बलवा न किया जाए — जो कोई अवैध बात करने द्वारा किसी व्यक्ति को परिद्वेष से या स्वैरिता से प्रकोपित इस आशय से या यह सम्भाव्य जानते हुए करेगा कि ऐसे प्रकोपन के परिणामस्वरूप बलवे का अपराध किया जाएगा, यदि ऐसे प्रकोपन के परिणामस्वरूप बलवे का अपराध किया जाए, तो वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि एक वर्ष तक की हो सकेगी, या जुमनि से, या दोनों से, और यदि बलवे का अपराध न किया जाए, तो वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि छह मास तक की हो सकेगी, या जुमनि से, या दोनों से, दण्डित किया जाएगा।

धारा 295 :-किसी वर्ग के धर्म का अपमान करने के आशय से उपासना के स्थान को क्षति करना या अपवित्र करना. जो कोई किसी उपासना के स्थान को या व्यक्तियों के किसी वर्ग द्वारा पवित्र मानी गई किसी वस्तु को नष्ट, नुकसानग्रस्त या अपवित्र इस आशय से करेगा कि किसी वर्ग के धर्म का तद्वारा अपमान किया जाए या यह सम्भाव्य जानते हुए करेगा कि व्यक्तियों का कोई वर्ग ऐसे नाश, नुकसान या अपवित्र किए जाने को अपने धर्म के प्रति अपमान समझेगा, वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि दो वर्ष तक की हो सकेगी, या जुमनि से, या दोनों से, दण्डित किया जाएगा।

धारा 298 :-धार्मिक भावनाओं को ठेस पहुँचाने के विमर्शित आशय से शब्द उच्चारित करना आदि. जो कोई किसी व्यक्ति की धार्मिक भावनाओं को ठेस पहुँचाने के विमर्शित आशय से उसकी गोचरता में कोई शब्द उच्चारित करेगा या कोई ध्वनि करेगा या उसकी दृष्टिगोचरता में कोई अंगविक्षेप करेगा, या कोई वस्तु रखेगा, वह दोनों में से किसी

भांति के कारावास से, जिसकी अवधि एक वर्ष तक की हो, सकेगी, या जुमाने से, या दोनों से, दण्डित किया जाएगा।

धारा 505 :- लोक रिष्टिकारक वक्तव्य.

(1) जो कोई किसी कथन, जनश्रुति या रिपोर्ट को

(क) इस आशय से किया जिससे यह सम्भाव्य हो कि, भारत की सेना, नौसेना या वायुसेना का कोई ऑफिसर, सैनिक (नाविक या वायुसैनिक) विद्रोह करे या अन्यथा वह अपने उस नाते अपने कर्तव्य की अवहेलना करे, या उसके पालन में असफल रहे, अथवा

(ख) इस आशय से कि, या जिससे यह सम्भाव्य हो कि, लोक के किसी भाग को ऐसा भय या संत्रास कारित हो जिससे कोई व्यक्ति राज्य के विरुद्ध या लोक प्रशान्ति के विरुद्ध अपराध करने के लिए उत्प्रेरित हो, अथवा

(ग) इस आशय से कि, या जिससे यह सम्भाव्य हो कि, उससे व्यक्तियों का कोई वर्ग या समुदाय किसी दूसरे वर्ग या समुदाय के विरुद्ध अपराध करने के लिए उद्दीक्षित किया जाए, रचेगा, प्रकाशित करेगा या परिचालित करेगा, वह कारावास से, जो तीन वर्ष तक का हो सकेगा, या जुमाने से, या दोनों से, दण्डित किया जाएगा।

(2) विभिन्न वर्गों में शत्रुता, घृणा या वैमनस्य पैदा या सम्प्रवर्तित करने वाले कथन. जो कोई जनश्रुति या संत्रासकारी समाचार अन्तर्विष्ट करने वाले किसी कथन या रिपोर्ट को इस आशय से कि, या जिससे यह सम्भाव्य हो कि, विभिन्न धार्मिक, मूलवंशीय भाषाई या प्रादेशिक समूहों या जातियों या समुदायों के बीच शत्रुता, घृणा या वैमनस्य की भावनाएं, धर्म, मूलवंश, जन्म स्थान, निवास स्थान, भाषा, जाति या समुदाय के आधारों पर या अन्य किसी भी आधार पर पैदा या संप्रवर्तित हो, रचेगा, प्रकाशित करेगा, या परिचालित करेगा, वह कारावास से, जो तीन वर्ष तक का हो सकेगा, या जुमाने से, या दोनों से, दण्डित किया जाएगा।

(3) पूजा के स्थान आदि में किया गया उपधारा

(2) के अधीन अपराध. - जो कोई उपधारा (2) में विनिर्दिष्ट अपराध किसी पूजा के स्थान में या किसी जमाव में एं जो धार्मिक पूजा या धार्मिक कर्म करने में लगा हुआ हो एं करेगा एं वह कारावास से जो पांच वर्ष तक का हो सकेगा एं दण्डित किया जाएगा और जुमाने से भी दण्डनीय होगा।

अपवाद.- ऐसा कोई कथन, जनश्रुति या रिपोर्ट इस धारा के अर्थ के अन्तर्गत अपराध की कोटि में नहीं आती, जब उसे रचने वाले, प्रकाशित करने वाले या परिचालित करने वाले

व्यक्ति के पास इस विश्वास के लिए युक्तियुक्त आधार हो कि ऐसा कथन, जनश्रुति या रिपोर्ट सत्य है और वह उसे सद्भावपूर्वक तथा पूर्वोक्त जैसे किसी आशय के बिना] रचता है, प्रकाशित करता है या परिचालित करता है।) ”

31. जब हम धारा 482 दं०प्र०सं० के अंतर्गत न्यायालय को प्राप्त क्षेत्राधिकार की सीमाओं में रहते हुए मामले के तथ्यों को देखते हैं तो प्रथम दृष्टया यह प्रतीत होता है कि प्रार्थी द्वारा श्री राम मानस पर दिए गए बयान के कारण पूरे भारत में कुछ अन्य नेतागण ने एक राय होकर श्री राम चरित मानस की प्रतियां जलाई और समस्त ब्राह्मण संगठनों व हिन्दू समाज के प्रति गंदी-गंदी गालियां दीं अपमान जनक शब्दों का प्रयोग किया तथा समस्त मानस प्रेमियों के प्रति अभद्रता की। इस कारण से जन मानस में काफी आक्रोश एवं अशांति का वातावरण उत्पन्न हो गया तथा हिन्दू धर्म के विभिन्न वर्गों में शत्रुता एवं वैमनस्य का भाव पैदा हो गया।

32. प्रथम दृष्टया ऐसा प्रतीत होता है कि प्रार्थी के उपरोक्त तथ्यों से लोगों में बलवा कराने का प्रकोपन उत्पन्न हुआ। उक्त कृत्यों से श्री राम चरित मानस एं जो एक बड़े वर्ग द्वारा पवित्र ग्रंथ माना जाता है एं को जला कर नुकसान पहुंचाया गया तथा उसका अपमान किया गया एं जिसे एक बड़े वर्ग ने अपने धर्म का अपमान माना। प्रार्थी द्वारा कहे गए कथन प्रथम दृष्टया इस आशय से कहे गए प्रतीत होते हैं या उसके कथनों से यह संभाव्य प्रतीत होता है कि उससे व्यक्तियों का एक वर्ग दूसरे वर्ग के विरुद्ध अपराध करने के लिए उद्दीक्षित हो जाए। अतः प्रथम दृष्टया प्रार्थी द्वारा धारा 153, 295, 298 तथा 505(1)(ग) भा०दं०सं० के अन्तर्गत अपराध का कारित होना प्रतीत होता है।

33. प्रार्थी कथित आरोपों के लिए दोषी है या नहीं, यह इस न्यायालय को इस स्तर पर नहीं देखना है और यह विचारण के दौरान साक्ष्य लेकर विचारण न्यायालय तय करेगा।

34. प्रार्थी के विद्वान अधिवक्ता ने तर्क दिया कि धारा 196 दं०प्र०सं० के अन्तर्गत केंद्रीय सरकार, राज्य सरकार अथवा जिला मजिस्ट्रेट की स्वीकृति के बिना प्रार्थी के विरुद्ध अभियोजन नहीं चलाया जा सकता है।

35. धारा 196 (1-क)(क) प्राविधानित करती है कि कोई न्यायालय भा०दं०सं०, 1860 की धारा 153(ख) या धारा 505 की उपधारा (2) या उपधारा (3) के अधीन

दण्डनीय किसी अपराध का संज्ञान केंद्रीय सरकार या राज्य सरकार या जिला मजिस्ट्रेट की पूर्व स्वकृति से ही लेगा अन्यथा नहीं। प्रार्थी के विरुद्ध कथित अपराध धारा 505 की उप-धारा(1) के अधीन आते हैं तथा उक्त अपराध के लिए धारा 196 में अभियोजन स्वीकृति लेने की आवश्यकता नहीं है। अतः प्रार्थी के विद्वान अधिवक्ता का यह तर्क भी बलहीन है।

36. उपरोक्त समीक्षा के दृष्टिगत न्यायालय का यह मत है कि प्रार्थना पत्र अन्तर्गत धारा 482 दं०प्र०सं० बलहीन है।

37. तदनुसार, प्रार्थना पत्र निरस्त किया जाता है।

38. यह स्पष्ट किया जाता है कि विचारण न्यायालय प्रकरण को गुण-दोष के आधार पर, साक्ष्यों तथा विधि के अनुसार इस आदेश में कहे गए किसी भी तथ्य से प्रभावित हुए बिना निर्णीत करेगा।

**(2023) 11 ILRA 334
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.11.2023**

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Application u/s 482 No. 11375 of 2023

**Mathura Prasad @ Mathura ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties**

Counsel for the Applicant:
Yogeshwar Sharan Srivastava

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 233(3) - trial court can reject an application on three grounds: vexatious intention, intention to delay the trial, and intention to defeat the ends of justice - Indian Penal Code, 1860 - the relevancy of the witnesses is to be shown, pleaded and proved. (Para -18, 20)

Applications preferred by petitioner for summoning - Head Moharrir, Prabhari Adhikari (Ayudh) and other witnesses - relevancy to call witnesses not indicated in application - rejected by trial court.

HELD:-Applications have been moved with an intention to delay the trial, as the FIR was lodged way back on 14.04.1997 i.e. about 25 years back. Application has rightly been rejected by trial court **(Para -22, 23)**

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

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the applicant and learned AGA for the State and perused the record.

2. The present petition has been filed for the following main relief:-

"For the facts reasons and circumstances mentioned in the accompanying affidavit, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash the order dated 17/10/2023, passed by Learned Additional District and Session Judge Court No. 05/ Special Judge (Gangster Act.) Gonda, (State Vs. Ramesh and Ors.) in Session Trial No. 198 of 2003, in the interest of justice."

3. Brief facts of the case, as indicated, are to the effect that an FIR was registered by the police on 14.07.1997 at about 13.40, with regard to an incident occurred in the night of 13/14.04.1997. The prosecution story narrated in the FIR, in short, is that the named accused persons including the petitioner came to the house of the informant namely Vasudev Mishra, in the night of 13/14.04.1997 at about 2:30 A.M. and assaulted the sons of the informant

with Hathgola and Gun & Katta with the intention to cause death and also demolished the newly constructed wall. Thus, general allegations were leveled in the FIR dated 14.07.1997, against the named accused persons including the petitioner.

4. During the course of trial the statement of the petitioner under Section 313 Cr.P.C. was recorded by the Trial Court on 10.08.2023. In this statement the petitioner stated that at the time of alleged incident the licensed gun of petitioner's father was deposited in the police station and he had gone to his brother's house at Lucknow.

5. After the aforesaid, the petitioner preferred an application No. 307 Kha dated 24.08.2023, praying therein that head Moharrir P.S.- Tarabganj, Distt.- Gonda, who had deposited the licensed gun of petitioner's father bearing gun No. 26797, be summoned for examination to prove that the licensed gun and two cartages (Kartoos), were deposited in the police station by the petitioner after demise of his father on 13.03.1996. Another application No. 308 Kha was preferred by the petitioner, wherein he prayed to summon the Prabhari Adhhikari (Ayudh) Office of District Magistrate, Gonda, to prove the fact that the licensed gun was released on 22.02.2001 in favour of legal heirs of late Umashankar, as the petitioner claims that the licensed gun of his father was not available at the time of alleged occurrence and therefore the alleged presence of the petitioner at the place of alleged occurrence would become foul version of the informant. The petitioner had also preferred a list of the witnesses to be summoned.

6. By means of the impugned order dated 17.10.2023 (Annexure No.1), the trial Court has rejected the above indicated applications of the petitioner.

7. Assailing the order impugned dated 17.10.2023, learned Counsel for the applicant stated that the Additional District and Sessions Judge, Court No.5/ Special Judge (Gangster Act), Gonda, in Session Trial No. 198 of 2003 vide its order dated 17.10.2023, rejected the application(s) no. 306kha, 307kha, 308kha preferred by the applicant for summoning the witnesses namely Head Moharrir, Police Station Tarabganj, District Gonda, and Prabhari Adhikari (Ayudh), Office of District Magistrate Gonda as also Sri Shashi Shekhar Ojha, Praveen Kumar Srivastava, Raghav Ram Pandey, Surendra Kumar Tiwari, Babban Pandey, Harishanker Barai, Devdadeen and Chandramani Tiwari, in a utter arbitrary and illegal manner.

8. He further submitted that allegations against the applicant in the FIR is to the effect that at the time of alleged incident he was holding a gun and as such to support the case setup by the applicant at the stage of 313 Cr.P.C., wherein the applicant specifically indicated that the licensed gun of father of the petitioner was deposited in P.S. Tarabganj, Gonda and on the date of alleged incident the applicant was not present at the place of crime as he had gone to the house of his brother situated at Lucknow, the witnesses indicated in the applications are relevant witnesses and as such they were required to be summoned and being so by the impugned order dated 17.10.2023 injustice has been done by trial court.

9. He further submitted that examination of Head Moharrir and the

Prabhari Adhikari (Ayudh) was required to impeach the case of the prosecution.

10. Learned Counsel for the applicant further says that relevant grounds have already been indicated in paragraph nos. 22 to 25 of the affidavit filed in support of the present application, which are as under:-

"22. That in fact the petitioner has been falsely implicated in the instant case and impugned order has been passed by the Court below in a regular routine manner and as such the interference of this Hon'ble Court is required at this stage to secure the justice in favour of the petitioner.

23. That, the Petitioner submits that the allegations against the Petitioner are serious in nature and without affording opportunity to produce their defense Learned trial court has rejected the applications in cursory and mechanical manner. The Petitioners are charged with attempt to murder, causing injuries and in these circumstances the Petitioners ought to have been given ample opportunity to produce their defense.

24. That, Learned trial court failed to consider that during trial prosecution was given ample opportunity to produce its case but the application of the Petitioner to produce defense witnesses and evidence was rejected on the ground of causing delay.

25. That, section 233 (3) Cr.P.C stipulates that "if the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

11. In support of his contention, learned Counsel for the applicant has placed reliance on the judgment passed by the co-ordinate Bench of this Court dated 21.09.2023 in Application U/s 482 Cr.P.C. No. 9156 of 2023 (Raja Yadav alias Vijay Kumar Yadav and another Versus State of U.P. and Others). The relevant paragraphs, referred by learned Counsel for the applicant, are as under:-

"5. Learned A.G.A., while opposing the prayer of the applicants, submits that police report related to Case Crime No. 296 of 2017 has no relevancy in the present case. It is further submitted that Application Nos. 219 Kha/1, 235 Kha/1 and 239 Kha/1 have already been allowed by the court below by which, F.I.R. of the aforesaid case, final report, site plan, panchayatnama and post mortem report of Amritlal as well as medico legal report were taken on record along with other documents. It is also submitted that for proving of the said documents, it is obligatory on the part of the accused persons/applicants to produce defense witnesses. However, as all the witnesses, those names are mentioned in the police report in Case Crime No. 296 of 2017 have no relevancy in the present case as they are formal witnesses, including the Head Moharrir, Sub-Inspector and the doctor, who prepared the medico legal report as well as post mortem report of Amritlal. It is lastly submitted that the court below has rightly allowed the aforesaid three applications of the applicants and rejected the rest of the applications.

6. Considering the arguments advanced by the learned counsel for the applicants, learned A.G.A. and going through the contents of application, F.I.R., impugned order as well as other relevant documents, it is evident that 6 applications

were moved by the applicants, out of which, 3 applications were allowed by the court below and rest of the 3 applications were rejected vide impugned order.

It is further evident that in the present case, the entire police report of Case Crime No. 296 of 2017 has no relevancy. However, attention of the Court has been drawn towards the statement of Chandrika Prasad, which was recorded in the present case on 09.09.2017, which is entered in CD No. 33 and a request was also made before the court below for calling him as a defense witness, but the same was also rejected. Evidently, the court below rightly rejected the application for summoning the record and police report related to Case Crime No. 296 of 2017, but once the statement of Chandrika Prasad was recorded in the present case and he was not produced as a defense witness, then the defence cannot be stopped from calling him as a defense witness. Therefore, the court below has wrongly rejected the application for summoning the Chandrika Prasad as a defense witness.

7. In such circumstances, present application stands disposed of with the direction that, in case, any such application for summoning of Chandrika Prasad or any other witness is moved, the same shall be considered and decided by the court below expeditiously, in accordance with law. "

12. Prayer is to interfere in the impugned order dated 17.10.2023 and allow the prayer sought in the present application.

13. Learned A.G.A. has opposed the present application. He says that order impugned is well reasoned and the trial court has taken note of each and every aspect of the case including the fact related to the witnesses namely Head Moharrir,

Police Station Tarabganj, District Gonda, Prabhari Adhikari (Ayudh) and also Sri Shashi Shekhar Ojha, Praveen Kumar Srivastava, Raghav Ram Pandey, Surendra Kumar Tiwari, Babban Pandey, Harishanker Barai, Devdadeen and Chandramani Tiwari. He further submitted that applicant was failed to indicate the reasons for summoning these witnesses. As such no interference is required in the present matter and the present application is liable to be dismissed with cost, for the reason that the applicant preferred the application(s) just to cause the delay in trial, as the FIR was lodged way back on 14.04.1997 i.e. about 25 years back.

14. Considered the submissions advanced by learned Counsel for the parties and perused the record.

15. So far as the provision indicated by learned Counsel for the applicant is concerned i.e. 233(3) Cr.P.C., this Court finds that this provision is not mandatory. Each and every application based upon the frivolous ground, would not be allowed under this provision and accordingly it should be read as directory. It is in view of the law laid down by the Hon'ble Apex Court in the case of State of Madhya Pradesh Versus Badri Yadav reported in AIR 2006 SC 1769, the relevant paragraphs reads as under:-

"7. In this matter, the learned Additional Sessions Judge dismissed Crl.R.P. No. 46/2022 relying on a decision reported in AIR 2006 SC 1769: 2006 KHC 842 : (2006) 3 KLT 205: (2006) 9 SCC 549], State of Madhya Pradesh v. Badri Yadav]. In the said decision, the Apex Court considered the impact of Section 233(3) of Cr.P.C. Section 233 deals with 'entering upon defence'. Sub section 3 of

Section 233 provides that if the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. While interpreting sub section 3 of Section 233 of Cr.P.C., the Apex Court held that S.233 itself deals with entering upon defence by the accused. The application for recalling and reexamining persons already examined, as provided under S.311 Cr.P.C., was already rejected. The power to summon any person as a witness or recall and reexamine any person already examined is the discretionary power of the Court in case such evidence appears to it to be essential for a just decision of the case. Under S.233 Cr.P.C. the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his defence. The provisions of sub-s.(3) of S.233 cannot be understood as compelling the attendance of any prosecution witness examined, cross examined and discharged to be juxtaposed as Dws (Defence Witnesses). In the present case PW8 and PW9 were juxtaposed as DW1 and DW2. This situation is not one what was contemplated by sub-s.3 of S.233 Cr.P.C.

8. Thus the law is very clear on the point that the provisions of sub section 3 of Section 233 Cr.P.C. could not be understood as one compelling the attendance of any prosecution witness, who was examined in chief already, cross examined and reexamined, to be examined as a defence witness.

9. In the present case, the prayer that has been canvassed after dismissal of the petition filed to recall PW3 is for the

said purpose and, therefore, such procedure cannot be permitted. In view of the matter, the orders impugned do not require any interference and, therefore, this petition lacks merit and is accordingly dismissed."

16. For coming to the conclusion as to whether the impugned order dated 17.10.2023 passed by the trial court is justified or not, this Court is of the view that it would be appropriate to quote the relevant portion of the same, which reads as under:-

"उभयपक्षों को सुनने तथा पत्रावली के परिशीलन के पश्चात् स्पष्ट होता है कि प्रस्तुत सत्र परीक्षण 198/2003 राज्य बनाम रमेश आदि मुकदमा अपराध संख्या 64/1997 अन्तर्गत धारा 147, 148, 149, 307, 324, 427, भारतीय दण्ड संहिता, थाना तरबगंज, जिला गोण्डा से सम्बन्धित हैं पत्रावली एक्शन प्लान के अन्तर्गत प्राचीनतम वादों की श्रेणी में आती है आरोप विरचित किये जाने के पश्चात् प्रस्तुत सत्र परीक्षण में दिनांक 15.07.2023 को अभियोजन साक्ष्य समाप्त होने के उपरान्त पत्रावली अभियुक्तगण के बयान अन्तर्गत धारा 313 सीआरपीसी हेतु नियत की गयी। तत्पश्चात् दिनांक 10.08.2023 बयान अन्तर्गत धारा 313 सीआरपीसी अभिलिखित किया गया तथा पत्रावली सफाई साक्ष्य हेतु नियत की गयी, जिसके पश्चात् अभियुक्तगण की ओर से उपरोक्त तीनों ही प्रार्थना पत्र संख्या 306ख, 307ख, 308ख, सफाई साक्ष्य में विभिन्न साक्षियों को प्रस्तुत किये जाने हेतु प्रस्तुत किया गया है। यहाँ यह उल्लेख करना भी समीचीन होगा कि अभियुक्तगण की ओर अपने उपरोक्त तीनों ही प्रार्थना पत्र में जिस विशेष बन्दूक एस0बी0बी0एल0 गन संख्या 26797 का उल्लेख करते हुए उक्त बन्दूक के संदर्भ में सम्बन्धित हेड मोहरीर द्वारा जारी की गयी रसीद के आधार पर तत्कालीन हेड मोहरीर थाना तरबगंज जिला गोण्डा तथा सम्बन्धि प्रभारी अधिकारी (आयुध) कार्यालय जिला मजिस्ट्रेट गोण्डा को दस्तावेजीय साक्ष्यों के साथ सफाई साक्ष्य में तलब किये जाने हेतु याचना की गयी है उक्त विशेष लाइसेंसी बन्दूक के संदर्भ में वादी मुकदमा द्वारा न तो प्रथम सूचना रिपोर्ट में कोई उल्लेख किया गया है और नही उक्त विशेष लाइसेंसी बन्दूक को सम्बन्धित विवेचक द्वारा विवेचना में सम्मिलित किया गया है और न ही उक्त के संदर्भ में कोई फर्द बरामदगी ही पत्रावली पर उपलब्ध है। अतः विशेष लाइसेंसी बन्दूक के जमा किये जाने के संदर्भ में जारी रसीद एवं अन्य दस्तावेजी साक्ष्यों के साथ सम्बन्धित तत्कालीन हेड मोहरीर व

प्रभारी अधिकारी (आयुध) जिला मजिस्ट्रेट गोण्डा को सफाई साक्ष्य में तलब किये जाने का कोई औचित्य नहीं है और न ही प्रस्तुत सत्र परीक्षण के प्रभावी एवं सम्यक् न्याय निर्णयन हेतु उक्त साक्षियों को तलब किया जाना आवश्यक ही है। जहाँ तक अभियुक्तगण द्वारा प्रस्तुत प्रार्थना पत्र 306 ख में अन्य साक्षियों शशि शेखर ओझा, प्रवीण कुमार श्रीवास्तव, राघवराम पाण्डेय, सुरेन्द्र कुमार तिवारी, बब्बन पाण्डेय, हरिशंकर बढई, देवतादीन व चन्द्रमणि तिवारी को तलब किये जाने की याचना का प्रश्न है तो उक्त साक्षियों के संदर्भ में अभियुक्तगण द्वारा यह स्पष्ट नहीं किया गया है कि वे प्रस्तुत सत्र परीक्षण के प्रभावी एवं सम्यक् न्याय निर्णयन हेतु किस प्रकार आवश्यक हैं एवं उक्त व्यक्ति घटना से किस प्रकार जुड़े हुए हैं कि उनके साक्ष्य से अभियुक्तगण लाभ प्राप्त करने के अधिकारी होंगे। यहाँ यह उल्लेख करना भी समीचीन होगा कि अभियोजन पक्ष की ओर से प्रस्तुत साक्षी पी. डब्लू. 07 हेड मोहरीर जगदीश पाण्डेय से अभियुक्तगण की ओर प्रतिपरीक्षा में प्रार्थना पत्र में उल्लिखित विशेष लाइसेंसी बन्दूक के संदर्भ में कोई भी प्रश्न नहीं किया गया है और न ही अभियुक्तगण द्वारा विवेचना के दौरान अपने बयान अन्तर्गत धारा 161 सीआरपीसी में ही न तो कोई कथन किया गया है और न ही कोई दस्तावेजीय साक्ष्य प्रस्तुत किया गया है अभियुक्तगण द्वारा उपरोक्त तीनों ही प्रार्थना पत्र मात्र प्रस्तुत सत्र परीक्षण को विलम्बित किये जाने के उद्देश्य से प्रस्तुत किया जाना परिलक्षित होता है।

अतः उपरोक्त मामले के तथ्य एवं परिस्थितियों को दृष्टिगत रखते हुए अभियुक्तगण की ओर प्रस्तुत प्रार्थना पत्र निरस्त किये जाने योग्य है।

आदेश

आवेदक/अभियुक्तगण मथुरा प्रसाद पाण्डेय आदि द्वारा क्रमशः प्रस्तुत किये गये प्रार्थना पत्र संख्या 306ख, 307ख, व 308ख, निरस्त किये जाते हैं। पत्रावली वास्ते बहस दिनांक 30.10.2023 को पेश हो।"

17. From the relevant portion of impugned order dated 17.10.2023, quoted above, it appears that for rejecting the prayer to summon Head Moharrir P.S.- Tarabganj, Distt.- Gonda and Prabhari Adhikari (Ayudh), the trial court observed that neither the informant has indicated anything in the FIR with regard to the licensed gun nor the same was made part of the investigation report and as such there is no requirement to summon these witnesses. With regard to Head Moharrir P.S.- Tarabganj, Distt.- Gonda namely, Jagdish

Pandey (P.W.:-7), the trial court in the impugned order also observed that in cross-examination, no question was put to this witness in relation to licensed gun nor the accused in his statement made under Section 161 CrPC has indicated the facts related to same nor has produced the documentary evidence in support of his case. With regard to other witnesses indicated in the application No.306 Kha, the observation of the trial court is to the effect that relevancy to summon the witnesses has not been indicated.

18. It would be apt to refer that while exercising power under Section 233(3) of CrPC, the trial court on three grounds can reject the application under Section 233(3) CrPC. Firstly, the application should have been with vexatious intention; secondly, the application should have been moved with an intention of delaying the trial and third ground for rejection available to the court is that the application has been moved with an intention of defeating the ends of justice.

19. In the instant case, Head Moharrir P.S.- Tarabganj, Distt.- Gonda was duly examined and cross-examined and during the cross-examination no such question was put as observed in the order impugned and to controvert the same, no document has been placed on record by the applicant and further, that in the FIR it has not been indicated that the present applicant was armed with gun and in fact in the FIR the general allegations have been levelled against all the accused and accordingly, the observations made by the trial court in rejecting the prayer to call the witnesses namely, Head Moharrir and Prabhari Adhikari (Ayudh) to the view of this Court are justified.

20. So far as the other witnesses, namely Sri Shashi Shekhar Ojha, Praveen Kumar Srivastava, Raghav Ram Pandey, Surendra Kumar Tiwari, Babban Pandey, Harishanker Barai, Devdadeen and Chandramani Tiwari, indicated in the Application No.306 Kha preferred by the petitioner are concerned, it is to be noted that the court has duty to call/summon those witnesses, whose testimony is relevant and therefore, if an accused wants to summon a witness then, he has to explain to the court the reasons for the same. In another words, the relevancy of the witnesses is to be shown, pleaded and proved.

21. From the application on record, it is apparent that the relevancy to call the witnesses namely Head Moharrir, Police Station Tarabganj, District Gonda, Prabhari Adhikari (Ayudh) and also Sri Shashi Shekhar Ojha, Praveen Kumar Srivastava, Raghav Ram Pandey, Surendra Kumar Tiwari, Babban Pandey, Harishanker Barai, Devdadeen and Chandramani Tiwari has not been indicated. As such, the trial court rightly rejected the Application No.306 Kha.

22. The trial court while rejecting the applications preferred by the petitioner for summoning the witnesses specifically observed that the applications have been moved with an intention to delay the trial. In the instant case, the FIR was lodged way back on 14.07.1997 and as such, this observation of the trial court appears to be just and proper.

23. For the reasons aforesaid, this Court affirms the specific findings given by the trial court while rejecting the application(s) preferred by the applicant and accordingly, this Court is of the view

that the application(s) have rightly been rejected by the trial court and as such, the present application is liable to be dismissed. It is accordingly **dismissed**. No order as to costs.

(2023) 11 ILRA 340
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.11.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Application u/s 482 No. 11555 of 2023

Akhilesh Paswan	...Applicant
Versus	
State of U.P.	...Opp. Party

Counsel for the Applicant:
Santosh Kumar Srivastava

Counsel for the Opp. Party:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Section 441-A - Declaration of sureties - no bar for accepting a person as surety even if he has stood as such, in some other case/cases - Indian Penal Code, 1860 - Section 201,302,307,364,392,411, Arms Act, 1959 - Sections- 3/25, The U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986 - section 3(1) - Neither the court nor the accused can bind a surety to stand as such in all the cases unless he himself is willing to do so - pre condition for accepting the surety - they should be fit or competent, solvent and reliable. (Para - 8, 9, 10, 11)

Bail granted to applicant in all four cases - by order of High Court passed on different dates - directed to furnish two sureties in each of the cases - applicant cannot arrange two sureties for each case - Seeking direction to courts below - to release petitioner on bail - accepting

only two sureties in all the four cases. **(Para - 2,4)**

HELD: -Applicant or surety Shall apply for a court to arrange different persons as sureties, highlighting any difficulties they may face. Court concerned shall, before accepting the sureties, keep provisions of Section 441-A Cr.P.C. in mind. **(Para - 12)**

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

List of Cases Cited:-

1. Hani Nishad @ Muhammad Imran @ Vikky Vs St. of U. P., in Petition(S) for special leave to appeal (criminal) No. 8915 of 2018

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

1. Heard Sri Santosh Kumar Srivastava, learned counsel for the applicant and learned A.G.A. for the State.

2. This petition under section 482 Cr.P.C. has been filed by accused Akhilesh Paswan with the prayer as below:

"To direct the learned courts below to release the petitioner on bail, accepting only two sureties in all the four cases, i.e. Case Crime No. 75 of 2022, under section 307 I.P.C. P.S.- Cantt. District- Ayodhya, (ii) Case Crime No. 190 of 2022, under sections 364, 302, 201, 392, 411 I.P.C. P.S.- Kotwali Nagar, District- Ayodhya, (iii) Case Crime No.78 of 2022, under sections- 3/25 Arms Act, P.S.- Cantt. District- Ayodhya and (iv) Case Crime No.241 of 2022, under section 3(1) of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, P.S.- Cantt. District- Ayodhya."

3. The submissions of the applicant are that in connivance with police

personnels, he has been falsely implicated in four criminal cases viz.

I. Case Crime No. 75 of 2022, under section 307 I.P.C. P.S.- Cantt. District- Ayodhya.

II. Case Crime No. 190 of 2022, under sections 364, 302, 201, 392, 411 I.P.C. P.S.- Kotwali Nagar, District- Ayodhya.

III. Case Crime No.78 of 2022, under sections- 3/25 Arms Act, P.S.- Cantt. District- Ayodhya.

IV. Case Crime No.241 of 2022, under section 3(1) of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, P.S.- Cantt. District- Ayodhya.

4. The applicant has been granted bail in all the aforesaid cases by order of the High Court passed on different dates and he has been directed to furnish two sureties in each of the cases. It is submitted by the applicant that he is a poor person and therefore, he cannot arrange two sureties for each case.

5. The application is opposed by the learned A.G.A.

6. When the presence of accused is needed before the court, the courts, to secure his attendance before it, may require the person concerned to execute a bond; additionally the court may also direct the persons/accused concerned to furnish sureties. The only purpose of this exercise is to ensure and secure production of the accused before concerned forum. There is no bar that a person, who has stood surety for securing the attendance of the accused before the court concerned, cannot stand as such, in any other case irrespective of whether the accused is same or not. There may be instances where an accused is facing criminal prosecution in a number of

cases. Depending on number of cases and personal circumstances of an accused, he may face difficulty in producing different sureties in each case. The court should be concerned with the reliability and competency of sureties only, unless there are circumstances or factors dissuading the court from accepting such sureties for good reasons. As observed earlier, if the surety is competent and reliable, the court concerned may accept his/her bond notwithstanding the fact that same person has stood surety in some other case.

7. The applicant relies upon a judgment of the Supreme Court given in **Hani Nishad @ Muhammad Imran @ Vikky Vs. State of Uttar Pradesh, in Petition(S) for special leave to appeal (criminal) No. 8915 of 2018, delivered on 29.10.2018**. In the aforesaid case, the accused was granted bail in 31 cases asking him to furnish two sureties each in all 31 cases. The applicant-accused expressed his inability to arrange for sureties. The Supreme Court ordered that same surety bond shall hold good for all 31 cases. It may be noted that Supreme Court did not lay down any principle of law and that a particular relief was given to the applicant as per the exigencies of a particular case. In the case in hand, the accused is required to arrange two sureties each in four cases he is facing.

8. It cannot be presumed that the court concerned shall ask for 8 different sureties. It is the discretion of the court concerned to accept the same set of sureties in all the 4 cases or ask for different sureties in any one or more of them. No hard and fast rule can be laid down in such matters. Any such attempt will be unnecessary incursion in judicial discretion of the courts. In my view, where accused is facing a number of

criminal cases, he may indeed face some difficulty in arranging for different persons to stand as surety in each one of them. In such circumstances, he may move an application before the court concerned disclosing difficulties faced by him, if any, and to permit him to furnish same set of sureties in a particular case, however, this observation cannot be construed to mean that he has right to produce same set of sureties. Moreover, it is the sweet will of surety whether he wants to stand as such in a case or not. **Neither the court nor the accused can bind a surety to stand as such in all the cases unless he himself is willing to do so.**

9. The only pre condition for accepting the surety is that they should be fit or competent, solvent and reliable.

10. The Section 441-A Cr.P.C. clarifies the position of law, which is as below.

[441-A. Declaration of sureties.- Every person standing surety to an accused person for his release on bail, shall make a declaration before the Court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars.]

11. The above provision indicate that there is no bar for accepting a person as surety even if he has stood as such, in some other case/cases. On the other hand, such declaration is not a meaningless requirement. This is where court's positive discretion may have a role to play.

12. In view of the above position of law, I finally dispose of this application as below.

The applicant or his surety shall move an application in the light of the observations as above apprising the court concerned of the difficulty if any, faced by him in arranging different persons as sureties and the court concerned shall decide the same applying his judicial discretion. The court concerned shall, before accepting the sureties, keep provisions of Section 441-A Cr.P.C. in mind.

13. Accordingly, this application is finally disposed of.

(2023) 11 ILRA 343
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.11.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

CrI. Misc. Bail Application No. 3121 of 2023

Abbas Ansari		...Applicant
	Versus	
State of U.P.		...Respondent

Counsel for the Applicant:
 Pranjali Krishna, Arun Sinha, Siddhartha Sinha

Counsel for the Respondent:
 G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 420, 467, 468 & 471 - Arms Act, 1959 - Section 30 - Arms Rules, 1962 - Rule 54(6) - Allegation against applicant that he initially granted licence by District Magistrate for single DBBL gun, which did not bear UID number - Under Rule 54(6) of Arms Rules, 1962 (effective from 24.07.2012), no arms licence is valid without UID allotted through electronic automated system as developed by NIC w.e.f. 01.10.2015 - Applicant's plea that UID introduced in 2016 and prior to that,

there was no prescription for issuance of UID, rejected - No steps taken to obtain UID, licence became invalidated - Despite his licence of Lucknow having lapsed on 01.10.2015, he obtained licence of Delhi on 01.06.2017 and acquired seven firearms - He imported pistol, rifle and six barrels in breach of NRAI import permit, including two prohibited-bore barrels and pistol with three spare barrels without NRAI permit, not permissible for shooter - Case against applicant rests on NRAI Secretary's letter and cancellation order by Joint Commissioner of Police, Licensing, New Delhi - Large quantities of arms and ammunition recovered from his Delhi premises - His past influence over jail authorities, enabling unauthorised visits by his wife with mobile phone, indicates risk of witness influence and evidence tampering - Thus, bail application rejected. (Para 52, 53, 54, 58)

Bail application rejected. (E-13)

List of Cases cited:

1. Satender Kumar Antil Vs CBI, (2022) 10 SCC 51
2. Siddharth Vs St. of U.P. & anr., (2022) 1 SCC 676, (Paras 9 to 11)
3. Dr. Shivinder Mohan Singh Vs Directorate of Enforcement, 2020 SCC OnLine Del 766, (Paras 24 to 26)
4. Moti Ram Vs St. of M.P., (1978) 4 SCC 47, (Para 2)
5. Babu Singh Vs St. of U.P., (1978) 1 SCC 579, (Paras 16, 19, 20)
6. Ash Mohammad Vs Shiv Raj Singh @ Lalla Babu & anr., (2012) 9 SCC 446
7. Chaman Lal Vs St. of U.P. & anr., (2004) 7 SCC 525
8. Masroor Vs St. of U.P. & anr., (2009) 14 SCC 286

9. P. Chidambaram Vs CBI, (2020) 13 SCC 337, (Paras 21, 22)

10. P. Chidambaram Vs Directorate of Enforcement, (2020) 13 SCC 791, (Para 23)

11. Prasanta Kumar Sarkar Vs Ashis Chatterjee & anr., (2010) 14 SCC 496

12. Ram Govind Upadhyay Vs Sudarshan Singh & anr., (2002) 3 SCC 598, (Paras 3, 4)

13. Sanjay Chandra Vs CBI, (2012) 1 SCC 40, (Paras 21 to 23)

14. Harjeet Singh Vs Indrapeet Singh & ors., AIR 2021 SC 4017

15. Ram Govind Upadhyay Vs Sudarshan Singh, (2002) 3 SCC 598, (Paras 3, 4)

16. Dataram Singh Vs St. of U.P., (2018) 3 SCC 22, (Paras 4 to 6)

17. Gurcharan Singh Vs St. (Delhi Admn.), (1978) 1 SCC 118, (Para 29)

18. Ishwarji Nagaji Mali Vs St. of Guj. & anr., (2022) 6 SCC 609

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

1. Heard Sri Priyadarhi Manish Advocate, the learned counsel for the applicant, Sri Anurag Verma, the learned Additional Government Advocate-I for the State and perused the record.

2. The instant application has been filed seeking release of the applicant on bail in Case Crime No. 431 of 2019, under Sections 420, 467, 468, 471 I.P.C. and Section 30 of Arms Act, registered at Police Station Mahanagar, District Lucknow.

3. The aforesaid case has been registered on the basis of an F.I.R. lodged by the Inspector In-charge, Police Station

Mahanagar on 12.10.2019, alleging that the applicant was issued a DBBL Gun License No. 1628/P.S. Mahanagar/Lucknow by the District Magistrate, Lucknow in the year 2012. The applicant had applied to the Joint Commissioner of Police, Licensing, New Delhi for registration of his license at his Delhi address, i.e., 111/A/9, Ganpati Niwas, Kishangarh, Vasant Kunj, New Delhi and he was issued License No. SDVS/2/2015/1 and UID No. 10675002 1283342015. The applicant purchased numerous fire arms on the aforesaid license claiming himself to be a renowned shooter. He projected that he had got the license issued at Lucknow transferred to Delhi but no intimation in this regard had been given to the concerned police station and the applicant continued to use both the licenses issued in two different states on two different UID's.

4. In the affidavit filed in support of the bail application, it has been stated that the applicant is innocent and he has been falsely implicated in the present case. In para 29 of the affidavit filed in support of the bail application, it has been stated that the applicant has a criminal history of eight cases but particulars of those cases has not been disclosed by the applicant in the affidavit.

5. The State has filed a counter affidavit opposing bail application and the following criminal history of the applicant has been disclosed in the counter affidavit:

Sl. No.	Case Crime No.	Section	P.S.	District
1	689 / 20	120 B, 420, 323, 356, 467,	Kotwali, Ghazip	Ghazi pur

		468, 471, 474, 477 A IPC	ur	
2	236 / 20	120 B, 420, 467, 468, 471 IPC and Prevention of Damage To Public Property Act	Hazarat ganj	Lucknow
3	431 / 19	419, 420, 467, 468, 471 IPC and Section 30 Arms Act	Mahana gar	Lucknow
4	27 / 22	188, 171 H IPC and Section 133 of Representation of People Act	T. Tola	Mau
5	95 / 22	188, 171 F IPC	Kotwali	Mau
6	97 / 22	171 H, 506, 186, 189, 153 A, 120 B, IPC	Kotwali	Mau
7	106 / 22	171 H, 188, 341 IPC	Kotwali	Mau
8	312 / 22	174 A IPC	Kotwali Mahana gar	Lucknow
9	0088 / 23	387, 222, 186, 506, 201, 120	Kotwali Nagar Karvi	Chitrakut

		B, 195 A, 34 IPC & 34, 7, 8, 13 P.C. Act		

6. A rejoinder affidavit has been filed on behalf of the applicant in reply to the counter affidavit filed by the State.

7. The applicant had filed a Criminal Misc. Writ Petition No. 28833 of 2019 and by means of an interim order dated 19.10.2019 a Division Bench had stayed arrest of the applicant. However, the aforesaid writ petition has been dismissed as infructuous by means of an order dated 24.01.2022, after a charge-sheet was submitted and the trial court has taken cognizance of the case on 24.12.2020. Thereafter, the petitioner filed an Application u/s 482 Cr.P.C No. 1905 of 2022 challenging validity of the charge-sheet. The aforesaid application is pending consideration of this court and no interim relief has been granted to the applicant in that case.

8. The learned counsel for the applicant has submitted that initially the applicant was granted an Arms license by the District Magistrate, Lucknow but thereafter the applicant had shifted his residence from Lucknow to Delhi and, therefore, he had applied to the Joint Commissioner of Police, Licensing Unit, New Delhi, for registration of the outside license granted at Lucknow. The Joint Commissioner of Police, Licensing, New Delhi had sent a letter dated 10.05.2015 to the District Magistrate, Lucknow asking for the following information:-

“1. What was the area validity at the time of last renewal.

2. *Whether one state, more than one states (specify the states) or All India (copy of Area Validity extension order may also be enclosed).*

3. *Date of the sanction of the licence.*

4. *Details of the weapon entitled according to the arms license.*

5. *Quota cartridges entitlement.*

6. *Last renewal and its validity.*

7. *A copy of local police verification conducted at the time of issues of Arms Licence & copy of residence proof submitted by above license, may also be provided to this office. This may kindly be treated as URGENT."*

9. The District Magistrate Lucknow had sent a reply on 04.08.2015 stating that the applicant had been granted License No. 1268/P.S Mahanagar/ Lucknow in respect of a DBBL Gun No. DTO3287W by means of an order dated 21.09.2012. The aforesaid license was renewed till 24.09.2015 and it was valid in the entire state of Uttar Pradesh. The license authorized the applicant to purchase upto 10 cartridges at one instance and a maximum of 100 cartridges per year. The office of the District Magistrate conveyed that it had no objection in case the license granted to the applicant was registered and renewed by the office of the Joint Commissioner of Police.

10. Thereafter, the Joint Commissioner of Police, Licensing, New Delhi had issued a license to the applicant on 01.06.2017 and the applicant purchased as many as seven arms on the strength of the aforesaid license, which are mentioned on the license. The license mentions the areas of its validity to be all India being a renowned shooter and it was valid till 24.09.2018. The cartridges purchased on the strength of the arms license have also

been mentioned on the license, which indicates that the applicant had made several purchases of cartridges of a gun, rifle and pistol of different bores at several instances. He had often purchased 200 cartridges at once on several instances and at one instance he had purchased 1000 cartridges of 1.22 bore. Numerous other instances of purchase of cartridges have been endorsed on the license issued to the applicant.

11. The learned counsel for the applicant has submitted that a 'Renowned Shooter' is defined in the Explanation (c) appended to Rule 40 of the Arms Rules 2016. A notification dated 04.08.2014 issued by the Ministry of Home Affairs, Government of India provides that a Renowned shooter may possess the following categories of firearms: -

"(i) Rifles in caliber .22 Long (1) The total number of weapon Rife (also known as .22 L.R);

(ii) Center fire Rifles with calibers up to 8 mm including all calibers lower than 8mm;

(iii) Pistol/ Revolvers of caliber up to and including 9 mm (2) The person must hold a certificate but excluding o mm parabellum (9x19mm)

(iv) Short guns of caliber up to 12 bore/gauge including all calibers lower than 12 bore/gauge."

12. The conditions mentioned in the Schedule appended to the aforesaid Notification states that total number of weapons exempted shall not exceeds 7 in addition to the number of weapons he is entitled to possess as a normal citizen as per the provisions of the Act, subject to an overall ceiling of 10 weapons.

13. The learned counsel for the applicant has submitted that as the applicant is a renowned shooter, he was entitled to hold 10 firearms and the applicant was having merely 7 firearms, which was permissible in law.

14. The learned counsel for the applicant has next submitted that the police claimed that the applicant had acquired firearms in excess of the number, for which he had been licensed and the firearms had been recovered from the applicant's residence at New Delhi. The offence, if any, has been committed by the applicant at New Delhi, and, therefore, U.P. Police had no authority to lodge a First Information Report in police Station Mahanagar, as no offence has been committed by the applicant within the territorial limits of the aforesaid Police Station or even in the territory of the State of Uttar Pradesh.

15. In the order dated 19.10.2019 passed by a Division Bench of this court in Writ Petition No. 28833 (M/B) of 2019, this Court had directed that while filing a counter affidavit, the State should address the point that after a license had been issued by the Delhi Police whether the District Magistrate, Lucknow remained the licensing authority after having given a No Objection letter.

16. The learned counsel for the applicant has further submitted that the allegation that the applicant had got two licenses issued on a single Unique Identification Number, is false as the license issued to the applicant by the District Magistrate, Lucknow did not bear any Unique Identity Number and that is the reason why no such number is mentioned in any of the communication issued by the office of District Magistrate or by the

Police. He has submitted that the Unique Identification Number was introduced in Rule 15 of the Arms Rules, 2016 and prior to that, there was no such prescription for issuance of Unique Identification Number and, therefore, the applicant has been issued a Unique Identification Number after he was granted a license by the Delhi Police and prior to that he was not allotted any Unique identification Number.

17. The applicant was languishing in jail in connection with a case lodged by the Directorate of Enforcement, since 04.11.2022 and the applicant is in jail in connection with the present case since 24.12.2022.

18. At the closure of his submissions, Sri. Priyadarshi Manish, the learned counsel for the applicant supplied a compilation of photocopies of 13 judgments running into 242 pages, which has no index attached. The judgments are **Satender Kumar Antil versus CBI**, (2022) 10 SCC 51, **Siddharth versus State of U.P. and another**, (2022) 1 SCC 676, **Dr. Shivinder Mohan Singh versus Directorate of Enforcement**, 2020 SCC OnLine Del 766, **Moti Ram versus State of M.P.**, (1978) 4 SCC 47, **Babu Singh versus State of U.P.**, (1978) 1 SCC 579, **Ash Mohammad versus Shiv Raj Singh alias Lalla Babu and another**, (2012) 9 SCC 446, **Chaman Lal versus State of U.P. and another**, (2004) 7 SCC 525, **Masroor versus State of U.P. and another**, (2009) 14 SCC 286, **P. Chidambaram versus CBI**, (2020) 13 SCC 337, **P. Chidambaram versus Directorate of Enforcement**, (2020) 13 SCC 791, **Prasanta Kumar Sarkar versus Ashis Chatterjee and another**, (2010) 14 SCC 496, **Ram Govind Upadhyay versus Sudarshan Singh and another**, (2002) 3

SCC 598 and **Sanjay Chandra versus CBI**, (2012) 1 SCC 40. However, he placed before the Court only one judgment in the case of **Dr. Shivinder Mohan Singh versus Directorate of Enforcement**, 2020 SCC OnLine Del 766 and left the other judgments to be read by the Court itself.

19. Replying to the aforesaid submissions, Sri Anurag Verma, learned A.G.A.-I has submitted that the applicant was initially granted an Arms License by the District Magistrate, Lucknow, which license authorized him to purchase a single DBBL gun and it did not authorize him to have multiple firearms. He has submitted that the provisions for issuance of Unique Identification Number had been introduced in Arms Rules, 1962 by an amendment made in the year 2012 and this provision was there when the applicant was granted a licence by the District Magistrate Lucknow and when the applicant had obtained a No objection certificate.

20. Sri Verma has submitted that the license issued to the applicant by the Delhi Police has already been cancelled by means of an order dated 26.08.2021 passed by Joint Commissioner of Police, Licensing Unit, Delhi, after issuing a show cause notice to the applicant, providing him an opportunity of personal hearing and taking into consideration his submissions. The aforesaid order records following reasons for cancellation of his arm's license:-

“(1) The FIR No. 431/19 U/s 420/467/468/471 IPC & 30 Arms Act, PS Mahanagar, Lucknow, UP is still pending trial in the Hon'ble Court which has not been quashed by the Hon'ble High Court so far. Therefore, any contention regarding it being irrelevant or extra jurisdictional or

frivolous cannot be considered at this stage.

2. Perusal of record revealed that the licensee applied to this Licensing Authority on 14.10.2015 seeking addition of an NPB Rifle on the grounds of being “Renowned Shot and for which recommendation of NRAI and copy of import permit no. NRAI/IMPP/861/1785/2015 dated 02.09.2015 was issued by the NRAI. The then Licensing Authority accordingly allowed addition of 01 Rifle with spare Barrel on the basis of these documents. However, licensee preferred not to avail import permit and rather availed the provisions of notification no. 147/94-Customs for bringing 06 spare Barrels in personal baggage.

Further, perusal of the import permit revealed that a clear description of Bore, Barrel, number of Rifles as ‘one’ and number of spare barrels as ‘one’ permitted to be imported was mentioned in the import permit. Had the licensee used the said import permit he would have not been allowed to import weapons or barrels of other description and excess in quantity which he actually did. He rather exploited the conditions of the Ministry of Home Affairs Notification No. S.O 665(E), dated 04.08.2014 which clarifies that “for exemptees at SI No. 1 and Sl. No. 2 of the schedule, a weapon with spare or conversion Barrels is to be treated as one weapon only at the time of endorsement of the license and full details of the said weapon and such spare and conversion weapon shall be endorsed on the respective license”. The act of the licensee is suggestive of his intention to bring the Barrels of different Bores from overseas for some other purposes and reasons best known to him, other than sports as Barrels of caliber (1) .375 (9.52 mm) Bore No. R/101633 and (2) .458 (11.63 mm) Bore

No. R/109355 are not permissible to shooters as per the then existing Ministry of Home Affairs Notification No. S.O. 1988 (E), dated 04/08/2014.

Perusal of record also revealed that on 06.04.2016, the licensee had applied for conversion of his NPB Gun to NPB Revolver/Pistol citing reason of being a renowned shot who wanted to participate in 'small bore' weapon events. His request was acceded to. He imported one .357 (9.067 mm) Bore Pistol No. BBGV-728 alongwith 03 spare Barrels and out of which .40 (10.16 mm) Bore No. BBGD-839 was not permissible to sports person as per the then existing Ministry of Home Affairs Notification No. S.O 1988 (E), dated 04.08.2014 which again casts aspersions on the intention of the licensee to use said weapon for some other purpose and reasons best known to him."

21. The order further records that jacketed cartridges have been recovered from the applicant's possession regarding which he claimed that those were used by him for target practice. National Rifle Association of India (NRAI) has categorically prohibited such ammunition to be used in range for shooting practice. ISSF also does not allow such ammunition to be used during events. Jacketed cartridges are dangerous for human beings and, therefore, not allowed in shooting ranges. Recovery of such cartridges from the possession of licensee further strengthens the inference that the licensee imported Jacketed cartridges for some other purposes best known to him, though certainly not for bona fide purpose.

22. In view of the aforesaid reasons, the Joint Commissioner of Police came to a conclusion that the applicant is not suitable to hold an Arms License as he deliberately

imported firearms/spare barrels and ammunition for which he was not authorized. He has misused the status and privileges of a renowned shooter. His clandestine objective has been to acquire foreign origin arms through the privileges extended to a renowned shooter for reasons best known to him. The applicant could not provide satisfactory and logical reasons for the violations during oral hearing.

23. In response to a letter issued to National Rifle Association of India (NRAI), its Secretary has informed through a letter dated 21.12.2019 that the applicant has imported the following four weapons: -

"1. 12 Bore SBBL Gun No. TA-013638 Import from Policane. Slovenija .

2. 0.357 Bore Pistol No. BBGV-728 Import form Policane. Slovenija.

3. 0.30-06 Bore Rifle No. R/105923 with 06 Barrels (1) Cal. .223 Sl. No. R/111317 (2) Cal. .308 Sl. No. R/111048 (3) Cal. .30-06 Sl. No. R/101847 (4) Cal. 300 Sl. No. R/105251 (5) Cal. .375 Sl. No. R/101633 (6) Cal. .458 Sl. No. R/10355 Imported from Policane, Slovenija J

4. 12 Bore DBBL Sl. No. 03297W Beretta Import from Cyprus."

24. Item Nos. 2 & 3, i.e. a 0.357 bore pistol and rifle with six barrels of different calibers, had been imported without any import permit.

25. A copy of an affidavit dated 15.11.2019 submitted by the applicant before the Licensing Authority at New Delhi has been annexed with the counter affidavit, which mentions his permanent residential address as "111 A/9 Ganpati Niwas Kishangarh, V Kunj, ND" whereas the applicant was never a permanent resident of that place. He has mentioned the

name of his nominee as Mukhtar Ansari, who is the applicant's father whereas the applicant's father is already undergoing incarceration for the past more than a decade.

26. The learned A.G.A.-I has submitted that aforesaid address mentioned by the applicant as his permanent resident, is absolutely false as during investigation statement of the owner of the premises has been recorded, who said that the applicant has taken a one bedroom accommodation in her house on rent and he used to visit the premises once in every 2 or 3 months.

27. The learned A.G.A.-I has further submitted that the applicant had filed an application for grant of anticipatory bail, which was rejected by means of an order dated 26.08.2022 passed by this Court in Criminal Misc. Anticipatory Bail No. 1396 of 2022. The applicant had challenged the aforesaid order dated 26.08.2022 by filing Special Leave Petition (Crl.) No. 9315 of 2022, which was dismissed by means of an order dated 09.01.2023 passed by the Hon'ble Supreme Court with the observation that the observations made while rejecting the anticipatory bail application would not come in the way of consideration of his regular bail application.

28. The learned A.G.A.-I has relied upon the judgment of the Hon'ble Supreme Court in the case of **Harjeet Singh Vs. Indrajeet Singh and others**: AIR 2021 SC 4017, wherein the Hon'ble Supreme Court has set aside a bail order passed by the High Court for the reason that *the High Court had failed to appreciate and consider the nature of the accusation and the severity of the punishment in case of conviction and the nature of supporting*

evidence. The High Court had also failed to appreciate the facts of the case; the nature of allegations; gravity of offence and the role attributed to the Accused.

29. Keeping in view the conduct of the learned Counsel for the applicant in supplying a compilation of 13 judgments running into 242 pages, without even an index, and placing only one judgment of the Delhi High Court and leaving it for the Court to go through the remaining 12 judgments, the Court is constrained to observe that an increasing tendency of supplying multiple case-laws, without connecting the same to the facts and circumstances of the case in hand is being observed nowadays. This results in wastage of precious time of the Court and creates an unnecessary obstacle in expeditious dispensation of justice.

30. It would be proper and sufficient if the learned Counsel put up a proposition and then submit a case-law in support thereof. In case any proposition is supported by any land-mark judgment which has been followed consistently and repeatedly, it would be sufficient to cite that land-mark judgment, or at the most one more latest judgment in which it was followed or reiterated. The Counsel should not supply case laws without putting up a proposition and they should avoid the temptation of citing multiple case-laws on a single point, which does not make any beneficial difference. The learned Counsel are expected to assist the Court in arriving at a decision expeditiously without wasting the precious time of the Court so that the same time may be better utilized in the interest of some other litigants.

31. However, since photocopies of 13 judgments have been supplied by the

learned Counsel for the applicant, I proceed to deal with all those judgments.

32. In **Ram Govind Upadhyay v. Sudarshan Singh**, (2002) 3 SCC 598, the first bail application of the accused had been rejected by the High Court but his second application was allowed for the sole reason that the accused had spent more than 1 year in jail. While setting aside the bail order, the Hon'ble Supreme Court held that: -

“The High Court thought it fit not to record any reason, far less any cogent reason, as to why there should be a departure when in fact such a petition was dismissed earlier not very long ago. The consideration of the period of one year spent in jail cannot in our view be a relevant consideration in the matter of grant of bail, more so by reason of the fact that the offence charged is that of murder under Section 302 IPC having the punishment of death or life imprisonment — it is a heinous crime against the society and as such the court ought to be rather circumspect and cautious in its approach in a matter which stands out to be a social crime of a very serious nature.”

33. In **Ram Govind Upadhyay**, the Hon'ble Supreme Court reiterated the principles regarding grant of bail in the following words: -

“3. Grant of bail though being a discretionary order — but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the court and

facts, however, do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always to be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic considerations for the grant of bail — more heinous is the crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.

4. Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture, though however, the same are only illustrative and not exhaustive, neither there can be any. The considerations being:

(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a *prima facie* satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

34. In **Chaman Lal v. State of U.P.**, (2004) 7 SCC 525, **Masroor v. State of U.P.**, (2009) 14 SCC 286, **Prasanta Kumar Sarkar v. Ashis Chatterjee**, (2010) 14 SCC 496, **Ash Mohammad v. Shiv Raj Singh**, (2012) 9 SCC 446, copies whereof have also been supplied by the learned Counsel for the applicant, the Hon'ble Supreme Court had set aside the bail orders passed by the High Courts, following the aforesaid principles laid down in **Ram Govind Upadhyay** (Supra). These cases do not at all support the applicant's claim for being released on bail and I cannot appreciate the aforesaid judgments being included in the compilation handed over by the learned Counsel for the applicant.

35. In **Moti Ram v. State of M.P.**, (1978) 4 SCC 47, the appellant, who was a mason, had filed a Criminal Appeal, which was pending before the Hon'ble Supreme Court and the Hon'ble Supreme Court had passed an order for bail in his favour "to the satisfaction of the Chief Judicial Magistrate". The Magistrate ordered that a surety in a sum of Rs 10,000/- be produced. Further, the Magistrate refused to accept the suretyship of the petitioner's brother because he and his assets were in another district. The Hon'ble Supreme Court mandated the Magistrate to release the applicant on his furnishing a personal bond of Rs.1,000/- and observed that: -

"2. If mason and millionaire were treated alike, egregious inequality is an inevitability. Likewise, geographic allergy at the judicial level makes mockery of equal protection of the laws within the territory of India. India is one and not a conglomeration of districts, untouchably apart."

The aforesaid judgment has no relevance for deciding the applicant's bail application.

36. In **Siddharth versus State of U.P. and another**, (2022) 1 SCC 676, the Hon'ble Supreme Court held that: -

"9.... It has rightly been observed on consideration of Section 170 CrPC that it does not impose an obligation on the officer-in-charge to arrest each and every accused at the time of filing of the charge-sheet. We have, in fact, come across cases where the accused has cooperated with the investigation throughout and yet on the charge-sheet being filed non-bailable warrants have been issued for his production premised on the requirement that there is an obligation to arrest the accused and produce him before the court. We are of the view that if the investigating officer does not believe that the accused will abscond or disobey summons he/she is not required to be produced in custody. The word "custody" appearing in Section 170 CrPC does not contemplate either police or judicial custody but it merely connotes the presentation of the accused by the investigating officer before the court while filing the charge-sheet.

10. We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it [Joginder Kumar v. State of U.P., (1994) 4 SCC 260 :

1994 SCC (Cri) 1172]. If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the investigating officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused.

11. We are, in fact, faced with a situation where contrary to the observations in *Joginder Kumar* case how a police officer has to deal with a scenario of arrest, the trial courts are stated to be insisting on the arrest of an accused as a prerequisite formality to take the charge-sheet on record in view of the provisions of Section 170 CrPC. We consider such a course misplaced and contrary to the very intent of Section 170 CrPC.”

37. The aforesaid principle of law has no application to the facts of the present case.

38. In **Babu Singh v. State of U.P.**, (1978) 1 SCC 579, the Hon’ble Supreme Court was dealing with an objection that second bail application would not be maintainable, and held that an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. The Hon’ble Supreme Court reiterated the following principles regarding grant of bail:

“16. Thus the legal principle and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this

context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record—particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance.

* * *

19. A few other weighty factors deserve reference. All deprivation of liberty is validated by social defense and individual correction along an anti-criminal direction. Public justice is central to the whole scheme of bail law. Fleeing justice must be forbidden but punitive harshness should be minimised. Restorative devices to redeem the man, even through community service, meditative drill, study classes or other resources should be innovated, and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offences while on judicially sanctioned “free enterprise”, should be provided against. No seeker of justice shall play confidence tricks on the Court or community. Thus, conditions may be hung around bail orders, not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our Constitution.

20. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The

panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding — if that be so — of innocence has been recorded by one Court. It may be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, it enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio-geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a complacent refusal."

39. Dr. Shivinder Mohan Singh versus Directorate of Enforcement, 2020 SCC OnLine Del 766 is the only judgment that was placed before the Court by the learned Counsel for the applicant, in which it was held that: -

"24. Nowhere is it the law that an accused, yet to be tried, is to be kept in custody only on a hunch or a presumption that he will prejudice or impede trial; or to send any message to the society. If anything, the only message that goes-out to the society by keeping an accused in prison before finding him guilty, is that our system works only on impressions and conjectures

and can keep an accused in custody even on presumption of guilt. While in certain cases such message may even quench the thirst for revenge of the lay society against a person they believe to be guilty, such action would certainly not leave our criminal justice system awash in glory. An investigating agency must come to court with the confidence that they have arrested an accused, based on credible material, and have filed a complaint or a charge-sheet with the certainty that they will be able to bring home guilt, by satisfying a court beyond reasonable doubt. But when an investigating agency suggests that an accused be detained in custody as an undertrial for a prolonged period, even after the complaint or charge-sheet has been filed, it appears that the investigating agency is not convinced of its case and so it fears that the accused may 'get-off' by discharge or acquittal; and that therefore the only way to 'punish the accused' is to let him remain in custody as an undertrial.

25. After all, the Supreme Court has said that it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson (cf. Sanjay Chandrav. CBI, supra). How does one carry forward the Supreme Court precept that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty, if we deny bail without cogent reason (cf. Sanjay Chandrav. CBI, supra).

26. People's trust in the criminal justice system must rest on surer footing than on pre-trial punishment by keeping accused persons in prison. Statistics available on the Delhi Prisons website as on 31.12.2019 show that the proportion of undertrials to convicts in Delhi prisons is

about 82 percent to 18 per cent. These numbers are telling. Prison is a place for punishment; and no punishment can be legitimate without a trial. There must be compelling basis, grounds and reasons to detain an undertrial in judicial custody, which this court does not discern in the present case.”

40. The aforesaid judgment has been rendered by an Hon’ble Single Judge of another High Court and it has no binding precedential value, and there was no occasion to place this judgment when there are numerous judgments of the Hon’ble Supreme Court on the points in issue.

41. In **Sanjay Chandra v. CBI**, (2012) 1 SCC 40, the appellant’s request for grant of bail had been rejected by the Session Court and the High Court on two grounds – (1) the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer and (2) the possibility of the accused persons tampering with the witnesses. The Hon’ble Supreme Court allowed the appeal after taking into consideration that the charge was that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.

42. In **Sanjay Chandra** (Supra) the Hon’ble Supreme Court reiterated the well established general principles that: -

“21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, “necessity” is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for

it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

43. However, in **Sanjay Chandra** (Supra) the Hon'ble Supreme Court further held that ***"The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case."***

44. In **Dataram Singh v. State of Uttar Pradesh**, (2018) 3 SCC 22, the Hon'ble Supreme Court reiterated the following principles regarding to be kept into consideration while deciding an application for release of an accused person on bail: -

"4. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in Inhuman Conditions in 1382 Prisons, In re.

5. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in Nikesb Tarachand Shah v. Union of India going back to the days of the Magna Carta. In that decision, reference was made to Gurbaksh Singh Sibbia v. State of Punjab in which it is observed that it was held way back in Nagendra Nath Chakravarti, In re that bail is not to be withheld as a punishment.

Reference was also made to Emperor v. H.L. Hutchinson wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days."

45. Immediately after stating the aforesaid principles, the Hon'ble Supreme Court cautioned in **Dataram Singh** (Supra) that: -

"6. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately."

46. In **P. Chidambaram v. CBI**, (2020) 13 SCC 337, the Hon'ble Supreme Court had reiterated the well settled principles regarding grant of bail that: -

"21. The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:

(i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution;

(ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses;

(iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence;

(iv) character, behaviour and standing of the accused and the circumstances which are peculiar to the accused;

(v) larger interest of the public or the State and similar other considerations.

22. There is no hard-and-fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner.”

(Emphasis sullied)

47. In **P. Chidambaram v. Directorate of Enforcement**, (2020) 13 SCC 791, the Hon’ble Supreme Court explained the principles for considering the claim of release on bail regarding persons accused of economic offences and held that: -

“23. ... the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of “grave offence” and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same,

being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.

48. In **Satender Kumar Antil v. CBI**, (2022) 10 SCC 51, the Hon’ble Supreme Court had categorized the offences in 4 categories: -

‘Categories/Types of Offences

(A) Offences punishable with imprisonment of 7 years or less not falling in Categories B & D.

(B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

(C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (Section 37), PMLA (Section 45), UAPA [Section 43-D(5)], Companies Act, [Section 212(6)], etc.

(D) Economic offences not covered by Special Acts.”

49. The offences allegedly committed by the applicant are punishable with imprisonment upto life and his case falls under category B, regarding which the guideline laid down by the Hon’ble Supreme Court is that ‘*On appearance of the accused in court pursuant to process issued bail application to be decided on merits.*’

50. The Hon’ble Supreme Court reiterated the well settled principle that bail is the rule and jail is the exception. The Hon’ble Supreme Court referred to an earlier decision in the case of **Gurcharan Singh v. State (Delhi Admn.)**, (1978) 1 SCC 118 wherein it was held that: -

“29. ... There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.”

The Hon’ble Supreme Court further held that: -

“It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.”

51. In the case of **Ishwarji Nagaji Mali** (2022) 6 SCC 609, the Hon’ble Supreme Court has held in that: -

“The jurisdiction to grant bail has to be exercised on the basis of well settled

principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behavior, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the Legislature has used the words “reasonable grounds for believing” instead of “the evidence” which means the court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge.”

(Emphasis supplied)

52. When we consider the facts and circumstances of the case in light of the law laid down in the aforesaid judgments, what we find is that the allegation against the applicant is that he was initially issued a license by the District Magistrate Lucknow authorising him to hold a single DBBL gun. The license did not bear any UID number.

53. Rule 54 (6) of the Arms Rules, 1962, which came into force with effect from 24.07.2012, provides that without a unique identification number having been allotted through the electronic automated system as developed by the National Informatics Centre, no arms license shall be considered as valid with effect from

01.10.2015. Therefore, the submission of the learned counsel for the applicant that Unique Identification Number was introduced in the year 2016 and prior to that, there was no such prescription for issuance of Unique Identification Number, is wrong and the same is rejected. Apparently, the applicant did not take any steps for obtaining a UID number and, therefore, the applicant's license became invalidated with effect from 01.10.2015 as per the Rule 54 (6) of the Arms Rules, 1962.

54. Although the applicant's license issued initially at Lucknow had become invalidated on 01.10.2015, on the strength of the same license he got a license issued at New Delhi on 01.06.2017 and he purchased as many as 7 firearms. He imported a pistol, a rifle and 6 barrels in violation of the import permit issued by NRAI. He imported two barrels of prohibited bores and a pistol with 3 spare barrels without NRAI permit and the pistol and two of the barrels were not permissible for a shooter. He got endorsed a revolver which was not permissible for a shooter and he was having 4431 cartridges in his possession, many of which were metal jacketed and were not permitted to be used by a shooter.

55. The aforesaid illegal conduct is not at all expected of any person, much less from a person who claims himself to be a renowned shooter. Moreover, as the applicant is a Member of Legislative Assembly of U.P., he is expected to pay some higher respect to the laws of the land as compared to any other person.

56. So far as the submission of the learned Counsel for the applicant regarding territorial jurisdiction is concerned, the

same may be the subject matter of the pending application under Section 482 Cr.P.C. wherein the prayers for quashing of the charge-sheet and the proceeding have been made. However, for the purpose of the present application, it would be sufficient that the chain of acts allegedly committed by the applicant was initiated by the License granted to the applicant by the District Magistrate Lucknow authorising him to hold a single DBBL gun, in furtherance whereof the applicant got another license issued at New Delhi after obtaining a no-objection from the office of the District Magistrate Lucknow. It has come to light during investigation that the applicant's claim of a permanent residence at New Delhi is false and he is a merely casual visitor of the premises taken on rent at New Delhi.

57. The applicant has a criminal history of 8 cases. One of which is Case Crime No. 88 of 2023 under Sections 387, 222, 186, 506, 201, 120 B, 195 A, 34 IPC & 34, 7, 8, 13 P.C. Act in Police Station Kotwali Nagar Karvi, District Chitrakut. The allegation in that case is that while the applicant was lodged in jail in connection with another case, he wielded such great influence on the authorities that his wife used to frequently visit the jail without seeking any requisite permission from any of the authorities and without any checking. It is alleged that the visits of his wife facilitated the applicant to threaten people by using her mobile phone from inside the jail.

58. The material relied upon against the applicant is the letter sent by the Secretary of NRAI and the cancellation order dated 26.08.2021 issued by the Joint Commissioner of Police, Licensing, New Delhi. Huge quantities of arms and

ammunition have been recovered from the applicant's premises at New Delhi. The possibility of witnesses being influenced and evidence being tampered can be assessed from the fact that the applicant has exercised such great influence upon jail authorities in the past as has resulted into frequent visits to the jail by his wife without any permission or without any checking, while she used to carry her mobile phone inside the jail.

59. Having considered the nature of allegations against the applicant and the material relied upon by the prosecution, the status of the applicant as an expert shooter and a Member of Legislative Assembly, the possibility of the applicant being able to influence the witnesses in case of his release on bail, I am of the considered view that the aforesaid facts disentitle the applicant to receive discretion of this Court by enlarging him on bail.

60. Accordingly, the bail application stands **rejected**.

(2023) 11 ILRA 360
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.10.2023

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA,
J.

Crl. Misc. Anticipatory Bail Application No. 10711
of 2023
(under 438 CR.P.C.)

Kusum Raghav & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:

Sri Hemant Sharma

Counsel for the Respondents:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Sections 438, 82, 83 & 482 – Indian Penal Code, 1860 – Sections 420, 467, 468 & 471 – Anticipatory Bail – Proclaimed Offenders – Fraudulent Sale Deeds – Non-Cooperation with Trial Court

The applicants, Kusum Raghav and Asha Raghav, sought anticipatory bail in Case Crime No. 70 of 2013 under Sections 420, 467, 468, and 471 IPC, alleging false implication in a case involving fraudulent sale deeds of the informant's land. They claimed to be bona fide purchasers and cooperative during investigation, citing a compromise deed dated 21.11.2022. The St. opposed, noting the applicants' status as proclaimed offenders under Section 82 Cr.P.C. after failing to appear despite bailable and non-bailable warrants, and the rejection of their discharge application and revision. Held: (1) The anticipatory bail application was rejected as non-maintainable. (2) The applicants, aware of the trial proceedings, deliberately absconded, leading to their declaration as proclaimed offenders, disentitling them to anticipatory bail per Laves Vs St. (NCT of Delhi), St. of Madhya Pradesh Vs Pradeep Sharma, Prem Shankar Prasad Vs St. of Bihar, and St. of Haryana Vs Dharamraj. (3) No exceptional circumstances justified granting anticipatory bail. (4) The applicants' non-cooperation with the trial court, despite prior legal challenges (discharge application, revision, and pending writ petition), and failure to assail the proclaimed offender order, barred relief. (5) The compromise deed did not alter their absconding status, as they never appeared before the trial court.

Case Law Cited:

1. Purushottam Chaudhary Vs Central Bureau of Investigation, Application U/S 482 No. 1974 of 2023, decided on 27.02.2023 (All. HC)

2. Prem Shankar Prasad Vs St. of Bihar & anr.,
2021 SCC OnLine SC 955

3. Lavesch Vs St. (NCT of Delhi), (2012) 8 SCC 730

4. St. of Madhya Pradesh Vs Pradeep Sharma, (2014) 2 SCC 171

5. St. of Haryana Vs Dharamraj, 2023 SCC OnLine SC 1085

6. Abhishek Vs St. of Mah., (2022) 8 SCC 282

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

1. Apprehending their arrest in Case Crime No. 70 of 2013, under Sections 420, 467, 468, 471 IPC, Police Station - Anoopshahr, District - Bulandshahr, the present anticipatory bail application has been moved by the applicants - **Kusum Raghav and Asha Raghav.**

2. Heard learned counsel for the applicants, learned A.G.A. for the State and perused the material available on record.

SUBMISSIONS MADE ON
BEHALF OF THE APPLICANTS:

3. It is submitted by learned counsel for the applicants that the applicants are innocent and have no concern with the present matter. Allegations levelled against the applicants are false. It is further submitted that the applicants have been falsely implicated in this case. It is further submitted that the applicants have apprehension of their arrest by the police any time. It is also submitted that the applicants are ladies and they are the bonafide purchasers. They have purchased the land after payment of requisite consideration amount and they have not played any fraud with the informant at all.

4. It is further submitted that throughout the investigation they have been cooperative. It is also submitted that after investigation, final report was submitted in this matter, which was rejected by the Court concerned and cognizance was taken.

5. It is also submitted that thereafter an application U/S 482 No. 14954 of 2017 was preferred before this Court but no relief was granted by the Court and it was opined that the applicants have an alternative remedy by way of filing an appropriate application before the Court concerned and subsequently discharge application was moved before the Magistrate Court which was rejected vide order dated 15.12.2018 and revision preferred against the said order was also dismissed on 5.9.2019 by the Sessions Court. Subsequently Criminal Misc. Writ Petition No. 6976 of 2019 was preferred which is still pending.

6. It is further submitted that as a matter of fact, a compromise took place between the parties and they settled their disputes amicably through compromise deed dated 21.11.2022 but meanwhile process under Sections 82/83 CrPC was issued against the applicants by the Court concerned on 3.2.2021. It is further submitted that the applicants had been cooperative throughout the investigation and with the trial court as well and they had been engaged in taking recourse of legal forums and in continuation of that discharge application was also filed by them. It is also submitted that without following the required procedure for issuance of process under Sections 82 and 83 CrPC, the punitive processes have been issued by the Magistrate against the applicants and such order is not tenable in the eyes of law. Applicants have no criminal history to their

credit. In support of his submissions, learned counsel for the applicants has placed reliance upon a decision of this Court in **Application U/S 482 No. 1974 of 2023, Purushottam Chaudhary vs. Central Bureau of Investigation**, decided on 27.2.2023.

**SUBMISSIONS MADE ON
BEHALF OF THE STATE :**

7. Per contra, the learned A.G.A. opposed the prayer and submitted that after rejection of discharge application moved by the applicants before the Court of Magistrate, revision filed against the said order was also dismissed on 5.9.2019 and thereafter Writ Petition No. 6976 of 2019 was preferred but no interim order was granted in the aforesaid proceeding in favour of the applicants. Since the applicants deliberately kept themselves absent from the proceedings of trial court, the trial court had no option but to issue punitive process against them.

8. It is also submitted that a perusal of the order sheets reflects that after issuance of the bailable warrant against the applicants, non-bailable warrants were also issued and when they remained absconding, process under Section 82 CrPC was issued and the applicants were declared as proclaimed offenders. It is also submitted that a compromise petition was filed by the informant before the Court concerned but the present applicants never appeared before the trial court.

9. It is further submitted that mere filing a writ petition before the High Court wherein no order for interim protection or for stay of the proceedings of the case was passed, does not preclude the applicants to make their appearance in the proceedings

before the trial court. It is also submitted that since the applicants have been declared proclaimed offenders, before entering into the merits of the case, at the very outset they are not entitled for anticipatory bail in view of the settled law on the subject on account of non-maintainability of the application for grant of anticipatory bail.

10. I have considered the rival submissions made by the learned counsel for the parties and have gone through the entire record carefully.

FACTS OF THE CASE :

11. The prosecution story as unfolded in the F.I.R. is that the landed properties of the informant were sold fraudulently by way of execution of six sale deeds by some of the named accused persons in favour of co-accused persons including the present applicants and thereby causing a huge monetary loss to the informant whereas the vendors had no title or authority to execute the sale deed in respect of the properties which belonged to the informant. F.I.R. was lodged on 27.1.2013 and after investigation final report was submitted which was rejected by the Court and cognizance of the case was taken.

OBSERVATIONS :

12. It reflects from the perusal of the record that after issuance of the bailable warrant against the applicants, non-bailable warrants were also issued and when they remained absconding, process under Section 82 CrPC was also issued and the applicants were declared as proclaimed offenders.

13. It also reveals from the perusal of the record that the applicants were well aware of the proceedings of the trial court as they had already moved discharge application before the Court concerned in the light of the order passed by this Court in application under section 482 CrPC No. 14954 of 2017. Hence, there was no need to issue fresh summons to them. Suffice it to say that after taking into account the deliberate absence of the applicants if non-bailable warrant was issued by the Court against them, there was no illegality in issuing the same. It reveals that the applicants did not cooperate with the trial court and this fact finds support from the material placed on record.

14. The conduct of the applicants drags them under the umbrella of the law promulgated by the Hon'ble Apex Court in **Prem Shankar Prasad Versus State of Bihar and Another, 2021 SCC OnLine Supreme Court 955**. In the facts of that 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."

15. The Hon'ble Apex Court in **Lavesh Vs. State (NCT of Delhi)(2012) 8 SCC 730** has held that "Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."

16. Further, the judgment passed in **Lavesh** (supra) was referred by the Hon'ble

Apex Court in State of **Madhya Pradesh vs. Pradeep Sharma, (2014) 2 Supreme Court Cases 171** and referring to paragraph 12 of the judgment of Lavesh (supra), in paragraph 16 of the said judgment, it was observed, relevant portion of which is as under :

"16.....It is clear from the above decision that if anyone is declared as an absconder / proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail."

17. Hence, the law is discernible on the point that as per normal rule, anticipatory bail cannot be granted to an accused who is absconding or concealing himself in order to avoid execution of the process of the Court without offering any legal or plausible justification for his abscondence and consequently has been declared a proclaimed offender. Albeit a compromise petition was filed by the informant before the Court concerned but the present applicants never appeared before the Trial Court after rejection of discharge application and after adopting the lawful procedure, punitive processes were issued against them.

18. The ratio of law promulgated in **Purushottam Chaudhary case** (supra) relied upon by the learned counsel for the applicants is that the Courts while sending process to an accused to procure his presence before the Court must take into account that firstly summons should be sent which must be served in accordance with law, particularly in the light of Section 64 CrPC and after service of summons in case the accused fails to appear before the Court, bailable warrant and in that sequence non-bailable warrant and then punitive process under Section 82 CrPC

may be issued by the Courts but the factual matrix of the matter in hand differs in the sense that the present is not a case where the accused persons were not at all aware about the case pending against them before the Court. They had already moved discharge application before the Court concerned in light of the order passed by this Court in application U/S 482 CrPC No. 14954 of 2017 and after rejection of the same, Criminal Revision was also preferred by them, hence, since the applicants before this Court were very well aware about the case pending against them before the Court, there was no need to issue summons against them to bring the fact of pendency of case against them to their knowledge. The applicants, though having knowledge about the pendency of the case against them, deliberately avoided their presence before the Court, the Court concerned committed no legal error in issuing punitive process against them and therefore in these circumstances the law relied upon by the applicants in **Purushottam Chaudhary case** (supra) does not provide any help to them.

19. Further, in the recent pronouncement of the Hon'ble Apex Court in **State of Haryana vs. Dharamraj, 2023 SCC Online SC 1085**, decided on 29.8.2023 the legal position regarding maintainability of an application for grant of anticipatory bail to a proclaimed offender has been elucidated, which reads as under (paragraph 17 of the said judgment):

"17. The respondent, without first successfully assailing the order declaring him as a proclaimed offender, could not have proceeded to seek anticipatory bail. Looking to the factual prism, we are clear that the respondent's application under

Section 438, CrPC should not have been entertained, as he was a proclaimed offender. We may note that in Laves v. State (NCT of Delhi), (2012) 8 SCC 730, this Court was categoric against grant of anticipatory bail to a proclaimed offender. In the same vein, following Laves (supra) is the decision in State of Madhya Pradesh v. Pradeep Sharma, (2014) 2 SCC 171, where this Court emphasised that a proclaimed offender would not be entitled to anticipatory bail. Of course, in an exceptional and rare case, this Court or the High Courts can consider a plea seeking anticipatory bail, despite the applicant being a proclaimed offender, given that the Supreme Court and High Courts are Constitutional Courts. However, no exceptional situation arises in the case at hand. Following Pradeep Sharma (supra), in Prem Shankar Prasad v. State of Bihar, 2021 SCC OnLine SC 955, this Court was unequivocal that the High Court therein erred in granting anticipatory bail ignoring proceedings under Sections 82 and 83, CrPC. In Abhishek v. State of Maharashtra, (2022) 8 SCC 282, this Court concluded:

'68. As regards the implication of proclamation having been issued against the appellant, we have no hesitation in making it clear that any person, who is declared as an "absconder" and remains out of reach of the investigating agency and thereby stands directly at conflict with law, ordinarily, deserves no concession or indulgence. By way of reference, we may observe that in relation to the indulgence of pre-arrest bail in terms of Section 438 CrPC, this Court has repeatedly said that when an accused is absconding and is declared as proclaimed offender, there is no question of giving him the benefit of Section 438 CrPC. [For example, Prem Shankar Prasad v. State of Bihar, (2022) 14 SCC 529, 2021 SCC OnLine SC 955] ?'"

20. The deliberate oblivion to the process issued by the Court on the part of the applicants denudes their claim to treat their application for grant of anticipatory bail as maintainable under the roof of a 'rare and exceptional case' and thereby to grant anticipatory bail to them.

21. In view of the above, declaring the present application for grant of anticipatory bail as not maintainable, I deem it not a fit case to grant anticipatory bail to the present applicants. The wilful defaulters, who do not cooperate with the trial court at all, are not entitled to get any relief from this Court by way of anticipatory bail.

22. The anticipatory bail application is, accordingly, **rejected**.

(2023) 11 ILRA 365
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.10.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VINOD DIWAKAR, J.

CrI. Misc. Writ No. 15487 of 2023

Narendra Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Mohammad Khalid, Sri Satish Tamta (Sr. Advocate)

Counsel for the Respondents:

G.A.

A. Criminal Law - Constitution of India, 1950- Article 226 - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986- Sections 2 & 3(1)- One of the main basic principles of

interpretation is that if meaning of words of statute are plain, effect must be given to it irrespective of consequences, Applying this principles there can be no two opinions that the words "the gang chart shall not be approved within the completion of investigation of the base case" are hardly open for any other interpretation as the words are plain and unambiguous and admits only one meaning and should be read as it is. Once this statutory mandate is taken as such the requirement of 'certified copy' of gang chart (or recovery memo) can safely be held or interpreted to be only 'procedural' in nature and only mandate of Rule 10 of the Rules would be that a copy certified by any competent person (which is being discussed in subsequent paragraphs) shall be attached with the gang chart. Any other interpretation of Rule 5(3)(c) read with Rule 10 of the Rules would frustrate the purpose and object of enactment of the Act and the Rules framed thereunder-Therefore, the only requirement of law as per the above quoted Rule 5(3)(c) is that there should be a completion of the investigation of the base case before approval of the gang-chart, and the same had clearly been done in the present case-filing or non-filing of the charge-sheet in the court concerned before preparation of the gang chart is immaterial and that the only requirement is that the charge-sheet should be available with the concerned authority before approval of the gang-chart- In the present case of the petitioner at the cost of repetition, it is highlighted that date of completion of investigation is 6.2.2023; the process of approval of the gang chart started on 17.3.2023 and the approval of the gang-chart was given by the Commissioner of Police on 20.3.2023, hence there is no violation of Rule 5(3)(c) of the Rules- Insofar as violation of Rule 10 of the Gangster Rules is concerned, submission is that there should exist a certified copy of the charge-sheet at the time of making draft gang chart- the charge-sheet has been prepared by the Investigating Officer under his signatures and the investigation had already been concluded before preparation of the gang chart. We are of the opinion that there should be a copy duly certified by the Officer only, who is having control over the document and it is no where required that it has to be a certified copy having been issued by the court of law-Rule 10 of the

Rules, 2021 nowhere says that copy of the charge-sheet has to be a copy certified by the Court or a certified copy of the charge-sheet issued by the Court. Submission of charge-sheet in the Court is not a prerequisite of Rule 10 of the Rules- the intention of the legislature is that the provision of Gangster Act can be imposed after completion of the investigation, therefore, it can be safely concluded that the copy of the charge-sheet or the recovery memo duly certified by the competent authority or the authority having control over such document i.e. Investigating Officer are sufficient for the said purpose. In this regard, a reference may be made to Rule 22 of the Rules, 2021, also heading whereof itself provides that criminal history is not mandatory and sections of the Gangster Act can be imposed in the course of investigation of any base case, falls under category of certain offence mentioned in Rule 22 (2) of the Rules, 2021- in case it is accepted that a certified copy issued by the competent Court of law only would be required before preparation of the gang chart, it would frustrate the very purpose of the Act and the Rules as this has already been noted above that no specific time frame has been fixed to complete investigation under the provisions of the CrPC and even further investigation can be directed by the police authority under the provisions of Section 173 (8) CrPC after receipt of police report forwarded by the Investigating Officer- Rule 5 (3) (c) of the Rules, 2021 clearly provides that "However, the gang-chart shall not be approved without the completion of investigation of the base case." Therefore, interpreting Rule 10 of the Rules, 2021 in any manner would clearly frustrate the aims and object of the Gangster Act and the Rules framed thereunder.(Para 1 to 31)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Ankit Sharma @ Ankit Kumar Vs St. of U.P. & ors. CMWP No. 8164 of 2022
2. Prithvi Singh Vs St. of U.P. CrI. Misc. Appl. U/S 372 Cr.P.C. (Leave to Appeal) No.329 of 2012
3. Nelson Motis Vs U.O.I . (1992) SC 1981

4. Kanailal Sur Vs Paramnidhi Sadhu Khan (1957) AIR SC 907
5. St. of U.P. Vs Vijay Anand Maharaj (1963) AIR SC 946
6. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd Vs Custodian of Vested Forests (1990) AIR SC 1747
7. Raghunath Rai Bareja Vs PNB (2007) 2 SCC 230
8. Shah Bhojraj Kuverji Oil Mills & Ginning Factory Vs Subhash Chandra Yograj Sinha, (1961) AIR SC 1596
9. Motiram Ghelabhai (deceased L.R.) Vs Jagan Nagar (deceased L.Rs.) & ors. (198) AIR5 SC 709
10. Sundaram Pillai Vs Pattabiraman (1985) 1 SCC 591
11. Shraddha Gupta Vs St. Of U.P. CRLA No. 569-570 of 2022
12. Ambuj Parag Dubey & ors. Vs St. of U.P. & two Ors
13. Ashok Kumar Dixit Vs St. of U.P. (1987) All 235 (All HC,FB)
14. Verneet Kumar Vs St. of U.P. (2009) 1 ALL CrJ 377
15. Virendra Kasaudhan Vs St. of U.P.(2023) SCC OnLine All 1431

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

1. Heard Shri Satish Tamta, learned Senior Counsel assisted by Shri Mohd. Khalid, learned counsel for the petitioner, Shri G.P. Singh, learned A.G.A. for the State-respondents, and perused the record.

2. The present writ petition has been preferred with the prayer to quash the impugned First Information Report dated

20.03.2023 registered as Case Crime No.136 of 2023, under Sections 2, 3(1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station- Dadri, District- Gautam Budh Nagar, and for a direction to the police not to arrest the petitioner in pursuance of the impugned FIR.

3. The prosecution's case posits that the petitioner, in collaboration with other gang members, usurped the Patta land allotted to landless individuals from scheduled castes and scheduled tribes in accordance with government land allotment policies. This acquisition was allegedly executed through the use of coercion and intimidation, allowing the petitioner and their associates to purchase the land at reduced rates and subsequently vend the same at elevated prices in an orchestrated manner. These gang members, acting both collectively and individually engaged in activities aimed at unjust economic and financial gain while inflicting illegal financial loss upon landless individuals from the scheduled castes and scheduled tribes. It is claimed that they are operating in association with other criminal gang members, perpetrating acts of terror on impoverished villagers. The actions of these professional criminals involved in organized criminal activities purportedly have adverse effects on societal health and morals.

4. Submission of learned counsel for the petitioner is that the petitioner has not done anything contrary to the provisions of sections 2, 3(1) of the Act and that there is a violation of Rules 5, 6, 10, 12, 13, 16, 17, 18 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Rules, 2021, framed under the provisions of Uttar Pradesh Gangsters and Anti Social

Activities (Prevention) Act, 1986 (hereinafter referred to as the Rules & Act) in the present case. It is submitted that the gang-chart has been prepared without there being joint meeting discussion as contemplated under Rule 5(3)(a) of the Rules. There is a violation of Rule 5(3)(c) of the Rules, which says that the gang-chart shall not be prepared without completion of investigation of the base case. It is next submitted that in this case it is mentioned in the gang chart that the charge-sheet was submitted on 6.2.2023, however, insofar as the accused-petitioner herein Narendra Kumar is concerned, whose name is mentioned at Serial No.6 of the gang-chart, it is revealed through e-court service information that the charge-sheet was filed in the court on 21.3.2023 and as such no charge-sheet was available on the day/date the gang-chart was prepared, and therefore, there is violation of Rule 5(3)(c) and Rule 10 of the Rules. It is also submitted that the gang-chart has not been forwarded in the manner as prescribed in Rule 16 of the Rules. In para-1 of the petition it has been stated that petitioner is an Advocate in Delhi. Submission, therefore, is that the impugned FIR is liable to be quashed.

5. No other ground is taken by learned counsel for the petitioner.

6. *Per contra*, learned A.G.A. opposing the prayer has pointed out that against the main accused gang leader Yashpal Tomar, the charge-sheet was forwarded by the Investigating Officer on 13.11.2023 cognizance whereof was also taken on 25.11.2022. In the case of the petitioner, the process of approval of the gang-chart has started on 17.3.2023 and was ultimately approved by the final authority- Police Commissioner, Gautam Budh Nagar on 20.3.2023, which is much

after the date of completion of the investigation against the petitioner and forwarding of the charge-sheet on 6.2.2023, cognizance whereof was taken by the court on 20.3.2023. A photocopy of the charge sheet as received and supplied by learned A.G.A. is taken on record.

7. We have heard learned counsel for the parties at length and have also gone through the grounds taken in the petition. However, much emphasis was given by learned counsel for the petitioner on violation of Rule 5(3)(c) of the Rules, which is quoted as under:

“5. General Rules- (1).....

(2).....

(3).....

(c) The gang-chart shall not mention those cases in which acquittal has been granted by the Special Court or in which the final report has been filed after the investigation. However, the gang-chart shall not be approved without the completion of investigation of the base case.”

(Emphasis supplied)

8. In the case of petitioner Narendra Kumar, gang-chart clearly mentions that the charge-sheet was prepared on 6.2.2023 and had already been forwarded by the Investigating Officer. On instructions, it was pointed out that initially charge-sheet was forwarded on 25.11.2022 by the Investigating Officer against other co-accused persons, however, subsequently, higher authority directed further investigation and it is only thereafter the charge-sheet dated 6.2.2023 was forwarded against the petitioner along with several other accused in the base FIR, cognizance whereof was taken by the court on 20.3.2023. Clearly, the investigation against

the petitioner had, therefore, been concluded on 6.2.2023, much before preparation of the gang-chart, and therefore, there is no illegality, infirmity in preparation of the gang-chart. It may be noted that the fact remains that cognizance of the charge-sheet filed against the petitioner on 6.2.2023 had also been taken by the court itself.

9. Learned counsel for the petitioner placed reliance on the judgment of this Court in Criminal Misc. Writ Petition No.8164 of 2022 (**Ankit Sharma @ Ankit Kumar v. State of U.P. and others**), decided on 9.11.2022, wherein learned Division Bench in the facts-circumstances has held that before making compliance of Rule 10 of the Rules, the gang-chart has been filed and a wrong impression was given to the court that the charge-sheet has already been filed in the related case crime number. A bare glance over the Rule 5(3)(c) of the Rules, 2021 clearly provides that only requirement is that the gang-chart shall not be approved without completion of the investigation of the base case. In the present case, therefore, under no circumstances, it can be held that the investigation has not been completed. As per learned A.G.A., initially investigation had been completed and charge-sheet was forwarded on 13.11.2022 against the gang leader Yashpal Tomar along with co-accused persons, however, on further investigation, names of certain accused persons were deleted, and names of certain other accused including the petitioner, herein were added and ultimately the charge-sheet dated 6.2.2023 was prepared and forwarded by the Investigating Officer cognizance whereof was taken by the court on 20.3.2023. Therefore, Ankit Sharma (Supra) is clearly of no help to the petitioner.

10. In Criminal Misc. Application U/S 372 Cr.P.C. (Leave to Appeal) No.329 of 2012 (**Prithvi Singh v. State of U.P.**), decided on 21.4.2022, this Court has considered the principles of statutory interpretation extensively, para 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 40 whereof are reproduced as under:

“10. Before proceeding further it would be appropriate to take note of the principles of statutory interpretation as the decision of the question involved in the present case is directly dependant on the interpretation of the statutory provisions. For this purpose we have taken help of the book 'Principles of Statutory Interpretation' '13th Edition, 2012' written by Justice G. P. Singh (Former Justice of M. P. High Court).

11. One of the main basic principles of interpretation is that if meaning of words of statute are plain, effect must be given to it irrespective of consequences.

12. In Nelson Motis vs. Union of India, AIR 1992 SC 1981 it has been observed that when the words of a statute are clear, plain or unambiguous, i.e., they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences.

13. In Kanailal Sur vs. Paramnidhi Sadhu Khan, AIR 1957 SC 907 it was observed that if the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

14. In State of Uttar Pradesh vs. Vijay Anand Maharaj, AIR 1963 SC 946 it was held that when a language is plain and unambiguous and admits of only one

meaning no question of construction of a statute arises, for the Act speaks for itself.

15. It is also a guiding rule of interpretation that language of the statute should be read as it is.

16. In *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd vs. Custodian of Vested Forests*, AIR 1990 SC 1747 it was observed that 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.

17. In *Raghunath Rai Bareja vs. Punjab National Bank*, (2007) 2 SCC 230 Supreme Court held that departure from the literal rule should be done only in very rare cases and ordinarily there should be judicial restraint in this connection.

18. Insofar as rule of 'regard to consequences' is concerned, the aforesaid book clearly provides that this rule has no application when the words are acceptable to only one meaning and no alternate construction is reasonably open. A reference may be made in this regard with citations noted above which provides that if meaning is plain, effect must be given to it irrespective of consequences.

19. In *Shah Bhojraj Kuverji Oil Mills and Ginning Factory vs. Subhash Chandra Yograj Sinha*, AIR 1961 SC 1596 it was observed that as a general rule, a 'proviso' is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a 'proviso' is not interpreted as stating a general rule.

20. However, in Chapter 3 of the aforesaid book at page 206 it has been observed that the insertion of a 'proviso' by the draftsman is not always strictly adhered to its legitimate use and at times a section worded as a 'proviso' may wholly or partly be in substance a fresh enactment adding to and not merely excepting something out of

or qualifying what goes before. A large number of rulings, including the English Law, have been noted in support of the aforesaid observation. A reference in this regard may be made to one of such rulings, namely, *Motiram Ghelabhai (deceased L.R.) vs. Jagan Nagar (deceased L.Rs.) and others*, AIR 1985 SC 709.

21. Purposes of a 'proviso' were aptly summarised in *Sundaram Pillai vs. Pattabiraman*, (1985) 1 SCC 591, wherein it was observed that by and large a proviso may serve the following four different purposes:-

"(1) qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

(emphasis supplied)

22. However, it was observed in the aforesaid book that the above summary cannot, however, be taken as exhaustive and ultimately a 'proviso' like any other enactment ought to be construed upon its terms.

40. As already noticed, the golden rule of interpretation is that if the meaning of words of a statute are plain, effect must be given irrespective of the consequences. We may refer to the judgments of the Supreme Court in cases of *Nelson Motis (supra)*, *Kanailal Sur (supra)*, *Vijay Anand Maharaj*

(*supra*), *Gwalior Rayan Silk (supra)*, *Raghunath Rai Bareja (supra)*.

11. Applying the aforesaid principles there can be no two opinions that the words “the gang chart shall not be approved within the completion of investigation of the base case” are hardly open for any other interpretation as the words are plain and unambiguous and admits only one meaning and should be read as it is. Once this statutory mandate is taken as such the requirement of ‘certified copy’ of gang chart (or recovery memo) can safely be held or interpreted to be only ‘procedural’ in nature and only mandate of Rule 10 of the Rules would be that a copy certified by any competent person (which is being discussed in subsequent paragraphs) shall be attached with the gang chart. Any other interpretation of Rule 5(3)(c) read with Rule 10 of the Rules would frustrate the purpose and object of enactment of the Act and the Rules framed thereunder.

12. We, therefore, find that as the only requirement of law as per the above quoted Rule 5(3)(c) is that there should be a completion of the investigation of the base case before approval of the gang-chart, and the same had clearly been done in the present case. Therefore, filing or non-filing of the charge-sheet in the court concerned before preparation of the gang chart is immaterial and that the only requirement is that the charge-sheet should be available with the concerned authority before approval of the gang-chart.

13. In the present case of the petitioner herein Narendra Kumar, at the cost of repetition, it is highlighted that date of completion of investigation is 6.2.2023; the process of approval of the gang chart started on 17.3.2023 and the approval of

the gang-chart was given by the Commissioner of Police, Gautam Budh Nagar on 20.3.2023, hence there is no violation of Rule 5(3)(c) of the Rules.

14. Insofar as violation of Rule 10 of the Gangster Rules is concerned, submission is that there should exist a certified copy of the charge-sheet at the time of making draft gang chart. We find that the charge-sheet has been prepared by the Investigating Officer under his signatures and the investigation had already been concluded before preparation of the gang chart. We are of the opinion that there should be a copy duly certified by the Officer only, who is having control over the document and it is nowhere required that it has to be a certified copy having been issued by the court of law. Rule 10 of the Rules, 2021 nowhere says that copy of the charge-sheet has to be a copy certified by the Court or a certified copy of the charge-sheet issued by the Court. Submission of charge-sheet in the Court is not a prerequisite of Rule 10 of the Rules.

15. As the intention of the legislature is that the provision of Gangster Act can be imposed after completion of the investigation, therefore, it can be safely concluded that the copy of the charge-sheet or the recovery memo duly certified by the competent authority or the authority having control over such document i.e. Investigating Officer are sufficient for the said purpose. In this regard, a reference may be made to Rule 22 of the Rules, 2021, also heading whereof itself provides that criminal history is not mandatory and sections of the Gangster Act can be imposed in the course of investigation of any base case, falls under category of certain offence mentioned in Rule 22 (2) of the Rules, 2021.

16. The controversy has already been decided by Hon'ble Apex Court in the case of *Shraddha Gupta vs The State Of Uttar Pradesh* decided on 26 April, 2022 in Criminal Appeal No. 569-570 of 2022 that the provisions of Gangster Act can be imposed on the basis of a solitary case.

17. In addition, the object of enacting the Gangster Act and the Rules framed thereunder may also be taken note of, which are noted as under:

Of the Act:

"An act to make special provision for the prevention of, and for coping with, gangsters and anti-social activities and for matters connected therewith or incidental thereto."

Of the Rules:

In exercise of the powers conferred by Section 23 of the Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act, 1986 (U.P. Act No. 7 of 1986) read with Section 21 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act No. 1 of 1904) and in suppression of all Government Orders and Notifications made under the Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act, 1986 (U.P. Act No. 7 of 1986), except as respect things done or omitted to be done before such suppression, the Governor is pleased to make the following rules with a view to provide for a speedy and transparent procedure to punish gangsters, to establish an efficient recovery system in respect of property of gangsters and incidental benefits acquired by them through crimes and acts related therewith."

(Emphasis Supplied)

18. Clearly, object of framing Rules, 2021 is to provide for a speedy procedure as well. It is needless to point out that in the Criminal Procedure Code, there is no specific time frame provided for conducting the investigation and submission of charge-sheet in the Court. The only provision seems to be that under Section 167 CrPC, which provides that in certain cases, the charge-sheet is not filed within 60 days and in other cases the charge-sheet is not filed within 90 days, the arrested accused person shall be entitled for default bail.

19. Sub-section (ii) of Section 167 Cr.P.C. proviso (a) provides as under:

"167. Procedure when investigation cannot be completed in twenty-four hours.- (1) ...

(2).....

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;]

20. The aforesaid provision clearly reflects that only a guiding factor regarding completion of investigation within a time bound period has been provided in Cr.P.C., however, there is no mandatory provision in this regard in the Code.

21. That apart, it is the settled law that further investigation can be directed under Section 173(8) CrPC by the higher police authorise after receipt of the police report forwarded by the Investigating Officer.

22. The purpose of enacting the aforesaid Act is control special provision for the prevention of, and for coping with gangsters and anti-social activities in the State and speedy provision under the Rules, so that speedy investigation and trial can be conducted in the criminal prosecution lodged under the provisions of the Act.

23. Chapter 4 of the Rules, 2021 is dedicated to the sanction of the investigation and prosecution sanction. Rules 22 and 24 fall within this Chapter. Rule 24 of the Rules provides for expeditious investigation, which is quoted as under:

"24. Expeditious Investigation- (1) The investigation of any offence under the Act shall, as far as possible, be completed within six months.

(2) In unavoidable circumstances, after the approval of the district police in-charge, a maximum extension of three months can be provided.

(3) In no case, can the investigation be extended for more than one year."

24. By the aforesaid provision, specific time frame for completion of the investigation has been provided. Thus, the object of enacting the Gangster Act, 1986 and the Rules, 2021 framed thereunder is clearly to provide speedy procedure for conducting the investigation for effective speedy punishment under the provisions of the Act.

25. Under these circumstances, in case it is accepted that a certified copy issued by the competent Court of law only would be required before preparation of the gang chart, it would frustrate the very purpose of the Act and the Rules as this has already been noted above that no specific time frame has been fixed to complete investigation under the provisions of the CrPC and even further investigation can be directed by the police authority under the provisions of Section 173 (8) CrPC after receipt of police report forwarded by the Investigating Officer.

26. At the cost of repetition, it may again be highlighted that Rule 5 (3) (c) of the Rules, 2021 clearly provides that "However, the gang-chart shall not be approved without the completion of investigation of the base case." Therefore, interpreting Rule 10 of the Rules, 2021 in any manner would clearly frustrate the aims and object of the Gangster Act and the Rules framed thereunder.

27. In such view of the matter, we find that the arguments as raised by learned counsel for the petitioner are not sustainable in the eye of law. We further note that all such rules violation whereof is being claimed by the learned counsel for the petitioner have also been considered by this Court extensively in the case of **Ambuj Parag Dubey and two others v. State of**

U.P. and two others, delivered on 6.12.2022. Para 13, 14, 15, 17, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36 are quoted as under:

“13. Gangster Act was enacted to make special provision for the prevention of, and for coping with gangsters and anti-social activities and for matters connected therewith and incidental thereto. The Gangster Act is a special statute, as well as, a penal statute.

14. The Gangster Act seeks to punish declared criminals who have deliberately chosen the life of crime. The activities of these professional perpetrators of organized crimes, violence and orgy has a far more baneful effect on the health and morals of the society and its people. If the activities of such recidivists are subjected to same punishment as that other ordinary criminals, the confidence of public in the efficacy and efficiency of State Administration is bound to shake (vide; Ashok Kumar Dixit vs. State of U.P., AIR 1987 (All) 235 (All HC,FB).

15. As per Section 20 of Gangster Act, provisions of the Act or any Rule made thereunder shall have overriding effect notwithstanding anything inconsistent therewith contained in any other enactment. The State Government in exercise of powers under Section 23 of the Gangster Act and in supersession of all Government Orders and notifications, duly notified on 27 December 2021, the Gangster Rules to provide for speedy and transparent procedure to punish gangster and to establish efficient recovery system in respect of property of gangsters and incidental benefits acquired by them through crimes and acts related therewith.

17. Chapter-II of Gangster Rules lays down 'Conditions of Criminal Liability of Gangs'. Rule 3(1) provides that the offences

mentioned in Sub-sections (i) to (xxv) of clause (b) of section 2 of the Gangster Act shall be punishable under the Gangster Act only if they are: (a) committed for disturbing public order; or (b) committed by causing violence or threat or display of violence, or by intimidation, or coercion or otherwise, either singly or collectively, for the purposes of obtaining any unfair worldly, economic, material, pecuniary or other advantage to himself or to any other person.

26. All the anti-social activities mentioned in the definition of gang are not covered as offences but are certainly unlawful activities having serious reflection on the society, though not termed as offences. Thus, the law never required that offences must have been committed in past or involve use of violence for prosecution under the Gangster Act. Further, as per definition of gang, the Gangster Act seeks to prevent and punish activities which may result in undue temporal, pecuniary, material or other advantage to the gangsters or any other person and which may or may not necessarily, involve the use of violence. (Verneet Kumar vs. State of U.P. 2009 (1) ALL CrJ 377).

27. Chapter-III of Gangster Rules lays down the principles related to Gang Chart. Rule-5 mandates that Incharge of a Police Station/Station House Officer/ Inspector shall prepare a Gang Chart (Form No. 1) mentioning the details of criminal activities of the gang. The Gang Chart will be presented to the district head of the Police after clear recommendation of the Additional Superintendent of Police mentioning the detailed activities in relation of all the persons of the said gang. Sub-rule (2) of Rule 5 provides that the provisions contained therein shall be complied in respect of gang charts. The provision reads thus:

5. (1) To initiate proceedings under this Act, the concerned Incharge of Police General Rules Station/Station House Officer/Inspector shall prepare a gang-chart mentioning the details of criminal activities of the gang.

(2) The gang-chart will be presented to the district head of police after clear recommendation of the Additional Superintendent of Police mentioning the detailed activities in relation to all the persons of the said gang.

(2) **The following provisions shall be complied with in respect of gang-charts:-**

a. **The gang-chart will not be approved summarily but after due discussion in a joint meeting of the Commissioner of Police/District Magistrate/Senior Superintendent of Police/ Superintendent of Police.**

b. **There may be no gang of one person but there may be a gang of known and other unknown persons and in that form the gang-chart may be approved as per these rules.**

c. **The gang-chart shall not mention those cases in which acquittal has been granted by the Special Court or in which the final report has been filed after the investigation. However, the gang-chart shall not be approved without the completion of investigation of the base case.**

d. **Those cases shall not be mentioned in the gang-chart, on the basis of which action has already been taken once under this Act.**

e. **A separate list of criminal history, as given in Form No. 4, shall be attached with the gang-chart detailing all the criminal activities of that gang and mentioning all the criminal cases, even if acquittal has been granted in those case or even where final report has been submitted in the absence of evidence.**

Along with the above, a certified copy of the gang register kept at the police station shall also be attached with the gang-chart. In addition to the above, the information of crime and gang members mentioned in the gang-chart will also be updated on Interoperable Criminal Justice (ICJS) portal and Crime and Criminal Tracking Network System (CCTNS).

28. Rule 6 provides that while preparing the Gang Chart it shall be clearly mentioned, if the alleged act of the gang falls within the purview of clause (b) of Section 2 of the Act along with relevant provisions, further, sub-rule (2) mandates that the Investigating Officer makes an endorsement to the effect that the accused is causing panic, alarm or terror in public, then evidence shall be collected in this regard. In addition to the above, a list of criminal history may be attached separately in the prescribed format. (Form No. 4)

29. Rule 10 mandates that records of base cases, would accompany the gang chart and Rule 11 mandates that the present status of all the accused, whether they are in jail or on bail or absconding, shall be clearly mentioned. Rule 13 mandates that while writing abstract below the gang chart and particulars of those officials shall be specifically mentioned. Rule 13 is extracted:

13. While writing the abstract below the gang-chart and particulars separately with the gang-chart, the particulars of those offences shall be specifically mentioned:-

i. which have been committed for pecuniary, materialistic and temporal or similar benefits; or

ii. which disturb the public order; or
iii. Which are a ground for detention under the National Security Act, 1980 (Act no. 65 of 1980)

31. Rule 16 provides the manner and the recommendations to be made while forwarding the gang chart Rule 16 reads thus:

16. The following manner shall be followed in the forwarding of Gang-Chart:

(1) Forwarding of the gang-chart by the Additional Superintendent of Police: The Additional Superintendent of Police will not only take a quick forwarding action in the case but **he will duly peruse the gang-chart and all the attached forms; and when it is satisfied that there is a just and satisfactory basis to pursue the case,** only then will he forward the letter along with the recommendation given below on the gang-chart to the Superintendent of Police/Senior Superintendent of Police.

"Thoroughly studies the gang-chart and attached evidence. The basis of action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 exists. Accordingly, forwarded with recommendation."

(2) Forwarding of the gang-chart by the district police in-charge: When the gang-chart along with all the Forms is received by the Senior Superintendent of Police/Superintendent of Police with the clear recommendation of the Additional Superintendent of Police, he will also **thoroughly analyze all the facts and when it is confirmed that all the formalities of the Act have been fulfilled and there is a legal basis for taking action in the case,** then he should forward the gang-chart to the Commissioner of Police/District Magistrate stating that: "I have duly perused the gang-chart and attached forms and I am fully satisfied that all the particulars mentioned in the case are correct and there is a satisfactory basis for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities

(Prevention) Act 1986. Accordingly, approved"

(3) Resolution of the Commissioner of Police/District Magistrate: When the gang-chart is sent to be the Commissioner of Police/District Magistrate along with all the Forms, all the facts will also be thoroughly perused by the Commissioner of Police/Districts 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.

32. Satisfaction of the competent authority only means that the competent authority must be in fact satisfy and not a dishonest satisfaction, which will be no satisfaction at all. The satisfaction contemplated by the Gangster Rule is satisfaction in point of fact on the materials placed before the competent authority. The satisfaction of the competent authority referred to under the Rule is not with respect to the allegations levelled against the gangster but the satisfaction is confined to those allegations that the accused can be prosecuted under the Gangster Act. Whatever may be the nature of charge against the accused, the satisfaction of the competent authority should be with regard to that the materials placed before him and the nature of the accused indulging in

community antisocial activities. It is expedient to sanction prosecution under the Gangster Act.

33. The expression satisfied is much narrower than "application of mind". The competent authority is not to apply his mind and satisfy himself as to whether the material placed before him would be sufficient for convicting the accused under the Gangster Act. The satisfaction is confined within a narrow domain based on the materials placed before the competent authority; the authorities forwarding the gang chart is satisfied that the accused should be prosecuted under the Gangster Act. The expression satisfaction is not satisfaction on evidence but a prima facie satisfaction based on the representations of the nodal authority and the district police that the accused should be prosecuted under the Gangster Act.

34. Rule 17 mandates that the competent authority is bound to exercise its own independent mind while forwarding the gang chart and should not be on a pre-printed rubber seal gang chart. Rule 17 reads thus:

17 (1) the Competent Authority shall be bound to exercise its own independent mind while forwarding the gang-chart.

(2) A pre-printed rubber seal gang-chart should not be signed by the Competent Authority; otherwise the same shall tantamount to the fact that the Competent Authority has not exercised its free mind.

35. Rule 18 provides that gang chart shall be sent only in the manner as given in Form No.1 of these rules.

36. Rule 17 and 18 would have to be read together. Gang chart has to be sent in the prescribed Form No. 1. The endorsement to be made by each of the authorities have also been specified in Rule 16. The rule itself prescribes and mandates a printed Form. Rule 17 merely mandates that the competent authority while approving the gang chart should not be swayed by the recommendation of the police authorities mechanically but should satisfy himself

independently that the grounds for prosecution is made out. The satisfaction at that stage is subjective and does not rest upon any evidence. The competent authority has to satisfy that the materials placed with the gang chart calls for prosecution. The stage of collecting evidence follows thereafter. The scope of judicial review is miniscule, the accused cannot challenge the FIR without challenging the gang chart. The question as to whether the antisocial activities of the proposed accused is that of a gang or gangster is a matter of investigation."

(Emphasis supplied)

28. In the said judgment, the entire scheme of the Act was discussed and approved.

29. It may be noted that in Ambuj Parag Dubey (supra) also, the petitioner was an Advocate.

30. The provisions were again considered by this Court in the case of *Virendra Kasaudhan vs. State of U.P.*, (2023) SCC OnLine All 1431.

31. Therefore, for the discussions made herein above, we find that the present petition is devoid of merits, and is accordingly, **dismissed.**

**(2023) 11 ILRA 377
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.11.2023**

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN,J.

Contempt Application (Civil) No. 2385 of 2023

Pradeshik Chakbandikarta Sangh

...Applicant

Versus

Mr. Sudhir Garg, Addl. Chief Secy./Prin. Secy. Lko & anr.

...Opp.Parties

Counsel for the Applicant:

Abhineet Jaiswal, Shreya Jaiswal

Counsel for the Opp. Parties:

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Civil Law - By earlier order, no direction was issued against authority concerned - It was merely recorded, that some eligible officers had been promoted and in respect of remaining officers/officials, whose promotion orders not issued, appropriate decision would be taken after affording them opportunity of hearing - Any fresh decision would be taken expeditiously - Compliance with writ court's order expected and resultant order to be enclosed with fresh compliance affidavit - Despite writ court's directions, no appropriate steps taken by competent authority for considerable period and even after contempt notice, competent authority failed to take prompt and proper steps for compliance - Prima facie, challenging order dated 10.10.2023 before Apex Court amounts to misuse of court's process, waste of its time and disregard of Government Order dated 31.05.2017 - Directions accordingly. (Para 6, 16)

Contempt Application pending. (E-13)

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

1. Heard Shri Abhineet Jaiswal, learned counsel for petitioner and Shri Nishant Shukla, learned counsel for respondents.

2. Shri Abhineet Jaiswal, learned counsel for petitioner has filed reply/objection against the affidavit of compliance filed by respondent no. 2 and the same is taken on record.

3. Shri Nishant Shukla, learned counsel for respondents has filed second

affidavit of compliance, same is taken on record.

4. This Court has passed the order dated 10.10.2023, which reads as under:-

"1. Heard Mr. Abhineet Jaiswal, learned counsel for the applicant-petitioner, as well as Mr. Nishant Shukla, learned Additional Chief Standing Counsel, who has appeared for contemnor - opposite party no. 2 and, filed affidavit of compliance, the same is taken on record.

2. In compliance of order dated 27.09.2023, Mr. G.S. Naveen Kumar, presently serving as Secretary Revenue and Relief Commissioner, Government of U.P., who is also holding additional charge of Consolidation Commissioner, Government of U.P., is present in person.

3. By means of aforesaid affidavit of compliance, Mr. Nishant Shukla has stated that the order of the writ-Court has been complied with. However, Mr. Abhineet Jaiswal, has stated that he has filed an objection against the application for grant of time filed by the opposite party no. 2 on 25.08.2023 wherein he has stated that the order of the writ-Court has not been complied.

4. The aforesaid affidavit had been filed on 21.09.2023 and was put up before the Court on 25.09.2023, however, the same is not traceable on record.

5. Therefore, the office is directed to trace out the aforesaid affidavit and place the same on record.

6. Mr. Nishant Shukla has drawn attention of this Court towards paragraph-6 of the affidavit of compliance wherein it has been indicated that only 127 consolidators/ rectangulators were found suitable for promotion and, further order to that effect has been issued.

7. Referring the aforesaid submission, attention of this Court has been drawn towards Annexure CA-1 which is minute/order of promotion. The recommendation of committee, which is at running page-142 of the affidavit of compliance, makes it clear that some eligible officers have been promoted in terms of the order of the writ-Court and, for remaining officers/officials, appropriate exercise would be undertaken strictly in accordance with law by affording an opportunity of hearing to those officers/officials.

8. As per Mr. Nishant Shukla relevant order, in compliance of order of the writ-Court, would be issued expeditiously.

9. Since the affidavit, so filed by Mr. Abhineet Jaiswal, is not traceable on record and, from perusal of affidavit of compliance filed today, it appears that some more exercise is to be undertaken for making compliance of the order of the writ-Court in its letter and spirit regarding those employees who have not been promoted, let this matter be listed on 28.11.2023 within top ten cases of the cause-list.

10. On or before 28.11.2023, Mr. Nishant Shukla shall file a fresh affidavit of compliance, apprising this Court as to what decision has been taken regarding other employees in respect of their promotion in terms of the order of the writ-Court.

11. In the meantime, Mr. Abhineet Jaiswal, learned counsel for the applicant-petitioner, may file reply/objection to the affidavit of compliance, which has been filed today.

12. On the next date of listing, the officer, who is present in person today, need not appear again. However, it is made clear that if on the next date of listing it is found that the order of the writ-Court has not been complied in its letter and spirit, order

of his personal appearance may again be passed on the next date."

5. Shri Abhineet Jaiswal, learned counsel for petitioner has drawn the attention of this Court towards Annexure No. 2 of the affidavit filed today, which is the order dated 24.11.2023 passed by the Apex Court in Special Leave to Appeal (C) No. of 25541 of 2023. Though the aforesaid leave to appeal has been dismissed by the Apex Court but one fact has been noticed by this Court that by means of aforesaid special leave to appeal, the order dated 10.10.2023 (supra) has been challenged.

6. To the best of my understanding, by means of order dated 10.10.2023, no direction has been issued against the authority concerned, rather it has been indicated on the basis of submission of learned counsel for respondents that some of the eligible officers have been promoted and the remaining officers/officials, whose promotion order has not been issued, any appropriate order would be passed in their case after affording an opportunity of hearing to those officers. It has also been noted in the aforesaid order that any fresh order would be passed expeditiously, therefore, by means of an order dated 10.10.2023, it was expected that in compliance of the order of writ court any appropriate order may be passed and that order may be enclosed with the fresh affidavit of compliance. However, in earlier order, it has been noted that despite the order of the writ court, no appropriate steps have been taken by the competent authority for substantial time, even after service of contempt notice, the prompt steps have not been taken to make compliance of the order of the writ court in its letter and spirit.

7. When this Court has already observed that if the ineligible persons may not be promoted, the appropriate exercise may be undertaken by affording an opportunity of hearing to those officers/officials, meaning thereby, no direction was issued to the authority concerned to promote the ineligible persons.

8. The bare minimum expectation of the contempt court is to ensure the compliance of the order of writ court in its letter and spirit unless and until that order has been stayed or set aside by the superior court. I think, for the aforesaid bare minimum expectation, no authority should be aggrieved.

9. Even if the order of the writ Court has been complied with in its letter and spirit only such affidavit could be filed apprising the Court that the complete compliance has already been done, for that, the precious time of the Apex Court may not be wasted. If such affidavit is filed indicating therein that the order of the writ court has been complied with in its letter and spirit demonstrating the relevant documents, the contempt petition is dismissed for the reason that no contempt petition can be kept pending any longer if the order of the writ Court has been complied with in its letter and spirit.

10. The Apex Court should not be approached casually or without having any reasonable ground inasmuch as the highest court of the country should be approached only when there is any bona fide grievance of the person, which has not been redressed by the High Court/High Courts. If the authority concerned is the Senior Officer of the State Government i.e. opposite party no. 2- Mr. Naveen Chandra, Consolidation

Commissioner, Uttar Pradesh, Lucknow, he should remain more cautious before approaching the Apex Court ensuring that the precious time of the Apex Court is not wasted, and should also verify carefully that his bona fide grievance is still unredressed before the High Court. Further, to approach the Apex Court some reasonable expenses are to be incurred, therefore, so as to save the public exchequer, the Officer of the State Government should remain so cautious. He/she may not think so casually that this is not his/her hard-earned money but is of State Government and no one can ask him/her for those expenses. Rather, the proper approach of the officer must be that if said legal recourse, which is so warranted in the interest of justice, is not adopted the State agency shall suffer irreparable loss and injury. The aspect of misuse of public exchequer should be taken so seriously by the superior officers and if it is found that the Apex Court has been approached casually without having any plausible reason, the explanation should be called from the officer concerned.

11. It appears that in the present case there was no plausible reason or explanation approaching the Apex Court, therefore, the authority himself i.e., opposite party no. 2 has sought to withdraw the SLP. Accordingly, the SLP was dismissed on his request.

12. I have gone through one Government Order dated 31.05.2017 bearing No. 31/2017/U.O-23/Saat- Nyay- 1-2017-70G/2017 (Nyay Anu-2), issued by the Principal Secretary, and Legal Remembrancer, Department of Law, Government of U.P., Lucknow addressing to all Principal Secretaries/Secretaries, Government of U.P. in respect of filing of cases before the courts including Apex

Court. By means of aforesaid Government Orders guidelines have been circulated with the direction that those guidelines should be followed strictly. Some relevant extract of the aforesaid Government Order is being reproduced here-in-below:-

""2. ...

* एक साधारण वादी की भांति मुकदमों को किसी भी कीमत पर जीतने के उद्देश्य से पैरवी न करें।

* केवल मुकदमा करने के लिए मुकदमा न करें।

* यह सुनिश्चित करें कि झूठी दलीलें न दी जायें तथा सुसंगत तकनीकी बिन्दुओं को हतोत्साहित किया जाय।

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* मा० न्यायालयों में सरकारी मुकदमों को इस उद्देश्य के साथ कम करना है ताकि न्यायालय का कीमती समय अन्य महत्वपूर्ण लम्बित मामलों के निपटारे में लगाया जा सके, जिससे कि विचाराधीनता के औसत समय को 15 वर्ष से घटाकर 03 वर्ष किये जाने के राज्य विधिक मिशन लक्ष्य को प्राप्त किया जा सके।

...

अपील दाखिल करना:-

* एक पक्षीय और अन्तरिम आदेशों के विरुद्ध अपील नहीं दाखिल की जायेगी। पहले यह प्रयास अवश्य होना चाहिए कि आदेश को रद्द कराया जाय। आदेश रद्द न होने की दशा में और आदेश के प्रतिकूल प्रभाव पड़ने की दशा में अपील दाखिल किया जाना चाहिए।

* सबसे पहले उच्च न्यायालय के भीतर ही अपील दाखिल की जानी चाहिए। उच्चतम न्यायालय में, असाधारण स्थितियों के सिवाय सीधे अपील नहीं किया जाना चाहिए।

...

...

...

उच्चतम न्यायालय में अपील दाखिल नहीं की जायेगी

जब तक कि:-

* मामले में कानून का बिन्दु सम्मिलित न हो,

* यदि यह तथ्य का प्रश्न है, और तथ्य का निष्कर्ष इतना अनुचित है कि उस निष्कर्ष पर कोई साफ - साफ सुथरा न्यायिक मत नहीं पहुंच सकता है,

* जहाँ सार्वजनिक वित्त प्रतिकूल रूप से प्रभावित होता हो,

* जहाँ सार्वजनिक न्याय के साथ सारवान व्यवधान हो,

* जहाँ संविधान के अधीन होने वाला कानून का कोई प्रश्न हो,

* जहाँ उच्च न्यायालय ने अपने क्षेत्राधिकार का अतिक्रमण किया हो,

* जहाँ उच्च न्यायालय ने किसी सांविधिक प्रावधान को अधिकारातीत रूप में अभिखण्डित किया हो,

* जहाँ उच्च न्यायालय की व्याख्या साफतौर पर त्रुटिपूर्ण हो।

* प्रत्येक मामले में, कोई अपील दायर करने की आवश्यकता का एक समुचित प्रमाणन होगा। ऐसे प्रमाणन में समर्थन में संक्षिप्त किन्तु तर्कपूर्ण कारण दिये जायेंगे। इसी के साथ, वे कारण भी अभिलिखित किये जायेंगे कि अपील दायर करना ठीक या उपयुक्त क्यों नहीं समझा गया।

13. In the present case, it is clear that the aforesaid guidelines have not been adhered to, rather the same have been flouted and prima facie, it appears that the precious time of this Court as well as the Apex Court has been wasted.

14. Undoubtedly, to approach the Apex Court or the High Court is a fundamental right of every citizen if he/she is aggrieved from any action or inaction of any authority or is aggrieved from any order being passed in any judicial or quasi judicial proceedings and no one can restrain them to avail such remedy. At the same time, it is also trite that the process of law cannot be misused by filing frivolous, misconceived or vexatious petition only just to waste the precious time of the Court and to waste the money for such litigation. If such money belongs to the State Exchequer, then it should be expensed with due care & precaution, failing which, the

responsibility should be fixed on erring authority.

15. I am unable to comprehend as to why the order dated 10.10.2023 has been challenged before the Apex Court inasmuch as if the ground/reason challenging the order was appropriate, reasonable and bona fide, the authority should have not requested before the Apex Court seeking liberty to withdraw the SLP.

16. Therefore, prima facie, it is clear that challenging the order dated 10.10.2023 before the Apex Court is nothing but misuse of the process of the Court and wasting the precious time of the Apex Court, besides, is in utter disregard of the specific guidelines of the Government Order dated 31.05.2017 (supra). Therefore, a specific explanation is needed from the opposite party no. 2, who was the petitioner before the Apex Court as to why he has challenged the order dated 10.10.2023 before the Apex Court instead of filing affidavit of compliance before this Court stating therein that the order of writ court has been complied with in its letter and spirit, inasmuch as had such fresh affidavit of compliance been filed, the contempt petition would have been dismissed.

17. List this case on 13.12.2023. On that date, the opposite party no. 2 - Mr. Naveen Chandra, Consolidation Commissioner, Uttar Pradesh, Lucknow, 7th Floor, Indira Bhawan, Ashok Marg, Lucknow-226001 shall appear in person and he shall file his explanation on the aforesaid observation.

18. In the meantime, Shri Abhineet Jaiswal, learned counsel for petitioner shall file his reply/objection to the second affidavit of compliance.

19. It is made clear that any appropriate order may be passed on the next date after perusing the explanation so filed by the authority concerned.

20. Let a copy of this order be placed before the Chief Secretary, Government of U.P., Lucknow, Principal Secretary/Legal Remembrancer, Department of Law, Government of U.P., Lucknow and opposite party no. 1, namely, Shri Sudhir Garg, Additional Chief Secretary/Principal Secretary, Department of Revenue, Government of U.P., Civil Secretariat, Lucknow for perusal and necessary action, if so required, as per their wisdom, by the Senior Registrar of this Court within three working days.

(2023) 11 ILRA 382
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.11.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1803 of 2021

Ram Saran Verma & Anr. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:
 Dharmendra Kumar

Counsel for the Respondents:
 G.A., Mohammad Nauman, Osama Ahmad Abbasi, Vijay Bahadur Yadav

Criminal Law - - Constitution of India, 1950 - - Article 226 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 14-A(1) - Indian Penal Code, 1860 - Sections 419, 420, 467, 468, 471, 120-B - Criminal Appeal - Discharge Application - Forged

Will Deed – Civil Dispute – SC/ST Act Applicability

The appellants challenged the order dated 30.10.2021 passed by the Special Judge (SC/ST Act), Barabanki, rejecting their discharge application in Sessions Trial No. 1137 of 2021, arising from Crime No. 424 of 2021 under Sections 419, 420, 467, 468, 471, 120-B IPC, and Section 3(2)(v) of the SC/ST Act. The appellants, a lawyer and his associate, claimed they merely signed a will deed dated 27.10.2016 as witnesses, executed by Basant Lal (allegedly deceased in 1978) in favor of co-accused Manish Kumar Verma, and argued the dispute was civil in nature, involving a will cancellation suit and mutation proceedings. The respondents contended the appellants conspired to forge the will, misrepresenting Basant Lal's caste and death, supported by a 1978 death certificate from Haryana. Held: (1) The appeal was dismissed. (2) The trial court rightly rejected the discharge application, as prima facie evidence of forgery and conspiracy existed, including the appellants' admission of signing the will without verifying the executant's identity, and the 1978 death certificate contradicting their claim. (3) The dispute's civil nature did not preclude criminal liability, and allegations under the SC/ST Act were supported by evidence of caste misrepresentation. (4) The trial court was directed to conclude the trial within one year without unnecessary adjournments, ensuring observations in the appeal do not influence the trial.

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

1. Heard Shri Dharmendra Kumar, learned Counsel for the appellants, Mohammad Nauman, learned Counsel for opposite party No.2 and Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite party No.1.

2. This Criminal Appeal has been filed under Section 14 (A) 1 of the Schedule Castes & Schedule Tribes (Prevention of Atrocities), Act, 1989 against the impugned order dated 30.10.2021 passed by learned Special

Judge, (SC/ST Act), Barabanki, whereby application for discharge No.-B-53 moved by the appellant/accused in Sessions Trial No.1137 of 2021 arising out of Crime No.424 of 2021 under Sections 419, 420, 467, 468, 471 and 120-B I.P.C. & Section 3(2)(v) of SC/ST Act, relating to Police Station-Kotwali, District-Barabanki has been rejected.

3. Counter affidavit filed today in the Court by learned Counsel for the opposite party No.2 is taken on record.

4. Learned counsel for the appellants submits the appellant No.1 is a practicing lawyer, who has signed the will deed dated 27.10.2016 alongwith appellant No.2 as marginal witness due to non-availability of second witness, which was executed by one Basant Lal in favour of co-accused, namely-Manish Kumar Verma, in respect of land Gata No.23/0.507, Gata No.35/0.315 situated in village-Faijullaganj, Tehsil Nawabganj, District-Barabanki. He further submits that the executor of the said will deed, namely-Basant Lal who was an old age person and had died during treatment on 18.11.2016 and the co-accused Manish Kumar Verma after the death of Basant Lal moved a mutation application before the concerned Tehsildar on 01.12.2016. Thereafter, cousin sibling of opposite party No.2 has filed objection to the aforesaid mutation application on 30.03.2017 claiming the will deed to be forged but the Tehsildar having heard the parties and gone through the record has allowed the mutation application moved by co-accused Manish Kumar Verma vide order dated 05.04.2019 rejecting the objection filed by the cousin sibling of opposite party No.2. Thereafter, the opposite parties being aggrieved filed a civil suit for cancellation of the said will deed in the court of Civil

Judge, Junior Division, Barabanki on 31.08.2019. He further submits that after registration of F.I.R., the appellants have challenged the same by way of W.P. No.13182 (M/B) of 2021, in which this Hon'ble Court having heard the parties has stayed the arrest of the appellants vide order dated 29.06.2021 till filing of charge sheet. Thereafter, the Investigating officer during course of investigation has recorded statement of the complainant, in which he repeated the allegation of first information report but did not disclose fate of civil litigation pending in between the parties with regard to will deed. He next submits that Investigating officer recorded the statement of several witnesses who stated that Basant Lal was residing at Haryana and died forty years ago and they came to know that co-accused, namely-Manish Kumar Verma has got mutation of land on the basis of forged will deed and per the stand of the complainant, his grandfather, namely-Basant Lal who died at Harayana for last forty years ago even his land was not mutated in the name of legal heir and as per case of appellants, they signed the will deed executed by the Basant Lal in their presence on 27.10.2016, who later on died on 18.11.2016 but Investigating Officer without verifying the fact as to whether, the person who executed the said will deed on 27.10.2016 and died on 18.11.2016 and has filed the charge sheet against the appellants.

5. Learned Counsel for the appellants further submits that primarily the dispute between the parties is civil in nature. he has drawn attention of this Court to a civil suit filed by the complainant for a relief of cancellation of the said will deed. He further submits that regarding mutation certain litigation between the parties is pending before the revenue court as well.

In light of the aforesaid submissions, it has been argued that dispute between the parties being civil in nature, the offences as mentioned in the entire prosecution of the appellants are not made out against them. He further submits that there is no offence against the appellants is disclosed and the present prosecution has been instituted with a malafide intention for the purposes of harassment , thus, he submits that the present appeal may be allowed and the impugned order may be set aside.

6. Learned A.G.A. as well as learned Counsel for opposite party No.2 have opposed the prayer made by learned Counsel for the appellants and submits that a discharge application which was filed by the appellants has rightly been rejected by the court below vide impugned order dated 30.10.2021. As there are credible evidence available against the appellants, thus, there is no illegality and infirmity made by the court below. It is purely a disputed question of fact. Prima facie, the case is made out against the appellants and if they are not involved in the alleged offence, the trial court is competent to adjudicate the matter. They further submits that there is prima facie evidence available against the accused appellants and only probative value of evidence available on record shall be looked into and no further appreciation can be done by the trial court if there is primary investigation available against the accused appellants and in furtherance of this the present criminal appeal is filed only to use it as shield and abuse the court process as being case of SC/ST to escape arrest and not even today accused appellants have come up before the Learned Magistrate Court either applying for regular Bail and they are even trying to influence the trial by further delaying case by using their influence and tactics to

escape law to some how weaken the ample evidence and gravity of covering the deeds conducted by the Accused appellants one who uses legal profession as a shield to escape law while truth lies that Accused appellant No.1 Ram Saran Verma is known land grabber and has always being involved in the property dealings by using forge documents and then using them to gain monetary benefits. There are ample evidence against the accused appellants which came during the investigation and chargesheet submitted before the learned trial court by the police, the accused appellants are charged as co-conspirators for property fraud by forging fake death certificate of informants Grandfather as well as showing Caste of dead Basant lal not as Dhobi(SC) in state of Uttar Pradesh. They further submits that in the grounds mentioned in the appeal before this Hon'ble Court under section 14-A SC/ST act accused appellants have tried to basically cover their offence by saying that they are only witnesses in the will deed dated 27.10.2016 by one Basant Lal son of Mahabali informant's grandfather who already shifted much earlier to Haryana and has been living there and died on 22.07.1978.

7. Learned Counsel for the opposite party No.2 and learned A.G.A. further submits that the accused appellants claim that they have somehow signed the document under an impression that the imposter executant belong to Lodh Community which do not fall under SC/ST category, this shows the defence of meeting the very condition of signing document without proper knowing the executant and appellant No.1 who says himself to be an advocate this document without giving any thought about consequences as he belongs to category of property dealers and not real

practitioner. The second accused works for appellant No.1 as his servant and this has been admitted by appellant No. 2 while giving statement to the police. They further submits that the accused appellant No.1 has also admitted by way of the affidavit filed in support of the application that appellant No.2 know him and he is entrusted to be pairakar for Ram Pratap son of Bhagauti. They further submits that appellant No.1 is land grabber and property dealer who is only engaged in outlook of grabbing properties by using tactics and group of hooligans by making sale deeds will deed forgely and then getting them sold at high rates to another for gaining monetary gain and so far as to prove that the appellant No.1 is regular practitioner he has not placed before this Hon'ble court any evidence to support his claim. The claim of non availability of witness is just being said to misguide court and use it as defence for proving their innocence. They next submits that Basant lal Son of Mahabali has died at Kurukshetra, Haryana and a true copy of death certificate is already annexed as CA - 1 to the counter affidavit filed on behalf of opposite party No.2 where the date of death is 22.07.1978 and this truly need to be appreciated by the case diary record. They next added that death certificate presented by Manish Kumar Verma who is not an appellant in the present appeal is forged document by way of Annexure CA-3 before the Hon'ble Court Manish Kumar Verma never challenged the impugned discharge rejection and till date still neither taken bail and nor being arrested by the Police although NBW should have been issued by the learned Special Court SC/ST Barabanki. They draws the attention of this Court to look that how a forged will was made pre planned by the accused appellants wherein the statement before the police of co accused, appellant No.2 said that Basant

Lal told him that there is boy Manish Kumar who serves me and I shall write will in his favor although to counter the same Manish kumar denies that Basant Lal whom he knows belong to OBC and denies the Claim raised by the informant co-siblings who objected to his mutation entry before the Tehsildar Nawabganj, but the fact is that Basant lal has already died at Haryana by the Death certificate issued by Haryana government is already before the Hon'ble court and part of case diary.

8. Learned Counsel for the opposite party No.2 and learned A.G.A. for the State further submits that the appellants have tried to misguide the Hon'ble Court as the order dated 05.04.2019 was ex-parte order first as objectioner have stopped appearing before the Tehsildar and hence order was passed in favor of Manish kumar Verma who is not party in the present appeal and this very same order was stayed by the Tehsildar when present informant approached for recall and put actual facts before the Tehsildar along with Lekhpal Report, thereafter, the concerned Tehsildar after going through the material placed on record stayed the order dated 05.04.2019. They next added that statement recorded by independent witnesses which is filed by the appellants it becomes quite clear that independent witness Shareef son of Mohd Shakoor Sunil Kumar son of Puttilal are only persons who have known the family of deponent and all other person are living only for period 20 years and have no knowledge of the Basant lal also the theory of Basant lal being pujari is also claim of accused appellants although they need to prove that by facing trial and not at the stage of Discharge application being moved before Learned Trial court.

9. After considering the arguments advanced by learned counsel for the parties and after perusal of the impugned orders dated 30.10.2021 passed by the court below. The impugned order were rightly passed. The appellants claim that they have somehow signed the document under an impression that the imposter executant belong to Lodh Community which do not fall under SC/ST category, this shows the defence of meeting the very condition of signing document without proper knowing the executant and appellant No.1 who says himself to be an advocate, without giving any thought about consequences as he belongs to category of property dealers and not real practitioner and further considering the fact that the accused appellant No.1 has also admitted by way of the affidavit filed in support of the application that appellant No.2 know him and he is entrusted to be pairokar for Ram Pratap son of Bhagauti and also considering the fact that Basant lal Son of Mahabali has died at Kurukshetra, Haryana and a true copy of death certificate is already annexed as CA - 1 to the counter affidavit filed on behalf of opposite party No.2 where the date of death is 22.07.1978 and this truly need to be appreciated by the case diary record. There appears force in the argument of learned Counsel for opposite party No.2 that the claim of non availability of witness is just being said to misguide court and use it as defence for proving their innocence and also taking note of the fact that the appellants have already approached the court below by moving a discharge application but the court below did not entertain the prayer made by the appellants and the court below after considering the entire material, available before it, has rightly rejected the discharge application, thus, I do not find any illegality and infirmity in the impugned order.

10. Accordingly, this appeal lacks merit and substance, which is hereby **dismissed**.

11. However, keeping in view the fact and circumstances of the case, the learned trial court concerned is directed to get the trial concluded within one year from today with utmost expedition, without granting any unnecessary adjournments to the parties, in case there is no other legal impediment.

12. It is made clear that the trial of the aforesaid case shall be conducted without being influenced by any observation made herein above which are confined to the disposal of the instant criminal appeal.

(2023) 11 ILRA 387
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.11.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1929 of 2021

Subhadra		...Appellant
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Appellant:
 Ashutosh Pathak, Avinash Kumar

Counsel for the Respondents:
 G.A., Illegible, V.K. Tripathi, Vinay Prakash Tiwari

Criminal Law - Constitution Of India, 1950
- - Article 226 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 14-A(1) - Code of Criminal Procedure, 1973 - Section 156(3) - Criminal Appeal - Rejection of Application for FIR Registration - Mala Fide Intention - Counterblast Litigation

The appellant challenged the order dated 14.10.2021 passed by the Special Judge, SC/ST (P.A.) Act, Lucknow, rejecting her application under Section 156(3), Cr.P.C., for registration of an FIR against the respondents. The appellant alleged an incident warranting an FIR, while the respondents argued the application was a counterblast to a prior case (Case Crime No. 741 of 2017 under Sections 326, 452, 147, 148, 323, 504, 506, IPC) filed against the appellant's mother and brother, and a complaint case (No. 380 of 2018) filed by the appellant herself. Held: (1) The appeal was dismissed. (2) The trial court's rejection of the Section 156(3) application was justified, as the appellant's allegations in paragraphs 5, 6, 7, and 11 of the application were improbable and unbelievable, appearing as a mala fide attempt to falsely implicate the respondents, including young students, to ruin their careers and extract financial benefits, leveraging her SC/ST status against higher-caste respondents. (3) The appellant's application was a counterblast to existing litigation, aimed at pressuring the respondents to compromise the case against her family. (4) No illegality or infirmity was found in the impugned order, which was reasoned and upheld principles of natural justice and equity.

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

1. Heard Sri Ashutosh Pathak, learned counsel for the appellant, Ms. Chaaru Singh, learned A.G.A. for the State and perused the entire record.

2. This Criminal Appeal under Section 14-A (1) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been preferred against the impugned order dated 14.10.2021 passed by learned Special Judge, S.C./S.T. (P.A.) Act, Lucknow, in Criminal Misc. Application No. 299 of 2021, under Section 156 (3), Cr.P.C., Police Station Madiyaon, District Lucknow, whereby application of the appellant has been rejected.

3. Learned counsel for the appellant submits that the appellant had moved an application under Section 156(3), Cr.P.C. for lodging of an F.I.R., which was rejected by the impugned order dated 14.10.2021, without considering the averments made in the application. He further submits that the incident had actually taken place and there was no any intention of the appellant to take revenge or to file a case in counterblast of the case, which was filed by the opposite parties against the mother and brother of the appellant, thus, the impugned order be quashed and a direction be issued to the Court below to pass an order for registration of the first information report.

4. Miss Chaaru Singh, learned A.G.A. has submitted that the impugned order is perfectly just and legal and no interference is required in the matter at this stage.

5. From the averments made in the application filed under Section 156(3), Cr.P.C., it appears that the appellant wants to implicate the entire family in a false case, which is nothing, but a counterblast of the case, which was filed against the mother Ramadei alias Ramkali and brother Pintoo Kannaujia of the appellant bearing Case Crime No. 741 of 2017 under Sections 326, 452, 147, 148, 323, 504, 506, I.P.C., in which after investigation chargesheet has also been submitted against the mother and brother of the appellant. It has also been submitted by the learned A.G.A. that the appellant herself has also filed a Complaint Case bearing No. 380 of 2018 against one Ram Charitra Mishra, one of the opp. parties herein. It has also been submitted by the learned A.G.A. Miss Chaaru Singh that from a plain reading of the case set up by the appellant it is clear that she one after another made allegations against the opposite parties regarding the

incident from 2017 till 2021, whereas she is a married lady and only to give colour to the gravity of the offence she has shown her presence in her parental house and also showed that she is pregnant. She also submits that from a perusal of the averments made in para Nos. 5, 6, 7 and 11 the story totally appears to be improbable and unbelievable. She particularly emphasised that in the array of the opposite parties there are some young boys who are students and it appears that it is a ploy of the appellant to destroy the entire career of these aspirants, who are seeing their future in competitive examinations and also trying for better job, thus, the intention of the appellant is very much clear, and as she belongs to the SC/ST Category and the opposite parties belong to the higher caste, she wants to falsely implicate them to ruin their career and also to get some financial aid by the State Exchequer, thus, the Court below has rightly rejected the application filed by the appellant under Section 156 (3), Cr.P.C. and a reasoned and detailed order has been passed, thus, no interference is required by this Court in the matter and the present appeal deserves to be dismissed.

6. After considering the arguments, as advanced by the learned counsel for the parties and after perusal of the impugned order as well as the averments made in the application filed by the appellant under Section 156 (3), Cr.P.C., this Court is of the view that the entire exercise adopted by the appellant is nothing, but with mala fide and arbitrary intention, only to falsely implicate the opposite parties, in which there are some young students and aspirants looking for their future in competitive exams for job and if once a case is registered against them, their entire future shall be ruined. Thus, the Court has to protect the future and interest of these type of students and

also to frustrate such type of activities, which are being adopted with the intention to falsely implicate the persons, who have no concern at all with the incident alleged and are future of the nation, thus, their appears force in the arguments, as advanced by the learned A.G.A. Miss Chaaru Singh that the entire story as developed by the appellant in para Nos. 5, 6, 7 and 11 appears to be totally improbable and unbelievable. The appellant has tried to connect the incidents from 2017 till 2021 with the opposite parties, but since she failed in her all attempts, the said application has been moved to anyhow get an order from the Court for lodging of the first information report against the persons, who have no concern at all regarding the said incident, thus, this Court after perusal of the impugned order is fully justified by the reasoning given by the Court below and as there is already a case filed against the mother and brother of the appellant by the opposite parties bearing Case Crime No. 741 of 2017 under Sections 326, 452, 147, 148, 323, 504, 506, I.P.C., there appears a ploy to put pressure on the opposite parties to anyhow get the matter compromised, which has been filed against the mother and brother of the appellant.

7. There is one other criminal complaint also filed by the appellant herself against one of the appellants Ram Charitra bearing Complaint Case No. 380 of 2018, thus, it appears that the appellant, her mother and other family members are intentionally lodging and filing frivolous cases against the opposite parties to anyhow implicate them in the false case, thus, considering the principle of Natural Justice and the question of equity, this Court is of the view that no interference is required in the impugned order. The impugned order is rightly passed by the

court below. The counsel for the appellant fails to demonstrate any illegality or infirmity in the impugned order, which is perfectly just, legal and valid in the circumstances of the case and no relief can be granted to the appellant against it. Accordingly, this appeal lacks merits and is hereby dismissed.

(2023) 11 ILRA 389

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 08.11.2023

BEFORE

**THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSSAIN RIZVI,
J.**

Criminal Appeal No. 2899 of 2003

connected with

Criminal Appeal No. 2755 of 2003

Arvind Kumar & Anr.

...Appellants

Versus

State of U.P.

...Respondent

Counsel for the Appellants:

Sri Udai Karan Saxena, Sri Sanjeev Kumar Singh, Sri Satya Prakash Chaturvedi

Counsel for the Respondent:

G.A.

Criminal Law – Indian Penal Code, 1860 – Sections 376(2)(g) & 302/34 – Code of Criminal Procedure, 1973 – Sections 313 & 437A – Criminal Appeal – Rape and Murder – Conviction and Sentence – Reliability of Sole Eye-Witness – Chance Witness – Discrepancies in Evidence

The appellants, Arvind Kumar, Surjeet, and Babloo, challenged their conviction and sentence dated 30.05.2003 by the Additional Sessions Judge, Jalaun, in Sessions Trial No. 77 of 2000, arising from Case Crime No. 337 of 1999 under Sections 376(2)(g) and 302/34 IPC, for the rape and murder of a 13-year-old girl. They were sentenced to 10 years' rigorous

imprisonment with a Rs. 5,000 fine for rape and life imprisonment with a Rs. 5,000 fine for murder. The prosecution relied on the informant (PW-1) as the sole eye-witness, alleging the appellants committed the offences in an Arhar field. The appellants claimed false implication and an alibi of attending a relative's cremation. Held: (1) The appeals were allowed, and the convictions and sentences were set aside. (2) The sole testimony of PW-1, a chance witness, was unreliable due to discrepancies, including inconsistencies about the bed-sheet used for strangulation, which was not found tied around the victim's neck, and contradictions with the Forensic Science Laboratory (FSL) report and medical evidence regarding the ligature mark. (3) Three other prosecution witnesses (PW-2, PW-3, PW-4) turned hostile, failing to support the prosecution case. (4) The appellants' alibi was corroborated by PW-2 and PW-3, confirming their presence at a cremation during the incident. (5) The prosecution failed to prove the case beyond reasonable doubt, and the trial court erred in relying on PW-1's testimony without proper scrutiny. (6) The appellants, on bail, were acquitted, subject to compliance with Section 437A Cr.P.C.

(Delivered by Hon'ble S.A.H. Rizvi, J.)

1. The present appeals have been filed on behalf of accused-appellants- **Arvind Kumar, Surjeet, and Babloo**, who have been convicted by judgment and order dated 30.05.2003 passed by Additional Sessions Judge/ F.T.C. First, Jalaun in Session Trial No.77 of 2000 (State of U.P. vs. Arvind Kumar and others) arising out of Case Crime No.337 of 1999, under Sections 376(2)(g) and 302/34 I.P.C., Police Station- Kuthond, District- Jalaun and sentenced the appellants to 10 years rigorous imprisonment & fine of Rs.5000/- under Section 376(2)(g) and life imprisonment & fine of Rs.5000/- under Section 302/34 I.P.C. All the sentences are to run concurrently. Both the appeals are against the common judgment and order, hence being decided by a common order.

2. The F.I.R. of this case was lodged on 30.11.1999 at 19:45 P.M., under Section 376/302 I.P.C. against Surjeet, Arvind Kumar, Babloo, and Raj Kishore on the written information alleging therein that on 30.11.1999, the 13-year-old daughter of informant had gone to collect the grass with Ram Prasad, Babu, and Pramod Kumar. At about 5 P.M., the informant came near the Arhar field of Brij Bhushan Tiwari to collect the grass cut by his father where he heard the screams of his daughter from the Arhar field. On hearing the screams, the informant, his father, Babu, and Pramod Kumar entered the Arhar field. They saw Surjeet, Arvind, Babloo and Raj Kishore were strangulating her daughter by tying her neck with a bed-sheet. On exhortation, the accused ran away. When the informant reached near the victim, she had died. The accused have also committed sexual assault on her because her private part was bleeding and semen spots were present on the clothes. On hearing the noise, several villagers came to the spot. The informant leaving his family members and other villagers beside the dead body, came to the police station to lodge the F.I.R.

3. Inspector Harendra Singh- P.W.-8, took up the investigation. He reached the spot, conducted the inquest proceedings on the dead body, prepared related papers, and sent the body for postmortem examination. One cotton bed sheet, two torn pieces of kurta sleeve and one dupatta of the victim, and one slipper alleged to be of accused Raj Kishore @ Guthali were collected from the spot and separate memos were prepared. The Investigating Officer also inspected the place of occurrence and prepared the site plan. He arrested the accused persons and at the pointing out of the accused Raj Kishore one slipper of his right foot, which he was allegedly wearing

at the time of the incident was recovered from the Arhar field of Brij Bhushan.

4. Further investigation was conducted by Inspector Ram Naresh Singh, he sent the material of the case for forensic examination, collected the medical reports and made it part of the investigation, recorded the statements of witnesses, and after concluding the investigation submitted the charge-sheet.

5. The case was committed to the Court of Sessions. Charges under Section 376(2)(g) I.P.C. and Section 302 read with Section 34 I.P.C. were framed against appellants-accused, namely, Surjeet, Arvind Kumar, Babloo, Raj Kishore @ Guthali. All the accused denied the charges and claimed trial.

6. Prosecution has produced eight witnesses (P.W.-1 to P.W.-8), who have proved 16 prosecution papers from Ext. Ka-1 to Ext. Ka-16.

7. The statements of the accused were recorded under Section 313 Cr.P.C. and incriminating evidence was put to them. They denied the prosecution case. They have also stated that they have been falsely implicated, the informant in collusion with the father of the real culprits and to save them, has lodged a false report. Accused Raj Kishore has also denied the recovery of the slipper at his instance. The accused Surjeet, Arvind, and Babloo have stated that on the date of the incident, they were present at the cremation of Munni Devi, wife of Raj Bahadur, a near relative at the time of the alleged incident. The accused have also produced six witnesses, D.W.-1 to D.W.-6 in their defence.

8. The learned trial Court, after hearing the counsels for both the parties by the impugned judgement and order, has held the appellants-accused guilty and sentenced them as above.

9. The postmortem of the deceased was conducted on 01.12.1999 at 2:30 P.M. by Dr. Y.K. Sharma (P.W.-6). According to the autopsy report, the age of the victim was about 13 years. Her body was average built. Rigor mortis present on both extremities. Postmortem staining was present on the back, buttocks, and thighs. Eyes were closed, mouth half open, froth present in mouth and nostrils. Blood clots present on both sides of the lower part of the vaginal orifice, cyanosis present on the lips, face congested. Following antemortem injuries were on the body:-

(i) ligature mark 26 cm X 2.7 cm all around the neck with marginal ecchymosis, 6 cm below the left ear, 6 cm below the right ear, and 7 cm below the chin;

(ii) multiple abrasions in an area of 8cm X 5cm, on the left side in front of the neck and lateral side of the neck;

On dissection underlying tissue ecchymoses and blood clots were present, the slide of smear taken from the vagina was prepared for the examination. The hymen ruptured and blood clots were present on both sides of the vaginal orifice.

The Internal Examination:- Brain and trachea congested. Both lungs were congested. The right chamber of the heart was filled with blood, left chamber was empty. The small intestine was filled with gases, while the large intestine was filled with faecal matter and gases. The pancreas, spleen, and both kidneys were congested, the urinary bladder was empty, and the non-

gravid uterus. In the opinion of the autopsy surgeon, the cause of death was asphyxia, as a result of antemortem strangulation. The duration of the death was one day. The postmortem report has been proved as Ext. Ka-10 by Dr. Y.K. Sharma (P.W.-6).

10. The informant P.W.-1, in his examination-in-chief has stated that Surjeet, Babloo, Arvind Kumar, and Raj Kishore who live in his village Panditpur, sexually assaulted her 13-year-old daughter and committed her murder. The incident occurred in the Arhar field of Brij Bhushan Tiwari. He had gone to collect the grass cut by his father from the field. When he reached near the Arhar field of Brij Bhushan Tiwari at about 5 P.M., he heard the screams of his daughter. He along with his father, Babu and Pramod Kumar entered into the field then he saw that Surjeet and Babloo were strangulating her daughter by tying a knot with the bed-sheet and Raj Kishore was lying upon her while Arvind was pressing her mouth with his hands. On exhortation, all the accused ran away. His daughter had died. She was bleeding from her private parts and her clothes had stains of semen. While fleeing from the spot, accused Raj Kishore left his slipper of left foot. On hearing the noise, family members and other villagers came there. Leaving them beside his daughter's dead body, he came to the police station and lodged the report. The witness has proved his signature on the First Information Report Ext. Ka-1. The witness has further stated that the Investigating Officer has recovered scarf (dupatta) and two torn pieces of Kurta sleeves, undergarments, slipper and the hair clip of his daughter, one bedsheet and one slipper of left foot of accused Raj Kishore from the spot and prepared its memos and got his signatures on it. The witness has further stated that the second slipper of the

right foot of accused Raj Kishore was recovered at the pointing out of Raj Kishore from the Arhar field of Brij Bhushan. He was present at the time of recovery. The witness has proved his signature on this recovery memo Ext. Ka-7. The witness has also proved the material exhibits, scarf (dupatta), bedsheet, two torn pieces of kurta sleeves, one slipper of left foot and another slipper of right foot of the accused Raj Kishore as material Exts. 1 to 5.

11. The witness, in his cross-examination, has stated that when her daughter had gone to collect grass, she had taken the bedsheet with her. She was not having sickle and trowel (khurpi) with her. The witness has denied the suggestions that her daughter had not taken the bedsheet and it did not belong to her. The witness has further stated that his signature was not taken when the bedsheet was sealed but has denied the suggestion that the bed sheet was not sealed before him and it was sealed at the police station. He has further stated that the scarf (dupatta) was wrapped around the waist of her daughter. The witness has described the position of the dead body. He has further stated that there were semen stains on her scarf. The witness has denied the suggestions that the scarf has no semen stains, it has blood stains and the bedsheet is so thick that it cannot be tied around the neck. Witness has further stated that Raj Kishore @ Guthali lives near the house of his father. He had not seen accused Raj Kishore going towards the place of occurrence. He had seen Raj Kishore @ Guthali wearing those slippers before the incident. Witness has denied the suggestion that the slippers do not belong to Raj Kishore @ Guthali and it is not of the size of his feet. Witness has also denied the suggestion that he has forcibly kept the

mother of Guthali, after the death of her husband and he frequently visits her house. The witness has further been cross-examined, on the aspect that he has no daughter named ND. The witness has also denied the facts that two days before the incident, an altercation had taken place between him and the accused Raj Kishore. Witness has also denied suggestions that he has tried to establish immoral relations with the mother of Raj Kishore and this incident was witnessed by Laxmi Narayan, the father of Garibe.

12. The witness has further stated that he has one and a half bigha agricultural land. He has no agricultural field near the place of occurrence. At the time of offence, he was doing his agricultural work at Atta village and not at Panditpur village. This year, he is cultivating 16 bigha of grams while the remaining 1/3rd of these fields belong to Vimala Mausi, wife of Ram Kumar Tiwari. Witness has denied the fact that she is related to Brij Narayan, Umakant and Ramakant.

13. The witness has described the crops standing in the field situated near the place of occurrence. The witness has also stated that his father was cutting grass inside the Arhar field at a distance 5 to 6 paces from the chakroad. The witness has also stated that the Arhar crop was damaged, at the place of occurrence, the crop was very dense and other side was not visible. The bed-sheet was wrapped around the neck of the victim. The slipper of Raj Kishore was lying near the dead body. The torn pieces of kurta sleeves were also lying beside the dead body. It was not blood stained. When he came from the house, his father was cutting the grass. As soon as he reached there, he heard the screams of his daughter. Pramod and Babu were cutting

the grass 25 to 30 paces in the South from his father. He saw Pramod and Babu came running on his noise and when he reached near the dead body, they also came there. Shiv Kumar reached there, after the accused ran away from the spot. It took 2 to 4 minutes to reach the spot after hearing the screams. He saw the accused persons running away from the spot. He tried to catch them but Arhar was very dense and he could not catch them. Babu and Pramod do not make any attempt to catch the accused persons as the accused had run away till then. The witness has denied the suggestion that they were not present on the spot and they have not seen any incident. The witness has also denied the suggestion that on the date of the incident Munni Devi the wife of Raj Bahadur has died and Surjeet, Babloo and Arvind were present in her last rites which was performed during 4:30 to 5:30 P.M.

14. Babu P.W.-2 has not supported the prosecution case. The witness has stated that he knows the daughter of the informant and the accused. The daughter of the informant is not alive. He does not know what incident had occurred with her and how she died. Witness has denied that accused persons sexually assaulted the victim and committed her murder. The witness has been declared hostile. Witness in his cross-examination by the defence has stated that Munni Devi, the wife of Raj Bahadur has died on the date of the incident. Her last rites were performed at about 4 P.M. Babloo, Arvind and Surjeet were present in the last rites of Munni Devi.

15. Pramod P.W.-3 has also not supported the prosecution case. The witness has stated that the incident has occurred in the field of Brij Bhushan at village

Panditpur. He could not tell how the victim had died. He knows the accused Surjeet, Babloo, Arvind and Rajesh @ Guthli. He had not seen these accused persons sexually assaulting and committing murder of the victim on 30.11.1999 at 5 P.M. This witness has also been declared hostile on the prayer made by the prosecution. In cross-examination by the prosecution, the witness has denied his statement recorded under Section 161 Cr.P.C. and has also denied the prosecution version as suggested. In cross-examination by the defence, the witness has stated that he reached the place of occurrence at about 7 P.M. and saw the dead body of the victim, which was lying inside the Arhar field 10 paces from the boundary. The witness has also stated that in the family of Surjeet, Babloo and Arvind, the death of the wife of Raj Bahadur has occurred. Raj Bahadur is brother of the accused persons and in the last rites Babloo, Arvind and Surjeet were present till 5:15 P.M. The place of last rites is 2 Kms from the place of occurrence.

16. Ram Prasad P.W.-4 is the father of the informant. The witness in his examination-in-chief, has stated that the incident is of 30.11.1999 at about 5:15 P.M. He had gone to collect fodder from the field of Brij Bhushan. Pramod, Babu and her grand daughter had also gone with him at about 3:15 P.M. The victim was picking the greenery from the Arhar field which is used as fodder for the goats. He was at the boundary of the field, Babu and Pramod were collecting fodder at some distance from him. At that time his son came there to collect the grass. He was cutting the grass and his son was collecting it. From the Arhar field, screams were heard. On hearing the screams, they all ran towards the Arhar field. His son was on the front. When he reached near the victim, he found

her dead. He could not see who was present beside the victim. The witness has specifically stated that when he reached near the dead body of the victim, all the four accused persons were not there. Witness has further stated that the victim was bleeding from her private parts, however, he had not seen the accused, sexually assaulting her and committing her murder. This witness has been declared hostile by the prosecution. In the cross-examination by the prosecution, the witness has denied his statement under Section 161 Cr.P.C. The witness has further stated that when screams were heard, his son was 10 paces from him. As soon as he heard the scream, he ran towards it. Although, he could not understand that the screams were of her granddaughter, who had come with him and was picking fodder in the Arhar field, he ran towards it. He was picking the fodder 20 paces from the victim. The witness has denied the suggestions given by the prosecution. In the cross-examination by the defence, the witness has denied the suggestions that the informant has only one daughter, namely, Asha Devi and no other daughter in the name of the victim.

17. ASI, Baijnath Singh, P.W.-5 is the chik and GD writer, the witness has proved these documents as Ext. Ka-8 and Ka-9.

18. Inspector Shailendra Singh, P.W.-8, is the Investigating Officer. The witness has stated that on 30.11.1999, he started investigation of this case, he went on the spot and conducted inquest proceedings. The witness has proved the inquest report and related papers as Ext. Ka-2 and Ka-12 to ka-15. The witness has further stated that he also collected one bed-sheet, one slipper and another slipper of the accused, one kurta and dupatta of the victim from the spot

and prepared its memos. The witness has proved these memos as Ext. Ka-3 to ka-7. He also conducted the spot inspection and prepared the site plan Ext. Ka-16. The witness has further stated that he arrested the accused persons and recorded their statements. At the pointing out of accused Raj Kishore, he recovered one slipper of accused from the field of Brij Bhushan and prepared its memo. The witness has clarified that the statement made above of collecting two slippers from the spot is due to inadvertence. He has stated that memo Ext. Ka 6 was prepared on 30.11.1999 while Ext. Ka 7 was prepared on 01.12.1999. Witness has also proved the material exhibits, bed-sheet, dupatta, both the slippers and torn pieces of kurta sleeves of the victim as material Exts.1 to 7.

19. Inspector Ram Naresh Singh, P.W.-7 is the second Investigating Officer. This witness has stated that on 13.11.1999, he took up the investigation from the previous Investigating Officer. He sent the case property for forensic examination, collected postmortem report and other reports. After concluding the investigation, he submitted a charge-sheet on 19.02.2000.

20. The defence has also produced Ram Avatar Gupta, Assistant Teacher, Janta Sanatan Dharm Inter college, Kuthond D.W.-1, Baldev Prasad, Headmaster, Junior High School, Madaripur D.W.-2 and Smt. Sashi Srivastava, Incharge Headmaster, Primary School, Panditpur D.W.-3. they have produced the scholar registers of accused Arvind Kumar and Surjeet and also of Asha Devi to prove their age. These witnesses have proved copies of S .R. Register as Ext. Ka-1 to Ka-3.

21. Dilip Kumar Mishra D.W.-4 is the previous Pradhan of village Panditpur. The

witness has stated that he was village Pradhan of Panditpur from 1988 to 1999 and at present his wife is Pradhan of the village. He knows about the family of the informant, there is only one daughter of the informant who has died. She was murdered on 30.11.1999. Witness has also stated that N D was the sister of the informant who was married in village Manpura and had died in Punjab. The witness has further stated that on 30.11.1999, Hemlata @ Munni Devi the wife of Raj Bahadur, has died. Accused Surjeet, Arvind and Babloo are from one family and Babloo is the brother of Raj Bahadur while Arvind is maternal nephew (bhanja) and Surjeet is the nephew (bhatija) of Raj Bahadur. In his cross-examination, the witness has stated that when the incident has occurred, his wife was Pradhan. He had heard about the incident. He was not present in the village on the date of the incident. The witness has also stated that he was not present in the last rites of Hemlata @ Munni Devi.

22. Devendra Kumar Dwivedi D.W.-5, is the Village Development Officer, who on the basis of Pariwar Register deposed that there is entry of only one daughter of informant in it. In the family of the informant, the name of N.D. is also recorded but she has been married and now she does not reside with the family of the informant.

23. Ram Avatar, Lekhpal D.W.-6, has stated that he has brought Khasra register with him. At Gata no.241, Khatauni no.52 area 4.675 hectare, is recorded in the name of Brij Bhushan. The witness has further stated that to facilitate the cultivation this field was divided into four parts. In the Fasli year 1407 corresponding to year 1999-2000 in one part towards the North-East crop of Arhar was there, behind it

there was pea crop, there was a boundary between the two fields while in the North there was Arhar crop and in the West of it, there was pea crop.

24. The learned counsel for the appellants contended that out of the four witnesses of facts produced by the prosecution, only informant P.W.-1 had supported the prosecution case. The remaining three witnesses, namely, Babu P.W.-2, Pramod P.W.-3 and Ram Prasad P.W.-4, have not supported the prosecution case. The learned counsel further submitted that, in fact, no one has witnessed the incident and accused-appellants have been falsely implicated by the informant due to ulterior motive, which is evident from his statement of cross-examination in which he has admitted that after the incident, now he is cultivating 16 bigha of lands. It is further contended that the medical evidence does not support the prosecution version. The ligature mark as mentioned in the postmortem could not be caused by bed-sheet because its size is 26 cm X 2.5 cm and this ligature mark can only be caused by a rope or some thin material and not by a bed-sheet, which has a wide diameter if rolled. In support of his arguments, learned counsel relied upon the text of a book "The Essentials of Forensic Medicine and Toxicology" by Dr. K.S. Narayan Reddy and Dr. O.P. Murty. Relevant paragraph is quoted below:-

"Strong pressure may lacerate the skin or cut into the deeper tissues and cartilages. When a folded cloth has been used, there may be great difference between the appearance of the neck mark and the size of the ligature. A fabric ligature may leave a sharply defined mark. When a broad piece of cloth is tightly stretched, one or more bands appear that are under

greater tension than the rest which mark the skin. These marks are usually less well demarcated at the edges than a cord or rope."

25. The learned counsel further contended that the crop of Arhar has great density and height and nothing can be seen inside it and the crop is so hard that if a person goes in it after harvesting, the stubbles of the field can seriously cause injuries in his feet. In the postmortem, except the ligature mark no other external injury, has been noted on the body of the victim which contradicts the prosecution case that the victim was sexually assaulted in the Arhar field. The circumstances of the case indicates that the incident may have occurred at some other place and the body has been thrown in the Arhar field to conceal it. In these circumstances, there is no possibility of anyone witnessing the incident. The learned counsel further contended that the accused have stated in their defence that at the alleged time of the incident, they were present in the last rites of Munni Devi the wife of Raj Bahadur, their relative. This fact has been admitted by the prosecution witnesses, namely, Babu P.W.-2, Pramod P.W.-3. The village Pradhan Dilip Kumar Mishra D.W.-4 has also supported it. Lastly, it is contended that the P.W.-1 is a chance witness and there are major discrepancies in the prosecution evidence. The statement of P.W.-1 is wholly unreliable. Medical evidence also does not corroborate it. The prosecution has utterly failed to prove its case. The learned trial Court has committed manifest error in relying on the prosecution evidence and holding the appellants-accused guilty. The finding of the lower Court is perverse and illegal and not sustainable.

26. Per contra, the learned AGA contended that the appellants-accused are named in the F.I.R., which has been lodged promptly within three hours of the incident ruling out the possibility of false implication. It is further contended that the informant is an eye-witness of the incident. He was present near the place of occurrence with his father and two other witnesses. On hearing the screams, the informant and other witnesses immediately rushed towards it and saw the incident. There is no serious discrepancy or contradiction in the statement of the informant P.W.-1. P.W.-4 although has not supported the prosecution version that he saw the accused committing the offence but he has confirmed the presence of the informant at the place of occurrence on the time of the incident. He has also supported the prosecution version that the victim was present in the Arhar field, on the victim's screams, he and other witnesses rushed towards the place of occurrence. So the testimony of P.W.-4 partially supports the prosecution version and this part can be relied on. It is further contended that the autopsy surgeon P.W.-6 in his deposition before the Court has supported the prosecution version and has opined that the ligature mark present on the neck of the victim may be caused if the neck is tied by a bed-sheet and pulled from both the sides, twisting it like a rope. The medical report also supports that the victim was subjected to sexual assault, so oral evidence stands corroborated from the medical evidence. There is no reason to disbelieve the prosecution evidence. The trial Court has correctly appreciated the evidence and finding of guilt returned by the trial Court is just and proper.

27. The prosecution case is based on direct evidence. Four eye-witnesses of the

incident P.W.-1 to P.W.-4 have been examined by the prosecution. P.W.2, P.W.-3 and P.W.-4 have not supported the prosecution case and have turned hostile. Babu, P.W.-2 has stated that he did not know what incident had occurred with the victim and how she died. The witness has denied that the accused have committed the offence. The witness has further stated that he did not know about the incident. This witness is related to the informant and the victim, but he has not supported the prosecution version that he has seen the occurrence. Pramod P.W.-3 has also denied that he had seen the accused sexually assaulting and committing murder of the victim. The witness has stated that he did not know under what circumstances the victim had died. Both these witnesses have been cross-examined by the prosecution. In their cross-examination, they have denied their statements as recorded under Section 161 Cr.P.C. There is nothing in their cross-examination, which in any manner supports the prosecution case.

28. P.W.-4 is the father of the informant and grand-father of the victim. This witness has also denied that he had seen the accused persons on the spot, sexually assaulting and committing the murder of his grand-daughter by strangling her. The witness has only supported this part of the prosecution version that at the time of the incident her grand-daughter was collecting fodder in the Arhar field of Brij Bhushan, while he was cutting grass near the place of occurrence. His son (the informant) was also there, collecting the grass and on hearing the screams, they ran towards the field. The witness has further stated that he saw the dead body of his grand daughter.

29. As the above three eye-witnesses have not supported the prosecution version and have turned hostile the only evidence remains is that of the first informant P.W.-1. He claims himself to be the eye-witness of the incident. According to the prosecution, the incident occurred in the Arhar field of Brij Bhushan. P.W.-1 has stated that he came there to collect the grass cut by his father, so this witness is a chance witness and due to this reason, careful examination of his testimony is required. The witness has stated that at about 5 P.M., when he reached near the Arhar field of Brij Bhushan Tiwari, he heard the screams of his daughter. Hearing this, he with his father, Babu and Pramod Kumar entered into the Arhar field then he saw that Surjeet and Babloo were strangulating his daughter by tying the knot of bed-sheet around her neck, Raj Kishore was lying upon his daughter and Arvind was pressing her mouth. On his exhortation, the accused ran away. When he reached near the victim, she was dead. She was bleeding from her private parts. The witness has further stated that on their noise, family members and other villagers gathered at the place of occurrence.

30. The postmortem report confirms that the victim was subjected to sexual assault and was strangulated to death. One ligature mark and one abrasion were found on the neck. The evidence on record also indicates that the victim has put up resistance and struggled. Her kurta sleeves were torn into pieces and were found near the dead body. So the evidence on record suggests that the incident had not occurred in a moment. It must have happened for a considerable time, while according to the oral testimony of P.W.-1. On hearing the screams, he immediately rushed towards it. But when he reached near the victim, she

was already dead. The witness has also stated that on hearing the screams when he entered in the Arhar field then he saw two accused strangulating her daughter with bed-sheet tying it around her neck while one of the accused Raj Kishore @ Guthali was sexually assaulting her, lying upon her and the fourth accused was pressing her mouth. This eye-witness account is not inspiring. It appears highly improbable that at a time when one of the accused was engaged in sexual assault, the other accused were strangulating her tying bed-sheet around her neck. Further the informant P.W.-1 in his deposition has stated that when he reached the Arhar field then he saw that two of the accused were strangulating the victim pulling the bed-sheet tied around her neck, on his exhortation, all the accused ran away from the spot. In such a situation, the bed-sheet should have been found to be tied around the neck. The witness has also stated that the bed-sheet was wrapped around the neck of the victim but at the time of spot inspection the bed sheet was not found tied around the neck, instead it has been found lying at some distance near the dead body which the Investigating Officer has denoted with the letter B in the site plan. In the inquest report Exhibit Ka 2 also there's no description that on the neck of the victim any bed sheet was tied. So there is serious discrepancy in the eye-witness account of P.W.-1. It does not match with other evidence, material and circumstances.

31. The size of the ligature mark is 28 cm X 2.7 cm all around the neck. Although Dr. Y.K. Sharma, P.W.-6, in his examination-in-chief, has supported the prosecution case stating that this ligature mark may be caused if a bed-sheet is tied around the neck and pulled but in his cross examination the witness has stated that

considering the thickness of the bed-sheet, there is remote possibility of such type of ligature mark. The witness has also stated that if the bed-sheet is twisted like a rope then the width of the ligature mark will not be the same.

32. The width of the ligature mark is 2.7 cm and it is of the same size all around the neck. So in the light of the testimony of the Dr. Y.K. Sharma (P.W.-6) strangulation may not have been caused by the bed-sheet as alleged by the informant. It is pertinent to mention here that one dupatta of the victim has also been found near the dead body. The width of the ligature mark indicates that strangulation may have been caused by some thinner article than the bed-sheet. It further doubts the ocular testimony of the first informant P.W.-1, the sole witness who has supported the prosecution case.

33. First informant P.W.-1 being the chance witness, the serious discrepancies of his statement as analysed above, makes his ocular version untrustworthy. From the evidence and other material, it transpires that the first informant has reached the place of occurrence and saw the dead body of her daughter and only on the basis of suspicion, the F.I.R. has been lodged naming the accused persons.]

34. Another evidence produced by the prosecution is recovery of slipper of right foot of accused Raj Kishore, on his pointing out from the field of Brij Bhushan Tiwari. According to prosecution the other slipper of the left foot, however, was found on the spot by the Investigating Officer during spot inspection. The recovery memo is Ext. Ka-7. The witnesses of recovery are the informant, one Shiv Kumar, and police personnel. Shiv Kumar has not been

examined. The informant is an interested witness. There is no independent witness of the recovery. No time of this recovery has been mentioned in the recovery memo. The Investigating Officer, Shailendra Singh P.W.-8 in his examination-in-chief has stated that both the slippers were recovered from the spot. But later on, he corrected himself and stated that the above statement is due to inadvertence and actually the second slipper was recovered at the pointing out of the accused Raj Kishore @ Guthali. So, this evidence is also not reliable. Further this evidence is concerned with the accused Raj Kishore @ Guthali who has died and his appeal has abated.

35. There is also other discrepancy in the prosecution evidence. Informant P.W.-1 has stated that no blood was found from the place of occurrence, while Investigating Officer Shailendra Kumar P.W.-8 has stated that he has collected bloodstained and plain soil from the place of occurrence. Correcting himself, the witness has again stated that he collected only plain soil from the place of occurrence as the deceased was not bleeding. The witness has also accepted that he has not prepared any memo of collecting soil from the spot. The above statement of the Investigating Officer stands contradicted from the FSL report. In FSL report at Serial No.6, soil (blood stained) and soil (plain) are mentioned.

36. The appellants-accused have taken specific defence that on the date of incident Munni Devi wife of Raj Bahadur has died and the appellants Surjeet and Babloo are related with Raj Bahadur. The appellants-accused were present in the cremation of Munni Devi, which was held in the evening (between 4 to 5:30 P.M.), the time of the incident as alleged by the prosecution. Informant P.W.-1 has accepted

this fact that Raj Bahadur lives in his village and accused Babloo is his cousin. But the witness has feigned ignorance about the fact that someone of the family of the accused has died on the fateful day. He has also denied that Surjeet, Babloo and Arvind are of one family and Munni Devi is the wife of Raj Bahadur, aunt of Surjeet and maternal aunt (mami) of Arvind. Babu P.W.-2, who is relative of the informant and other prosecution witness Pramod P.W.-3, in their cross-examination by the defence have admitted this fact that Munni Devi wife of Raj Bahadur has died on the date of the incident and the accused persons were present in her cremation which was conducted in the evening.

37. From the analysis of evidence on record, it is clear that the sole testimony of informant P.W.-1, who is a chance witness, is not inspiring and trustworthy. There are serious discrepancies, which makes it highly doubtful that he has seen the occurrence. No doubt that the victim has been sexually assaulted and was strangled to death but it is not proved that appellants-accused are the real culprits and they have committed the offence. Their false implication on the basis of suspicion or with ulterior motive cannot be ruled out. There is no sufficient evidence on record to prove the prosecution case beyond reasonable doubt.

38. We have gone through the judgement of the learned trial Court. The learned trial Court has placed reliance on the ocular testimony of informant P.W.1 without appreciating it in right perspective. The learned trial Court had failed to notice the serious discrepancies in the ocular testimony of informant P.W.-1, who is also a chance witness and has erred in relying

on it. The finding of guilt returned by the trial Court on the basis of his testimony is not sustainable.

39. The conviction of the appellants-accused for offences under Sections 376(2)(g) and Sections 302 read with Section 34 I.P.C. and sentences imposed upon them by the trial Court are hereby set aside. The appellants-accused are acquitted from all the charges. They are on bail. They need not surrender, subject to compliance of Section 437A Cr.P.C. within four weeks.

40. Copy of this judgement and order along with Lower Court Records be transmitted to the trial Court immediately for necessary compliance.

(2023) 11 ILRA 400
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.11.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA,
J.

Criminal Appeal No. 5690 of 2004

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

Counsel for the Appellants:
 Sri A.K. Singh, Sri Sudhir Kumar

Counsel for the Respondent:
 G.A.

Criminal Law - Indian Penal Code,
1860 – Sections 376 & 452 – Code of
Criminal Procedure, 1973 – Section
374(2) – Criminal Appeal – Rape and
House Trespass – Conviction and Sentence
– False Implication – Lack of Corroboration
– Property Dispute

The appellants, Shamim, Shafi, and Khurshid, challenged their conviction and sentence dated 30.10.2004 by the Additional Sessions Judge, Fast Track Court No. 4, Badaun, in Sessions Trial No. 438/1996, arising from Case Crime No. 179/1991 under Sections 376 and 452 IPC. They were sentenced to life imprisonment with a Rs. 10,000 fine for rape and three years' imprisonment with a Rs. 3,000 fine for house trespass. The prosecution alleged that the appellants, motivated by a property dispute, entered the prosecutrix's house, dragged her to a sugarcane field, and raped her. The appellants claimed false implication due to enmity and a pending suit for cancellation of a sale deed. Held: (1) The appeal was allowed, and the conviction and sentences were set aside. (2) The prosecutrix's testimony was uncorroborated by medical evidence, showing no external or internal injuries despite claims of being dragged a mile and raped, and no spermatozoa were found in the vaginal smear. (3) The recovered salwar with semen stains was not chemically examined, and no independent witnesses supported the prosecution. (4) PW-2 and PW-3, eye-witnesses, only saw the accused in the house, not the alleged rape in the sugarcane field. (5) A property dispute and prior litigation provided a motive for false implication. (6) Per St. of Punjab Vs Gurmeet Singh, Sadashiv Ramrao Hadbe Vs St. of Maharashtra, Radhu Vs St. of Madhya Pradesh, and Manak Chand Vs St. of Haryana, the sole testimony of the prosecutrix, when unreliable and uncorroborated, cannot sustain conviction, especially given the risk of false rape allegations. (7) The prosecution failed to prove the case beyond reasonable doubt, and the appellants were acquitted, with bail bonds cancelled.

Case Law Cited:

1. St. of Punjab Vs Gurmeet Singh, (1996) 2 SCC 384
2. Sadashiv Ramrao Hadbe Vs St. of Mah. & anr., (2006) 10 SCC 92
3. Radhu Vs St. of M.P., (2007) 12 SCC 57
4. Manak Chand @ Mani Vs St. of Har., 2023 SCC OnLine SC 1399

5. Citation: Shamim & Ors. Vs St. of U.P., (2023) 11 ILR A, Criminal Appeal

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri Sudhir Kumar, learned counsel for the appellants and Sri Rahul Asthana, learned Additional Government Advocate for the State.

2. This is an appeal under Section 374(2) Criminal Procedure Code (Cr.P.C.) preferred by the appellants Shamim, Shafi and Khurshid challenging the Judgment and Order dated 30.10.2004 who have been convicted under Section 376 IPC for imprisonment of life and a fine of Rs. 10,000/- and under Section 452 IPC for imprisonment of three years and a fine of Rs. 3,000/- with default stipulations passed in Sessions Trial No. 438/1996 by Additional Sessions Judge (Fast Track Court No.-4), Badaun.

PROSECUTION CASE:-

3. The prosecutrix gave a written Tehrir on 14.11.1991 at 12:30 p.m. at P.S. Mujariya, District Badaun stating that about two years back, her husband purchased two bighas of land from Shamim. But later he wanted to sell it for personal necessity. Shamim desired to get back the land sold by him for the same amount but her husband was reluctant as he had a habit of gambling. In revenge, Shamim expressed his anger and on being insulted, he threatened of dire consequences. About a week before the incident, her husband went to Dehradun for a job. Then, on the intervening night of 12/13.11.1991 at around 12:00 at night, accused Shamim along with Shafiq,

Khurshid and Ashfaq of her village, entered into her house. On hearing the noise, she woke and enquired as to why they entered her house in odd hours. Her sister-in-law (Jethani) Firozi, who was nearby, also woke. The accused dragged her towards the sugarcane field. On being dragged, she screamed and her sister-in-law (Jethani) too raised an alarm. The villagers came but the accused dragged her away towards the sugarcane field and committed rape for the whole night one by one. In the morning, when the tillers saw her, they rushed to rescue her, the accused fled away. The prosecutrix came out from the sugarcane field with their help and then lodged the FIR.

4. On the basis of the aforesaid Tehrir, the First Information Report was lodged as Case Crime No. 179/1991 under Section 452, 376 IPC at P.S. Mujariya, District Badaun on 14.11.1991 at 12:30 p.m. against the four named accused Shamim, Shafi, Khurshid and Ashfaq.

5. On the same day, i.e. 14.11.1991 at 08:30 pm, the prosecutrix was produced for medical examination at Community Health Center, Ujhani, Badaun. According to the doctor, no external injuries were found. As per the internal examination, the vagina was two fingers loose and uterus was normal in size and the vaginal smear was taken for pathological examination of sperms. The prosecutrix was then referred for X-ray for the determination of age.

6. Next day, i.e. on 15.11.1991, salwar of the prosecutrix having stains of semen was collected and the recovery memo dated 15.11.1991 was prepared (Exhibit Ka-2).

7. According to the X-ray Report dated 24.01.1992, the epiphysis around the

right elbow and the right wrist were found fused. As per the supplementary report dated 29.01.1992, radiological age of the prosecutrix was more than 18 years. It was opined that no opinion could be given about rape as there were no sperms seen in the vaginal smear and was habitual to sexual intercourse.

8. The Investigating Officer made the spot inspection, prepared the site plan and recorded the statement of prosecutrix and the witnesses under Section 161 Cr.P.C. and was produced before the Magistrate for the recording of her statement under Section 164 Cr.P.C. The charge-sheet was submitted against all the four accused persons under Sections 452, 376 IPC. The co-accused Ashfaq died during inquiry, therefore, the proceedings were abated against him. After the cognizance, the learned Magistrate committed the case to the Sessions Court for the commencement of the trial. The charges were framed against the accused Shamim, Shafiq and Khurshid under Sections 452 and 376 IPC. The accused denied the charges and claimed to be tried.

9. The prosecution produced as many as seven witnesses. PW-1- is the prosecutrix/first informant, who proved the written Tehrir as Exhibit Ka-1. PW-2- Smt. Firozi sister-in-law (Jethani) of the prosecutrix and PW-3- Janab Khan (son of PW-2) were examined as the eye witnesses, PW-4- Dr. Suman Nagar proved the injury report and supplementary report, PW-5- Dr. M.P. Gangwar proved the X-ray report, PW-6- Inspector D.K. Baliyan was the second Investigating Officer and PW-7- Yashveer Singh was the first Investigating Officer.

10. After the prosecution evidence was closed, the statement of the accused were recorded under Section 313 Cr.P.C. in which they denied the occurrence and stated that they were falsely implicated. The accused Shamim denying the incident stated that a property dispute was pending amongst them as he sold 2 bighas of land to the husband of the prosecutrix on being lured. So his wife instituted a suit for cancellation of the sale deed against the prosecutrix. The co-accused Shafiq also denied the incident and stated that he had been falsely implicated due to enmity. The co-accused Khurshid also denied the incident and stated that he too had been falsely implicated, due to political rivalry. In defence, the accused produced the copy of the sale deed dated 25.04.1991 and the copy of the Suit No. 242/1991 Shamim vs. Prosecutrix. But, no oral evidence was placed in defence.

PROSECUTION WITNESSES:-

11. **PW-1 (Prosecutrix)** in her examination-in-chief recorded on 14.08.2001 deposed that her age was about 30 years. She knew the accused Shamim, Shafiq, Khurshid and Ashfaq who were the residents of her village. The prosecutrix supported the prosecution case and deposed that all the four accused entered into her house by crossing over the wall. After hearing the noise, she woke up and saw them inside her house and questioned their presence in odd hours. In the meanwhile, her sister-in-law (Jethani) Smt. Firozi also woke up and identified the accused in the light of Chirag and Lantern. At this, the accused dragged the prosecutrix outside the home and pulled her towards sugarcane field where she was raped in the whole night one by one. In her extensive cross-examination, she deposed that she was

married about 10-12 years before the incident and had a son and a daughter. Her husband was suffering from disease and was feeble. He was undergoing treatment in Delhi and Agra. She further deposed that she was illiterate. She stated that the accused were not armed with any weapon at the time of the incident. They came across the boundary wall and opened the latch of the door. She was well aware that before sleeping she had latched the door. When the accused entered, she was sleeping and was awakened by accused Shamim. The accused did not insult or rape her inside her house rather they dragged her by holding her hands and legs towards the sugarcane field. She received injuries in her legs and back. Even the clothes were torn. The distance of the sugarcane field from her house was about a mile. When she was dragged, she screamed and even her sister-in-law (Jethani) raised an alarm. The villagers reached but no one chased to rescue her as the accused were dangerous miscreants, who forcefully committed rape and badly tortured her. No blood was oozing from her back, only marks were present. Few injuries were on her hands and back. At the time of incident, the blood oozed and fell on the ground.

12. **PW-2 Smt. Firozi**, the sister-in-law (Jethani) of the prosecutrix deposed that about ten years before the incident at around 12:00 at night while she was sleeping in her Verandah, she heard the noise of prosecutrix and saw the accused Shamim, Khurshid, Shafiq and Ashfaq inside the house in the light of lantern and Dibbi. She was an illiterate lady. All the four accused dragged away the prosecutrix to insult her. Though she raised an alarm but no villagers chased the accused persons. During cross-examination, the said witness deposed that she was present in her

house. There was no prior enmity with the accused persons. Before the incident, the wife of accused Shamim, namely, Tamizan had instituted a case against the prosecutrix for cancellation of the sale deed.

13. **PW-3 Janab Khan**, the son of Smt. Firozi in his examination-in-chief deposed that he was sleeping with his mother and aunt. When the accused entered his house, he woke up on the alarm of his aunt and saw the accused persons in the light of Dibbi who dragged away his aunt from the house. During extensive cross-examination, the said witness deposed that he had not seen the torn clothes of his aunt nor any injuries on her body with the oozing blood.

14. **PW-4 Dr. Suman Nagar** was posted as Medical Officer Incharge at Community Health Center, Ujhani, District Badaun stated that on 14.11.1991, she examined the prosecutrix. There were no mark of external injuries. The vagina was two fingers loose and the uterus was normal in size. The vaginal smear was taken to examine the presence of spermatozoa. For age determination, the victim was referred for X-ray. A supplementary X-ray Report was prepared according to which the age of the victim was more than 18 years. No opinion could be given about rape as there was no sperms seen in the vaginal smear. She was habitual to sexual intercourse. In her cross-examination, she deposed that there were no internal injuries. She further deposed that in case the prosecutrix was dragged holding her hands and legs then definitely some injuries could be caused on her body but no external injuries were found nor any spot of blood was found on her body nor on her clothes. In case, any female is forcefully subjected to rape, the injuries

could be caused on her back. From the perusal of the injury report, there were no signs of external or internal injuries nor any sign of commission of rape.

15. **PW-5 Dr. M.P. Gangwar** was the Radiologist posted at District Hospital Badaun, who stated that on 24.01.1992, he performed the X-ray of the right elbow and the right wrist of the prosecutrix. Both the epiphysis were found fused. According to the X-ray Report, the age of the prosecutrix was determined as above 18 years.

16. **PW-6 Inspector D.K. Baliyan** was the second Investigating Officer and was entrusted with the investigation. He deposed that the prosecutrix was produced before the Magistrate for recording her statement under Section 164 Cr.P.C., whereby the prosecutrix supported the prosecution case. The said witness deposed that from the perusal of the Medical Report, no injuries were present on the body of the prosecutrix nor the doctor opined about commission of rape.

17. **PW-7 Inspector Yashveer Singh** was the first Investigating Officer. In his examination-in-chief, who deposed that on 14.11.1991, the said case was registered in his presence and the copy of Chik Report and General Diary were handed over to him. On 15.11.1991, he recorded the statement of the prosecutrix made a spot inspection and prepared the site plan. He collected the salwar of the prosecutrix and prepared the recovery memo. The said witness deposed that no blood was found from the place of incident. Though the sugarcane plants were found broken but he did not make any such entry in the case diary. The salwar which was collected from the prosecutrix was also not sent for the chemical examination. He did not enquire

from the prosecutrix about the reasons for the delayed FIR.

**STATEMENT OF THE ACCUSED
UNDER SECTION 313 Cr.P.C.:-**

18. The accused Shamim in his statement recorded under Section 313 Cr.P.C. stated that he was falsely implicated due to personal enmity as his wife had instituted a case against the prosecutrix. There was a property dispute as the sale deed of two bighas of land was executed in favour of the prosecutrix by being lured. The co-accused Shafiq also stated that he had been falsely implicated due to political enmity and rivalry. The co-accused Khurshid stated that he had been falsely implicated that he too had been falsely implicated due to political rivalry.

**SUBMISSIONS ON BEHALF OF
THE APPELLANTS:-**

19. Learned counsel for the appellants challenging the conviction and sentence argued that they have been falsely implicated due to personal enmity and political rivalry. There is a delayed FIR. Further, it was argued that they have been falsely implicated due to property dispute between the prosecutrix and the wife of accused Shamim as the suit for cancellation of sale deed was instituted. The main contention of the learned counsel for the appellants was that the case of the prosecutrix does not corroborate with the medical examination report. The victim in her examination-in-chief stated that she was forcefully subjected to rape by the accused one by one for the whole night but no such external or internal injuries were found on the body of the victim. It was further deposed by the victim that she was

dragged by her hands and legs of a distance of one mile but no such injuries were found on her body. The prosecutrix was a married lady having two children. From the X-ray Report, it is evident that epiphysis around the right elbow and the right wrist were fused. According to the X-ray Report, the radiological age of the prosecutrix was more than 18 years. PW-2 and PW-3 were examined as eye witness account of the incident but they could only narrate the incident which took place within the house but could not depose about the incident which took place in the sugarcane field. It is the admitted case of the prosecution that the prosecutrix was neither insulted nor subjected to rape inside her house but the actual incident of rape took place in the sugarcane field, therefore, the testimony of the two eye witnesses has no basis. From the Medical Report, it is obvious that there were no mark of external or internal injuries on the body of the prosecutrix. Neither any blood was found oozing from her body. The prosecutrix deposed that she was dragged to the sugarcane field covering a distance of about one mile but no such external injury was found on her body nor the blood was found oozing which also belies the prosecution story. The recovered clothes of the prosecutrix (salwar) having stained semen was not sent for chemical examination. No independent witness was examined to prove the case. According to the supplementary report, no opinion about rape was given as there were no sperms found in the vaginal smear. The prosecutrix was habitual to sexual intercourse. It was strange that despite the alarm being raised by the prosecutrix and her sister-in-law (Jethani) PW-2, no villagers chased the accused to rescue the prosecutrix, which also belies the prosecution case.

**SUBMISSIONS ON BEHALF OF
THE STATE**

20. Per contra, learned Additional Government Advocate vehemently opposed the arguments advanced by the counsel for the appellants and argued that the prosecutrix supported the prosecution version. In her statement recorded under Section 164 Cr.P.C. as well as in her examination-in-chief and the cross-examination, the prosecutrix was firm and consistent. PW-2 and PW-3 were the eye witnesses account of the incident and had supported the prosecution case. There was sufficient source of light. The accused had strong motive of insulting the prosecutrix as there was a property dispute between the co-accused Shamim and the husband of the prosecutrix who purchased two bighas of land by alluring him due to which accused Shamim felt insulted and wanted to take the revenge. The Medical Report also corroborates with the prosecution version. The accused crossed over the boundary wall of the prosecutrix' house and entered their house and were seen in the light of lantern and dibbi. The salwar of prosecutrix contained the stains of semen. During spot inspection, the Investigating Officer found the broken sugarcane plants.

ANALYSIS:-

21. Having heard the rival submissions and arguments advanced by learned counsel for the parties and after the perusal of records, we find that though there was slight delay in lodging the FIR but in rape matters it is a normal phenomenon. In cases of sexual assault, the victim is often bashful and carries trauma in her mind and requires some time to master the courage to undertake a legal battle against the culprit. The appellant

counsel has emphasized the property dispute as the main motive of implicating them for the accusation of rape finds substance. Enmity is a double edged weapon. The property dispute amongst the party is a strong reason for false implication. It has been found that already a suit was instituted by the wife of accused Shamim for the cancellation of the sale deed therefore, there was no occasion for the accused to unnecessary insult the prosecutrix by committing rape. The prosecutrix was a married young lady having two children and was medically examined within 48 hours of the incident on 14.11.1991 at 08:30 p.m., therefore, there was no reason to question its credibility. According to the doctor, no external injuries were found on her body. As per the internal examination, the vaginal smear did not contain any sperm. The prosecutrix was habitual to sexual intercourse, therefore, no opinion about rape could be given. According to the X-ray report, the age of victim was more than 18 years. The testimony of the prosecutrix of commission of rape is not substantiated and does not corroborates with the medical evidence. The statement of the prosecutrix is unworthy of credence. It is the admitted case of the prosecution that the accused were not carrying any weapon. PW-2 and PW-3 were examined as eye witness account of the incident but they could only narrate the incident which took place within the house but could not depose about the incident which took place in the sugarcane field. It has also been admitted by PW-1 that the accused neither insulted nor raped her inside the house. The evidence adduced by PW-2 and PW-3 does not support the case of commission of rape on the prosecutrix. The recovered clothes of the prosecutrix (salwar) having stained semen, was not sent for chemical

examination which also does not fortify the prosecution case. No independent witnesses were examined. Though the Investigating Officer found the fallen sugarcane plants but no such entry was made in the Case Diary. The site plan does not indicate the height of the boundary wall which was crossed by the accused while entering into the house. It is a clear case of false implication due to political rivalry and property dispute. There is no material evidence to substantiate the prosecution case.

22. In view of aforesaid facts and circumstances, the prosecution has failed to prove its case beyond the reasonable doubt. The statement of the prosecutrix is full of discrepancies and does not inspire confidence. Though, the conviction can be based on the sole testimony of the prosecutrix but the evidence of the prosecutrix when read as a whole does not corroborates with the medical evidence and is not worthy of credence.

23. In light of the observations of the Hon'ble Supreme Court, it is a settled position of law that the conviction can be based on the sole testimony of the prosecutrix but at the same time the Courts have to be extremely careful while examining the sole testimony as cautioned in ***State of Punjab vs. Gurmeet Singh (1996) 2 SCC 384:***

"If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony

of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation."

24. This was reiterated in ***Sadashiv Ramrao Hadbe vs. State of Maharashtra and Another (2006) 10 SCC 92.***

25. Similarly, the Hon'ble Supreme Court in ***Radhu Vs. State of Madhya Pradesh (2007) 12 SCC 57*** has held that:

"It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a "rape", if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrists, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges

of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."

26. Recently, in ***Manak Chand @ Mani vs. State of Haryana, 2023 SC Online SC 1399***, in three Judge's Bench of the Hon'ble Supreme Court while making observation in the matters of false cases of rape has held that:

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

27. Thus, considering the entire facts and circumstances of the case, the evidence as well as the law laid down by the Hon'ble Apex Court in various judgments discussed in foregoing paragraphs, we hold that in cases of a false accusation of rape, the accused must be protected from the indictment.

28. Hence, on the basis of the discussions as above, we are of the view that the prosecution has failed to prove its case beyond reasonable doubt and the appeal is liable to be allowed.

29. Accordingly, the appeal is **allowed**. The impugned Judgment and Order of conviction and sentence dated 30.10.2004 passed by Additional Sessions Judge/ Fast Track Court-IV, Badaun in Sessions Trial No. 438/1996 registered as Case Crime No. 179/91, under Section 452 and 376 IPC, P.S. Mujariya, District Badaun is hereby set aside. The appellants **Shamim, Shafiq and Khurshid** are on bail. Their bail bonds are cancelled and the sureties are discharged.

30. Office is directed to transmit a certified copy of this judgment and order to the concerned Court for necessary information. It is further directed that the original record of the case be returned forthwith which shall be kept safely by the Trial Court.

(2023) 11 ILRA 408
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.11.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

CrI. Misc. Application U/S 389 (2) 1 of 2023

Banwari Lal Kanchhal	...Applicant
Versus	
State of U.P.	...Opp. Party

Counsel for the Applicant:

Amit Jaiswal Ojus Law, Ambrish Singh Yadav,
Nadeem Murtaza

Counsel for the Opp. Parties:

G.A., Vijay Dixit

Criminal Law - Indian Penal Code, 1860 - Sections 332, 504 & 506 - Against order of conviction and sentence - Allegation that applicant, a traders' leader, caused hurt to deter public servant is unsupported by informant's medical report and uncorroborated by other witnesses - PW-5 confirmed applicant opposed departmental misdeeds and denied animosity allegations - On overall consideration, allegations do not prima facie establish offence involving moral turpitude - As per FIR, on 06.10.1991, informant, a Sales Tax Officer, assaulted in his office by applicant and his companion, who also threatened to kill him if vehicles loaded with goods intercepted - Medico-legal report records complaints of pain on left side of face and neck but no detectable injury, doctor gave no opinion - FIR named applicant with 10-12 other persons, charge-sheet filed only against him, indicating alleged group presence was not established in investigation - PW-2, admitted in cross-examination that none of accused misbehaved with him, no incident occurred during his presence in office - Informant named few persons who were present, but PW-4, PW-5 denied seeing applicant abuse anyone, other persons not examined as witnesses - Facts ignored by Trial Court, applicant's conviction stayed. (Para 60, 66, 67, 69, 71, 72, 73)

Application allowed. (E-13)

List of Cases cited:

1. Rajnish Kumar Rai Vs U.O.I. & ors., 2023 SCC OnLine SC 1222
2. Union Territory of Ladakh & ors. Vs Jammu and Kashmir National Conference & anr., 2023 SCC OnLine SC 1140, (Para 35)
3. The Committee of Management, Dadar Ashram Trust Society & ors. Vs Mahatma Gandhi Kashi Vidyapeeth & ors. AIR 2017 All 60

4. K. Prabhakaran Vs P. Jayarajan, (2005) 1 SCC 754
5. Singhasan Singh Vs St. of U.P., 2007 SCC OnLine All 1680 : 2008 (60) ACC 128
6. Navjot Singh Sidhu Vs St. of Punj., (2007) 2 SCC 574, (Paras 6, 21)
7. Radhey Shyam Vs St. of U.P., 2008 SCC OnLine All 175
8. Rama Narang Vs Ramesh Narang, (1995) 2 SCC 513, (Paras 16, 19)
9. Annu Tandon Vs St., (2022) ILR 1 All 931
10. St. of Mah. Vs Gajanan & anr., (2003) 12 SCC 432
11. Ravikant S. Patil Vs Sarvabhousma S. Bagali, (2007) 1 SCC 673
12. Ram Singh Vs Union of India, 2008 SCC OnLine All 133 : (2008) 3 ADJ 723
13. Shyam Narain Pandey Vs St. of U.P., (2014) 8 SCC 909, (Para 6)
14. Vikram Singh Saini Vs St. of U.P., 2022 SCC OnLine All 773
15. Rahul Gandhi Vs Purnesh Ishwarbhai Modi & anr., 2023 SCC OnLine SC 929
16. St. of T.N. Vs A. Jaganathan, (1996) 5 SCC 329
17. Irfan & ors. Vs St. of U.P., 2009 (6) ADJ 177
18. K.C. Sareen Vs CBI, (2001) 6 SCC 584
19. Ravikant S. Patil Vs Sarvabhousma S. Bagali, (2007) 1 SCC 673
20. Indra Pratap Tiwari Vs St. of U.P., (2021) ILR 12 All 50
21. Omprakash Sahni Vs Jai Shankar Chaudhary, (2023) 6 SCC 123, (Para 33)
22. St. Bank of India Vs P. Soupramaniane, (2019) 18 SCC 135, (Paras 13, 14, 16)

23. Sushil Kumar Singhal Vs Regional Manager, Punj. National Bank, (2010) 8 SCC 573

24. Coopertative Central Bank Ltd. & ors. Vs Additional Industrial Tribunal and other, (1969) 2 SCC 43

25. Baleshwar Singh Vs District Magistrate and Collector, 1958 SCC OnLine All 349 : AIR 1959 All 71

26. K. C. Sareen Vs CBI, (2001) 6 SCC 584, (Para 11)

27. Ram Singh Vs Union of India, 2008 SCC OnLine All 133

28. Lok Prahari Vs Election Commission of India, (2018) 18 SCC 114

29. Committee of Management, Shiksha Prasar Samiti Vs St. of U. P. and 2 others, 2023 (5) ADJ 546

30. Ran Vijay Chandra Vs St. of U.P., 2003 (2) AWC 1385

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

1. Heard Sri Jaideep Narain Mathur Senior Advocate assisted by Sri Amit Jaiswal, Sri Nadeem Murtaza and Sri Mohit Singh Advocates, the learned Counsel for the applicant, Dr. V. K. Singh, the learned Government Advocate for the State, Sri Vijay Dixit and Sri Devam Shukla Advocates, the learned Counsel appearing on behalf of the intervenors.

2. Briefly stated, facts of the case are that a First Information Report was lodged by a Sales Tax Officer against the applicant and 10-12 unnamed persons on 06.10.1991 alleging that when the informant was performing his duties in his office, the applicant and the other accused persons entered his office and beaten him up and that some other businessmen had abused

and threatened him as to why the informant used to intercept the vehicles loaded with goods. The informant stated that other Sales Tax Officers present in the Sales Tax Office came to the spot due to which the accused persons ran away while threatening that in case any other vehicle is intercepted, the informant will be killed. The informant further alleged that earlier also, the accused persons had abused another Sales Tax Officer Sri D. C. Chaturvedi, had broken some chairs kept in the office and had threatened the officers.

3. In furtherance of the aforesaid F.I.R., a charge-sheet was submitted against the applicant only and he alone was tried for commission of offences under Sections 332, 504 and 506 IPC and he has been convicted for commission of offences under Sections 332 and 506 IPC by means of the judgment and order dated 23.02.2023 passed by Additional Chief Judicial Magistrate, Court No. 11 Lucknow. The applicant has been sentenced to undergo simple imprisonment for a period of 2 years for each of the offences and to pay a fine of Rs.2,000/- for the offence under Section 332 IPC and Rs.3,000/- for the offence under Section 506 IPC.

4. The applicant has filed a Criminal Appeal No. 46 of 2023 in the Court of Sessions Judge, Lucknow, challenging the aforesaid judgment and order dated 23.02.2023. He filed an application praying for staying the conviction and sentence during pendency of the appeal, as also an application for his release on bail during the pendency of the appeal.

5. The appeal has been admitted by means of the order dated 01.03.2023 and the execution of the sentence has been suspended during pendency of the appeal

subject to the condition that the appellant deposits entire amount of penalty within a period of 15 days and the applicant has been enlarged on bail.

6. The applicant filed an application for correction/modification of the order dated 01.03.2023 passed by the appellate Court stating that the order mentions stay of sentence only and stay of conviction was omitted from being transcribed and it should also be stayed.

7. On 28.08.2023, the Sessions Judge, Lucknow passed an order rejecting the application for stay of conviction and the application for correction also.

8. After rejection of the aforesaid application filed under Section 389(1) Cr.P.C., the applicant has approached this Court by filing instant application under Section 389(2) Cr.P.C. with the following prayers:-

“It is therefore most respectfully prayed that this Hon’ble Court may graciously be pleased to set aside the impugned order dated 28.08.2023 passed by the learned Sessions Judge, Lucknow in Criminal Appeal No.46 of 2023 (Banwari Lal Kanchhal vs. State of U.P.) arising out of Criminal Case No.2824/2022 (CNR No.UPLK04-006240-2022) (State vs. Banwari Lal Kanchhal) arising out of Case Crime No.1039/1991, under Sections 332, 506 I.P.C., Police Station Hazratganj, District -Lucknow and stay the order of conviction dated 23.02.2023 passed by the Additional Chief Judicial Magistrate-III, Court No. 27, Lucknow in Criminal Case No.2824/2022 (CNR No.UPLK04- 006240-2022) (State vs. Banwari Lal Kanchhal) arising out of Case Crime No. 1039/1991, under Sections 332, 506 I.P.C., Police

Station - Hazratganj, District -Lucknow during the pendency of Criminal Appeal No.46 of 2023 (Banwari Lal Kanchhal vs. State of U.P.) before Sessions Judge, Lucknow.

It is further prayed that this Hon’ble Court may graciously be pleased to stay the order of conviction dated 23.02.2023 passed by Additional Chief Judicial Magistrate-III, Court No. 27, Lucknow in Criminal Case No.2824/2022 (CNR No.UPLK04-006240-2022) (State vs. Banwari Lal Kanchhal) arising out of Case Crime No.1039/1991, under Sections 332, 506 I.P.C., Police Station Hazratganj, District - Lucknow during the pendency of the present application and/or pass such other and further order which this Hon’ble Court may deem fit and proper in the facts and circumstances of the case, to meet the ends of justice.”

9. It has been stated in the affidavit filed in support of the application that the applicant is a 78 years old person, he is former Member of Parliament (Rajya Sabha) and also a former Member of Legislative Council of U.P. The applicant is a life member of a Society namely, Sri Ramswaroop Memorial Institute of Management and Computer Application. The regulations of association of the aforesaid society provide for disqualification of a Member upon conviction for an offence involving moral turpitude. Although the offences under Sections 332 and 506 IPC are neither serious nor involve moral turpitude yet the applicant is facing a serious threat of disqualification of life membership of the society. The General Body of the Society has passed a resolution dated 20.05.2023 terminating the life membership of the applicant. The Deputy Registrar, Firm Society and Chits had issued a notice dated

12.06.2023 asking the applicant to submit his objections against the resolution dated 20.05.2023. The applicant has sent a letter dated 18.09.2023 to the Deputy Registrar, Firm Society and Chits demanding copies of the certain documents to enable him to submit his objections against the resolution.

10. It has further been stated in the affidavit that the applicant is a life member of the Society, which runs various educational courses in institutions run by it; that as a life member of the society, the applicant performs important functions of the society, which will come to a halt consequent to his disqualification as a life member which, in turn, would impact thousands of students and livelihood of hundreds of employees of the institution. Consequence of disqualification of the applicant would be irreparable and will lead to injustice, as the applicant would not be able to continue as a life member of the society, unless his conviction is stayed.

11. Applicant's involvement in the following five cases has been disclosed in para 43 of the affidavit filed in support of the application, in all of which he has been granted bail:-

S. No.	Case No.	Crim e No.	Police Station/District	Sections
1	9313/07	736/98	Hazrat ganj/Lucknow	332/402/472 IPC
2	9329/07	736 A/98	Hazrat ganj/Lucknow	147/148/332 IPC

			w	
3	3618/09	19/09	Kaisar bagh/Lucknow	147/435/341 IPC
4	9316/17	736 C/98	Hazrat ganj/Lucknow	147/149/307/332/336/353/504/436/427/452/34 IPC
5	278B/92		Sarojni Nagar/Lucknow	147/353/504 IPC

12. The State has filed a counter affidavit in which the criminal history disclosed by the applicant in para 43 of the affidavit has not been disputed, but it has been stated that as per the report submitted by District Crime Record Bureau, the applicant is not involved in any case, other than Crime No.1039 of 1991, from which the present application arises.

13. The State has filed a supplementary counter affidavit stating that the aforesaid statement erroneously crept in the counter affidavit because of an incomplete DCRB report whereas the applicant is involved in a total of 6 cases, which have already been disclosed by the applicant.

14. Dr. Swati Agarwal, Dr. **Bhartendu Agarwal** and Laxmi Narayan Awarwal have filed an application for intervention, stating that they are also Members of the Society. Intervention application was allowed by means of the order dated 01.11.2023 and the learned counsel for the interveners has also been heard.

15. Sri. Vijay Dixit, the learned Counsel for the interveners has submitted as a preliminary objection against maintainability of the application that in the order dated 27.04.2016 passed by this Court at Allahabad in Application under Section 482 Cr.P.C. No. 8270 of 2016 titled B. K. Tiwari versus State of U.P., it was held that the power with regard to granting or rejecting the bail exercisable by the lower appellate court can very well be exercised by the High Court also, by virtue of sub-section (2) of Section 389 of Cr.P.C. If an appeal by a convicted person is filed in a court subordinate to High Court then the powers which the subordinate court of appeal would exercise are concurrent with the powers of the High Court in this regard by virtue of 389(2) of Cr.P.C. In fact just as has been provided by Section 439 of Cr.P.C. that a High court or a court of Session both may direct the release of an under trial accused on bail, similarly in case of an appeal filed by a convicted accused also the power of the subordinate appellate court with regard to bail can also be exercised by the High Court to whom the lower appellate court is subordinate to. There does not appear to be any ambiguity with regard to the aforesaid provisions.

16. Thereafter the applicant of Application under Section 482 Cr.P.C. No. 8270 of 2016 had filed a Criminal Misc. Application under Section 389 (2) Cr.P.C. No. 1 of 2016. On 20.01.2017, another coordinate bench of this Court passed an order expressing its opinion that the filing of the bail application under section 389 (2) Cr.P.C. before this Court would bestow special concern in the matter of pending appeal in the court below and would amount to curtail or abrogate the power of sub-ordinate court rather creating a new field of vision to sit as a court of appeal to

entertain the bail application under section 389 (2) Cr.P.C. when the bail application has already been rejected by the court below and no appeal is pending before this Court and the coordinate Bench has referred this point for consideration of a larger Bench. The matter is still pending consideration of a larger bench.

17. Sri. Vijay Dixit, the learned Counsel for the interveners has submitted that as the question of maintainability of an application under Section 389 (2) Cr.P.C. before this Court during pendency of an appeal before the Session Court is pending consideration of a larger bench, this Court should refrain from hearing the application under Section 389 (2) Cr.P.C.

18. The second preliminary objection raised by Sri. Dixit is that the applicant has sought stay of conviction in order to protect the life membership of an educational society, which membership has already been terminated by means of a resolution dated 20.05.2023 passed by the General Body of the Society. The membership already having been terminated, now there are no apprehended consequences of the conviction which may be prevented by the suspension of conviction and the application has become infructuous.

19. The third preliminary objection of the learned Counsel for the interveners is that the membership of a society is not even a statutory right and deprivation thereof would not amount to any legal injury. In absence of any apprehended legal injury, the prayer of stay of conviction cannot be entertained.

20. Replying to the first preliminary objection, Sri. Jaideep Narain Mathur Senior Advocate submitted on behalf of the

applicant that in **Rajnish Kumar Rai Versus Union of India and Others**, 2023 SCC OnLine SC 1222, a similar submission was made before the Hon'ble Supreme Court. Rejecting the submission, the Hon'ble Supreme Court held that till a judgment comes from the larger bench on the point, the ratio of the earlier judgment cannot be ignored.

21. In **Union Territory of Ladakh and Others Versus Jammu and Kashmir National Conference and Another**, 2023 SCC OnLine SC 1140, the Hon'ble Supreme Court has observed that: -

“35. We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts...”

(Emphasis supplied)

22. Therefore, I am of the considered view that the mere reference of a question

to a larger bench would not dilute the law laid down in the aforesaid judgment dated 27.04.2016 passed by this Court at Allahabad in Application under Section 482 Cr.P.C. No. 8270 of 2016 and I turn down the first preliminary objection raised by the learned Counsel for the interveners that this Court should not hear the application till pronouncement of judgment by the larger bench.

23. In reply to the second preliminary objection that the applicant's life membership of the society has already been terminated by means of a resolution dated 20.05.2023 passed by the General Body of the Society and the application has become infructuous, Sri. Jaideep Narain Mathur Senior Advocate has submitted that the Deputy Registrar, Firm Society and Chits had issued a notice dated 12.06.2023 asking the applicant to submit his objections against the resolution dated 20.05.2023. The applicant has sent a letter dated 18.09.2023 to the Deputy Registrar, Firm Society and Chits demanding copies of the certain documents to enable him to submit his objections against the resolution.

24. Section 4-B of the Societies Registration Act, 1860, as it applies to the State of Uttar Pradesh, provides that: -

“4-B(1) At the time of registration/renewal of a society, list of members of General Body of that society shall be filed with the Registrar mentioning the name, father's name, address and occupation of the members. The Registrar shall examine the correctness of the list of members of the General Body of such society on the basis of the register of members of the General Body and minutes book thereof, cash book, receipt book of

membership fee and bank pass book of the society.

(2) If there is any change in the list of members of the General Body of the society referred to in sub-section (1), on account of induction, removal, registration or death of any member, a modified list of members of General Body, shall be filed with the Registrar, within one month from the date of change.

(3) The list of members of the General Body to be filed with the Registrar under this section shall be signed by two office bearers and two executive members of the society.”

25. In **The Committee of Management, Dadar Ashram Trust Society and Ors. vs. Mahatma Gandhi Kashi Vidyapeeth and Ors.** AIR 2017 All 60, a Division Bench of this Court held that *“By virtue of amendment introduced in the Act of 1860, the list of members of society is also required to be filed under Section 4-B with the Registrar at the time of registration or renewal of society. Section 15 of the Act defines ‘member’ of a society. Section 22 provides power to the Registrar to call for information. Jurisdiction is also vested in the Registrar by virtue of section 24 to conduct investigation in the affairs of the society. From the scheme of Act, it is apparent that the Act of 1860 is a self-contained Code, which provides for registration of literary, scientific and charitable societies. All aspects of the society from the stage of its constitution, registration, membership, election, possessing of property, resolution of dispute of office-bearers and members, are all covered by the Act, and to that extent it is a special law dealing with the societies registered under the Act.”*

26. As the question of membership of the applicant is still pending before the Sub-registrar in proceedings under Section 4-B of the Societies Registration Act, 1860, without going into further details of the merits of the rival claims regarding validity of the resolution dated 20.05.2023 passed by the General Body of the society terminating the applicant’s membership, I hold that the aforesaid resolution would not create a bar against maintainability of the application under Section 389 (2) Cr.P.C.

27. The third preliminary objection of the learned Counsel for the interveners is that the membership of a society is not even a statutory right and deprivation thereof would not amount to any legal injury. In absence of any apprehended legal injury, the prayer of stay of conviction cannot be entertained. In support of this contention, Sri. Vijay Dixit has relied upon a judgment of the Hon’ble Supreme Court in **K. Prabhakaran versus P. Jayarajan**, (2005) 1 SCC 754.

28. In **K. Prabhakaran** (Supra), the Hon’ble Supreme Court was inter alia deciding the question whether an appellate judgment of a date subsequent to the date of election and having a bearing on conviction of a candidate and sentence of imprisonment passed on him would have the effect of wiping out disqualification under Section 8 (3) of the Representation of the People Act, 1951 from a back date if a person was disqualified from filing nomination and contesting the election on the dates of nomination and election? Answering the aforesaid question, the Hon’ble Supreme Court held that the qualification of a person to submit his nomination is to be judged as on the date of submission of the nomination and if his conviction is set aside subsequently, it will

have no effect on the validity of the order rejecting his nomination. The aforesaid judgment deals specifically with Section 8 (3) of the representation of the People Act, 1951, which has no application in the present case.

29. Sri. Dixit next relied upon a judgment of the Division Bench of this Court in **Singhasan Singh v. State of U.P.**, 2007 SCC OnLine All 1680 : 2008 (60) ACC 128. The appellant in that case had been convicted under section 302/149 and sentenced to imprisonment for life and a fine of Rs. 5,000/- IPC, he had been convicted for the offence under section 326/149 IPC and sentenced to 10 years' rigorous imprisonment and a fine of Rs. 2,000/- and he had also been sentenced under section 147 IPC, for which he was sentenced to one year's rigorous imprisonment. The appeal had been admitted and the applicant had been granted bail. Rejecting the plea for stay of conviction in view of the judgment in **Navjot Singh Sidhu v. State of Punjab**, (2007) 2 SCC 574, this Court held that the facts of Navjot Singh Sidhu (supra) are clearly distinguishable. Navjot Singh Sidhu had been acquitted of the charges under Section 302 IPC and had only been convicted and awarded a sentence of 3 years' rigorous imprisonment and a fine of Rs. 1,000/- under section 304. The special circumstances of that case were that after pronouncement of the judgment by the High Court, which had reversed the acquittal by the Trial Court and recorded the conviction of the appellant had resigned from the membership of the Lok Sabha for maintaining probity and moral values in public life. The Counsel for Singhasan Singh had neither pointed out how the offence for which he was convicted was not of a grave nature and how he would suffer

from the disabilities if after 4-½ years the order of conviction was not stayed except making general averments that his eligibility to contest for the electoral office would be adversely affected. **Singhasan Singh** (Supra) was based on the peculiar facts of the case, particularly the appellant's conviction for committing the offence of murder and his being sentenced to undergo imprisonment for life and no general rule of universal application was laid down in that case which would affect the maintainability of the present application.

30. The learned Counsel for the interveners next placed a judgment passed by a Division Bench of this Court in an Intra-Court appeal titled **Radhey Shyam v. State of U.P.**, 2008 SCC OnLine All 175. The appellant in that case had been removed from the post of Pradhan in exercise of the power under section 95(1)(g) of the U.P. Panchayat Raj Act, 1947. He challenged the removal order passed by the Collector/District Magistrate by filing a writ petition. The Hon'ble Single Judge found that the appellant having been convicted for the offence of dacoity and attempt to murder, was not entitled to hold public office of Pradhan of the village. In Appeal, the Division Bench held that there was no order of stay of conviction and, therefore, there was no illegality in dismissal of the Writ Petition.

31. In the cases of **Singhasan Singh** (Supra) the petitioner had been convicted of offences for murder, which is punishable with death and in the other case of and **Radhey Shyam** (Supra) the petitioner had been convicted for the offence of dacoity with attempt to murder which is punishable with imprisonment upto life, whereas in the present case, the applicant has been convicted for offence under Sections 332

IPC carrying the maximum punishment for imprisonment upto 3 years and the applicant has been awarded the sentence of imprisonment for 2 years. He has also been convicted of the offence under Section 506 IPC, which carries the maximum punishment for imprisonment upto 2 years and he has been awarded the maximum sentence. The cases of Singhasan Singh and Radhey Shyam (Supra) were decided keeping in view the peculiar facts of those cases which are materially different from the facts of the present case. Therefore, the observations made in **Singhasan Singh** and **Radhey Shyam** (Supra) would not apply to the facts of the present case.

32. Accordingly, I reject all the preliminary objections raised by the learned Counsel for the interveners.

33. Dr. V. K. Singh, the learned Government Advocate has also raised a preliminary objection that the first relief claimed in the application is for setting aside the order passed by the Appellate Court rejecting the application under Section 389 (1) Cr.P.C. and this relief cannot be granted under Section 389 (2) Cr.P.C. The learned Government Advocate is right in his submission, but the applicant has also prayed for stay of his conviction and if one of the several reliefs prayed by an applicant deserves consideration on merits, the mere fact that one of the reliefs claimed cannot be granted by the Court, cannot be a ground for rejection of the application in limine.

34. The learned Government Advocate next submitted that in the application under Section 389 (1) Cr.P.C., the applicant had not made a mention of the name of the society and his pleadings were vague. The applicant has improved his case

while drafting the application under Section 389 (2) Cr.P.C. In this regard, suffice it to say that as has been submitted by the learned Government Advocate himself, this Court is not hearing an appeal against the order passed by the Appellate Court rejecting the application under Section 389 (1) Cr.P.C. and, therefore, this Court need not go into the facts pleaded in the application under Section 389 (1) Cr.P.C. filed before the Appellate Court and this Court has to decide the application under Section 389 (2) Cr.P.C. on the basis of averments made therein.

35. The learned Counsel for the applicant has relied upon the judgment of the Hon'ble Supreme Court in the case of **Rama Narang v. Ramesh Narang**, (1995) 2 SCC 513 and a judgment of this Court in the case of **Annu Tandon versus State**, (2022) ILR 1 All 931.

36. The Learned Government Advocate has relied upon the judgments in the **State of Maharashtra versus Gajanan and another**, (2003) 12 SCC 432, **Ravikant S. Patil v. Sarvabhooma S. Bagali**, (2007) 1 SCC 673, **Navjot Singh Sidhu v. State of Punjab**, (2007) 2 SCC 574, **Ram Singh v. Union of India**, 2008 SCC OnLine All 133 : (2008) 3 ADJ 723, **Shyam Narain Pandey v. State of U.P.**, (2014) 8 SCC 909, **Vikram Singh Saini versus State of U.P.**, 2022 SCC OnLine All 773, **Rahul Gandhi Versus Purnesh Ishwarbhai Modi and Another**, 2023 SCC OnLine SC 929, and **Annu Tandon versus State**, (2022) ILR 1 All 931

37. Sri. Vijay Dixit, the learned Counsel for the interveners has relied upon the judgments in the cases of **Rama Narang v. Ramesh Narang**, (1995) 2 SCC 513, **State of T.N. v. A. Jaganathan**,

(1996) 5 SCC 329, **Irfan and Ors. vs. State of U.P.**, 2009 (6) ADJ 177, **K.C. Sareen v. CBI**, (2001) 6 SCC 584, **Ravikant S. Patil v. Sarvabhousma S. Bagali**, (2007) 1 SCC 673, **Shyam Narain Pandey v. State of U.P.**, (2014) 8 SCC 909, **Indra Pratap Tiwari vs. State of U.P.**, (2021) ILR 12 All 50, **Vikram Singh Saini versus State of U.P.**, 2022 SCC OnLine All 773, **Omprakash Sahni v. Jai Shankar Chaudhary**, (2023) 6 SCC 123, a judgment dated 27.04.2023 passed by a coordinate bench of this Court at Allahabad in Writ C No. 9866 of 2023, **C/M Shiksha Prasar Samiti and another versus State of U.P. and 2 others, State Bank of India versus P. Soupramaniane**, (2019) 18 SCC 135, **Sushil Kumar Singhal versus Regional Manager, Punjab National Bank**, (2010) 8 SCC 573, **Annu Tandon versus State**, (2022) ILR 1 All 931, **Coopertative Central Bank Ltd. and others versus Additional Industrial Tribunal and other**, (1969) 2 SCC 43 and **Baleshwar Singh v. District Magistrate and Collector**, 1958 SCC OnLine All 349 : AIR 1959 All 71

38. In **Rama Narang v. Ramesh Narang**, (1995) 2 SCC 513, the Hon'ble Supreme Court has explained the circumstances under which an order of conviction can be stayed under Section 389 Cr.P.C. The relevant portion of the aforesaid judgment is as follows: -

“16. In certain situations the order of conviction can be executable, in the sense, it may incur a disqualification as in the instant case. In such a case the power under Section 389 (1) of the Code could be invoked. In such situations the attention of the Appellate Court must be specifically invited to the consequence that is likely to fall to enable it to apply its mind to the

issue since under Section 389(1) it is under an obligation to support its order “for reasons to be recorded by it in writing”.

* * *

19. *That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code. We are, therefore, of the opinion that the Division Bench of the High Court of Bombay was not right in holding that the Delhi High Court could not have exercised jurisdiction under Section 482 of the Code if it was confronted with a situation of there being no other provision in the Code for staying the operation of the order of conviction. In a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted person does not suffer*

from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone; the disqualification incurred by Section 267 of the Companies Act and given effect to cannot be undone at a subsequent date if the conviction is set aside by the Appellate Court. But while granting a stay of (sic or) suspension of the order of conviction the Court must examine the pros and cons and if it feels satisfied that a case is made out for grant of such an order, it may do so and in so doing it may, if it considers it appropriate, impose such conditions as are considered appropriate to protect the interest of the shareholders and the business of the company.”

39. In **State of T.N. v. A. Jaganathan**, (1996) 5 SCC 329 the respondents were government employees and they had been convicted and sentenced for various offences and the Appellate Court had confirmed the orders. The respondents filed a revision before the High Court and the High Court allowed their application under Section 389(1) Cr.P.C. for suspension of convictions as well as the sentences on consideration of the fact that the respondents will lose the meager stipend, if the prayer for suspending the conviction during the pendency of the revisions is not granted. In appeal, the Hon'ble Supreme Court held that Rama Narang case had no application to the facts of the cases. In Rama Narang the conviction and sentences both were suspended on the reasoning that if the conviction and sentences are not suspended the damage would be caused which could not be undone if ultimately the revision of the appellants of that case was allowed. But in the case of **Jaganathan**, in the event the revisions against their conviction and sentences are allowed by the High Court

the damage, if any, caused to the respondents with regard to payment of stipend etc. can well be revived and made good to the respondents. The Hon'ble Supreme Court also held that the High Court did not consider at all the moral conduct of the respondents inasmuch as respondent Jaganathan who was the Police Inspector attached to Erode Police Station had been convicted under Sections 392 I.P.C. – i.e., robbery, which is punishable with imprisonment which may extend to 14 years, and 466 IPC – forgery of Court record, which is punishable with imprisonment which may extend to 7 years, while the other respondents who are also public servants had been convicted under the provision of Prevention of Corruption Act which carry the maximum punishment of imprisonment for 7 years. In such a case the discretionary power to suspend the conviction either under Sections 389(1) or under Section 482 Cr.P.C. should not have been exercised.

40. In **K. C. Sareen v. CBI**, (2001) 6 SCC 584, a bank officer had defrauded the Bank to the tune of about Rs 2 lakhs and he was sentenced to rigorous imprisonment for one year and to pay a fine of Rs 500 for the offence under Section 13(2) of the PC Act. The High Court had admitted his appeal and suspended the sentence. The appellant was dismissed from service because of his conviction. His application for suspension of the conviction was dismissed by the High Court observing that he was already out of service and in case he was ultimately acquitted, the damage, if any, caused with regard to his service can well be revived and made good to them. In the aforesaid factual background, the Hon'ble Supreme Court held that: -

“11. The legal position, therefore, is this: though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction the court should not suspend the operation of the order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act.”

Answering the aforesaid question, the Hon’ble Supreme Court held that: -

“the legal position can be laid down that when conviction is on a corruption charge against a public servant the appellate court or the revisional court should not suspend the order of conviction during the pendency of the appeal even if the sentence of imprisonment is suspended. It would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision.”

41. In **State of Maharashtra v. Gajanan**, (2003) 12 SCC 432, the High Court had stayed the conviction for an offence under Section 7 of the Prevention of Corruption Act to facilitate the respondent public servant to continue to hold the civil post in spite of his conviction. The Hon’ble Supreme Court reiterated the law laid down in *K. C. Sareen* (Supra) and held that the High Court had wrongly distinguished it on facts.

42. In **Ravikant S. Patil v. Sarvabhau S. Bagali**, (2007) 1 SCC 673, the appellant was an elected member of Legislative Assembly and he was convicted for offences under Sections 366 I.P.C. (i.e. kidnapping a woman to compel her marriage, which carries the maximum punishment of imprisonment for ten years) Section 376, I.P.C. (i.e. rape, which carries the maximum punishment of imprisonment for life) and was sentenced to undergo imprisonment for a period of seven years. Pending consideration of his appeal, the Bombay High Court had stayed execution of the sentence, as also the conviction. Thereafter, the appellant filed his nomination. The respondent raised an objection to the acceptance of the appellant’s nomination, contending that the appellant was disqualified under Sections 8(1) and (3) of the Act. The objection was rejected by the Returning Officer and the appellant was declared elected. The respondent filed an election petition on the ground that the appellant was not qualified to contest the election. During pendency of the election petition, the appellant’s appeal against conviction was allowed and he was acquitted. The High Court held that the appellant was disqualified to contest the election as on the date of nomination, he stood convicted. The Hon’ble Supreme Court set aside the order passed by the High Court and held that in view of the stay of conviction on the dates of nomination and election, the appellant was not disqualified. The question whether subsequently the conviction was set aside in appeal or whether the matter is in further challenge before this Court is of no relevance for deciding the point in issue. No such point is involved in the present case and, therefore, the judgment in the case of **Ravikant S. Patil** (Supra) is not relevant for decision of the present matter.

43. In **Navjot Singh Sidhu v. State of Punjab**, (2007) 2 SCC 574, the appellant was tried for charges under Section 302 I.P.C. and Section 323 read with Section 34 I.P.C., but was acquitted by the Sessions Judge. The High Court allowed the appeal convicted him under Section 304 II IPC and sentenced him to 3 years' rigorous imprisonment and a fine of rupees one lakh. In appeal, the Hon'ble Supreme Court had granted bail and thus the execution of the sentence imposed upon him was suspended. While deciding the application for suspending the order of conviction passed against him, the Hon'ble Supreme Court took into consideration the circumstances that the appellant was a sitting Member of Parliament and he had resigned from the membership of the Lok Sabha immediately after the pronouncement of judgment by the High Court. However, he wanted to contest the election again whereas he stood disqualified for the same on account of Section 8(3) of the Representation of the People Act, 1951. The Hon'ble Supreme Court held that: -

"6. The legal position is, therefore, clear that an appellate court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed. Unless the attention of the court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case.

* * *

21...The decisions of this Court rendered in Rama Narang v. Ramesh Narang and Ravikant S. Patil v. Sarvabhuma S. Bagali having recognised the power possessed by the court of appeal to suspend or stay an order of the conviction and having also laid down the parameters for exercise of such power, it is not possible to hold, as a matter of rule, or, to lay down, that in order to prevent any person who has committed an offence from entering Parliament or the Legislative Assembly the order of the conviction should not be suspended. The courts have to interpret the law as it stands and not on considerations which may be perceived to be morally more correct or ethical."

44. The Hon'ble Supreme Court rejected the submission that in view of the law laid down in **State of T. N. v. A. Jaganathan and K.C. Sareen v. CBI** the order of conviction passed against the appellant should not be suspended by stating that: -

"The cases cited have no application to the facts of the present case as both of them related to conviction on charges of corruption and in that context it was observed that when conviction is on a corruption charge, it would be a sublime public policy that the convicted person is kept under disability of the conviction instead of keeping the sentence of imprisonment in abeyance till disposal of the appeal. In such cases it is obvious that it would be highly improper to suspend the order of conviction of a public servant which would enable him to occupy the same office which he misused. This is not the case here."

45. Thus the Hon'ble Supreme Court distinguished **A. Jaganathan and K.C.**

Sareen on the consideration that the offence of corruption by a public servant was a very heinous offence and apparently the Hon'ble Supreme Court was of the view that the offence of culpable homicide not amounting to murder was a less heinous offence. The offence allegedly committed by the applicant are even lesser heinous.

46. **Ram Singh v. Union of India**, 2008 SCC OnLine All 133 was a Writ Petition filed challenging a judgment and order passed by the Central Administrative Tribunal whereby the Original Application filed by the petitioner challenging his dismissal from service on the ground of his being convicted and sentenced under Section 13 (1) (d) of the Prevention of Corruption Act. His conviction had not been stayed. Dismissing the Writ Petition, a Division Bench of this Court held that the petitioner does not deserve any sympathy in exercise of the equitable jurisdiction of this Court under Article 226 of the Constitution of India. It was observed that in case petitioner succeeds in his criminal appeal, he will have a right to approach the competent authority for recall of the order of dismissal but granting any relief to him at this stage would demoralise all other officers of the department. The aforesaid judgment rendered in a Writ Petition challenging an order passed by the Central Administrative Tribunal has no relevance for adjudication of the present matter.

47. In **Irfan and Ors. vs. State of U.P.**, 2009 (6) ADJ 177 the Appellant was convicted for offences under Sections 302/149, I.P.C. and some other offence carrying lesser punishments and he was sentenced to undergo imprisonment for life. A Division Bench of this Court had rejected the application for stay of conviction for the offence of murder.

48. In **Shyam Narain Pandey v. State of U.P.**, (2014) 8 SCC 909, the appellant was tried along with six others and was convicted for murder and was sentenced to life imprisonment and fine. The High Court had granted him bail but the bail order was cancelled by the Hon'ble Supreme Court in view of non-compliance with the first proviso to Section 389(1) Cr.P.C. and the matter had been remitted to the High Court for fresh consideration. The appellant had sought stay of conviction on the ground that he had been working as a Principal and if the conviction is not stayed, he will lose his job, will be denied of his livelihood and he would not be in a position to participate in subsequent selection procedures conducted by the U.P. Secondary Education Services Selection Board, Allahabad. The Hon'ble Supreme Court held that none of these contentions can be appreciated. The appellant had been convicted under Sections 147, 148, 302/144 IPC read with Section 120-B IPC and was sentenced to undergo life imprisonment. The Hon'ble Supreme Court further held that: -

6. ...It was regarding the release on bail of a convict where the sentence is of death or life imprisonment or of a period not less than ten years. If the appellate court is inclined to consider release of a convict of such offences, the Public Prosecutor has to be given an opportunity for showing cause in writing against such release. This is also an indication as to the seriousness of such offences and circumspection which the court should have while passing the order on stay of conviction. Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have

serious impact on the public perception on the integrity of the institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been cautioned time and again that the court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice.”

49. It has to be kept in mind that the aforesaid observations were made by the Hon’ble Supreme Court in the factual backdrop of the respondent being held guilty of committing murder.

50. In **Vikram Singh Saini versus State of U.P.**, 2022 SCC OnLine All 773, a coordinate bench of this Court was dealing with an application under Section 389 (1) Cr.P.C. for stay of conviction pending decision of a Criminal Appeal filed against a judgment and order whereby the appellant had been convicted and sentenced for the offence under Section 147 I.P.C. to undergo 01 year imprisonment, under Section 148 I.P.C. to undergo two years imprisonment and fine of Rs. 5000/-, and in default of payment of fine to 02 months additional imprisonment and under Sections 336 r/w 149 I.P.C. to undergo 02 months imprisonment, under Section 353 I.P.C. to undergo 01 month imprisonment, under Section 504 I.P.C. to undergo 01 year imprisonment, under Section 506 I.P.C. to undergo 02 years imprisonment with fine of Rs. 5,000/- and in default of payment of fine to undergo 02 months additional imprisonment and under Section 7 Criminal Law (Amendment) Act to undergo 06 months imprisonment. Relying upon the law laid down in **Ravikant S. Patil, Navjot Singh Sidhu and Shyam Narain**

Pandey (Supra) and Lok Prahari v. Election Commission of India, (2018) 18 SCC 114, this Court held that the appellant had been convicted for rioting, rioting armed with deadly weapon, endangering life or personal safety of others, assault or criminal force to deter public servant from discharging his duty, intentional insult with intent to provoke breach of peace and criminal intimidation which had caused a law and order problem and had thrown the peace of the citizens out of gear. These offences have the potentiality to destroy the core values of a healthy democracy, safety of the State, economic stability, national security, and prevalence and sustenance of peace and harmony amongst citizens and may others. The criminal activities resulting in disqualification are related to various spheres pertaining to the interest of the nation, common citizenry interest, communal harmony, and prevalence of goods governance. Merely by pleading that appellant by the conviction will stand disqualified as per the Act, 1951 is no ground to suspend the conviction.

51. In **Rahul Gandhi Versus Purnesh Ishwarbhai Modi** and Another, 2023 SCC OnLine SC 929, the appellant was convicted for an offence punishable under Section 499 of the Penal Code, 1860 and was inflicted the maximum sentence of imprisonment for two years. Except the admonition given to the appellant by the Hon’ble Supreme Court in contempt proceedings, no other reason was assigned by the learned Trial Judge for imposing the maximum sentence of two years. On account of the maximum sentence of two years imposed by the Trial Court, the appellant became disqualified to continue as a Member of Parliament in view of the provisions of sub-section (3) of Section 8 of the Representation of the People

Act, 1950. In appeal, the Hon'ble Supreme Court held that the ramification of sub-section (3) of Section 8 of the Act are wide-ranging. They not only affect the right of the appellant to continue in public life but also affect the right of the electorate, who had elected him, to represent their constituency. Accordingly, the Hon'ble Supreme Court allowed the appeal and stayed the order of conviction. No such principle has been laid down in **Rahul Gandhi** (Supra), as may be relevant for decision of the present case.

52. In **Omprakash Sahni v. Jai Shankar Chaudhary**, (2023) 6 SCC 123, the respondents 1, 3 and 4 along with six other co-accused were put to trial for the offences punishable under Sections 302, 120-B and 506, respectively, read with Section 34 IPC and Section 27 of the Arms Act, 1959 and they were held guilty of the offence of murder and the other co-accused were acquitted. The Patna High Court had suspended life imprisonment sentence imposed by the trial court on Respondents 1, 3 and 4 and had granted bail to the convicts pending the final disposal of the criminal appeals. The order was challenged by the informant. Even in a case where the person had been convicted for the offence of murder, the Hon'ble Supreme Court held that: -

“33. Bearing in mind the aforesaid principles of law, the endeavour on the part of the court, therefore, should be to see as to whether the case presented by the prosecution and accepted by the trial court can be said to be a case in which, ultimately the convict stands for fair chances of acquittal. If the answer to the abovesaid question is to be in the affirmative, as a necessary corollary, we shall have to say that, if ultimately the

convict appears to be entitled to have an acquittal at the hands of this Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually takes very long for decision and disposal. However, while undertaking the exercise to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. To put it in other words, something which is very apparent or gross on the face of the record, on the basis of which, the court can arrive at a prima facie satisfaction that the conviction may not be sustainable. The appellate court should not reappreciate the evidence at the stage of Section 389 CrPC and try to pick up a few lacunae or loopholes here or there in the case of the prosecution. Such would not be a correct approach.

The Hon'ble Supreme Court observed that the High Court had gone into the issues like political rivalry, delay in lodging the FIR, some over-writings in the first information report, etc., which aspects will have to be looked into at the time of the final hearing of the appeals filed by the convicts. The Hon'ble Supreme Court further held that “upon cursory scanning of the evidence on record, we are unable to agree with the contentions coming from the learned Senior Counsel for the convicts that, either there is absolutely no case against the convicts or that the evidence against them is so weak and feeble in nature, that, ultimately in all probabilities the proceedings would terminate in their favour.” The appeal was allowed for the aforesaid reason.

53. In **Omprakash Sahni** (Supra), the Hon'ble Supreme Court had decided the validity of the order passed under Section 389 (1) Cr.P.C. in a case involved commission of murder after a cursory

scanning of the evidence and finding that it was not a case where there was absolutely no case against the convicts or that the evidence against them was so weak and feeble in nature, that ultimately in all probabilities the proceedings would terminate in their favour.

54. The learned Counsel for the interveners has next submitted that the applicant is guilty of offence involving moral turpitude that, therefore, he is not entitled to be granted relief of stay of his conviction. In support of this submission, the learned Counsel for the interveners has relied upon the judgments in the cases of **Baleshwar Singh v. District Magistrate and Collector**, 1958 SCC OnLine All 349 : AIR 1959 All 71, **Sushil Kumar Singhal v. Punjab National Bank**, (2010) 8 SCC 573, **State Bank of India v. P. Soupramaniane**, (2019) 18 SCC 135 and **Committee of Management, Shiksha Prasari Samiti versus State of U. P. and 2 others**, 2023 (5) ADJ 546.

55. **Baleshwar Singh** was a judgment arising out of challenge to appointment of a member of Nyay Panchayat on the ground that he had been convicted of an offence under Section 182 I.P.C., i.e., *False information, with intent to cause public servant to use his lawful power to the injury of another person*. A Single Judge of this Court held that “The expression ‘moral turpitude’ is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character or disposition of the person charged with the particular conduct. The Court held that “an individual’s conduct in giving false information to a public servant in the circumstances stated in Section 182(a) is contrary to justice, honesty and good

morals and shows depravity of character and wickedness.

56. In **Sushil Kumar Singhal v. Punjab National Bank**, (2010) 8 SCC 573, the respondent Bank had dismissed the appellant – a peon, on account of his conviction for an offence under Section 409 I.P.C. (criminal misappropriation). The appellant challenged his dismissal before the Central Government Industrial Tribunal-cum-Labour Court. In the meanwhile, the appeal filed against the order of conviction was decided whereby his conviction was maintained, but he was granted the benefit of probation under the Probation of Offenders Act and he was released on probation. The Labour Court upheld the dismissal and the High Court dismissed the Writ Petition challenging the order of Labour Court. It was contended before the Hon’ble Supreme Court that the benefit granted by the appellate court under the provisions of the Probation of Offenders Act had taken away “disqualification” by virtue of Section 12 of the Act. The sole question involved in this case was whether the benefit granted to the appellant under the provisions of the 1958 Act makes him entitled to reinstatement in service. While deciding the aforesaid question, this Court had observed that “*moral turpitude means anything contrary to honesty, modesty or good morals. It means vileness and depravity. In fact, the conviction of a person in a crime involving moral turpitude impeaches his credibility as he has been found to have indulged in shameful, wicked and base activities.*”

57. In **State Bank of India versus P. Soupramaniane**, (2019) 18 SCC 135 the respondent had been discharged from service as a messenger in State Bank of

India as he had been charged for committing an offence under Section 307 IPC. The trial court was of the opinion that there was no material to convict the respondent under Section 307 IPC, but convicted him under Section 324 IPC and sentenced him to undergo imprisonment for three months. The conviction was affirmed by the appellate court but the appellate court released the respondent on probation. One of the reasons given by the appellate court to release the respondent on probation was that the respondent was employed as a messenger in a bank and any sentence of imprisonment would affect his career. The respondent was discharged from service on the ground of his conviction by a criminal court for an offence involving moral turpitude. The Hon'ble Supreme Court held that: -

“13. Ordinarily, the tests that can be applied for judging an offence involving moral turpitude are:

(a) Whether the act leading to a conviction was such as could shock the moral conscience or society in general;

(b) Whether the motive which led to the act was a base one, and

(c) Whether on account of the act having been committed the perpetrators could be considered to be of a depraved character or a person who was to be looked down upon by the society.

14. The other important factors that are to be kept in mind to conclude that an offence involves moral turpitude are : the person who commits the offence; the person against whom it is committed; the manner and circumstances in which it is alleged to have been committed; and the values of the society.

* * *

16. There can be no manner of doubt about certain offences which can

straightaway be termed as involving moral turpitude e.g. offences under the Prevention of Corruption Act, the NDPS Act, etc. The question that arises for our consideration in this case is whether an offence involving bodily injury can be categorised as a crime involving moral turpitude. In this case, we are concerned with an assault. It is very difficult to state that every assault is not an offence involving moral turpitude. A simple assault is different from an aggravated assault. All cases of assault or simple hurt cannot be categorised as crimes involving moral turpitude. On the other hand, the use of a dangerous weapon which can cause the death of the victim may result in an offence involving moral turpitude.

(Emphasis supplied)

58. The Hon'ble Supreme Court observed that **P. Soupramaniane** had no motive to cause the death of the victims and the injuries caused to the victims were simple in nature. On an overall consideration of the facts of the case, the Hon'ble Supreme Court held that the crime committed by the respondent did not involve moral turpitude.

59. In **Ran Vijay Chandrav. State of U.P.**, 2003 (2) AWC 1385, A Division Bench of this Court had held that an employee who had committed murder, was not guilty of offence involving moral turpitude as it was an outcome of sudden and grave provocation and was not a result of any premeditated design.

60. The allegation in the present case is that the applicant is a leader of traders and he had causing hurt to a public servant with intent to deter him from his duty. The allegation is not supported by the medical report of the informant, which mentions no

injury suffered by him. Except the informant, no other witness has supported the allegation. PW-5 K. K. Shukla stated that the applicant was a leader of the traders and he used to oppose the misdeeds of the department. He denied the suggestion that because of the behavior of the applicant the officials of the department were angry against him. On an overall consideration of the facts of the case, I am of the considered view that the allegations against the applicant prima facie do not make him guilty of an offence involving moral turpitude.

61. As has been noted above, even in cases involving commission of rape, e.g. **Ravi Kant S. Patil** (Supra) and murder, e.g. **Om Prakash Sahni and Ran Vijay Chandra** (Supra) the entitlement of the applicants for stay of conviction was considered on merits keeping in view the relevant considerations. Therefore, when the applicant before this Court has been convicted of offences under Sections 332 and 506 I.P.C. and he has been sentenced to undergo imprisonment for two years, his application under Section 389 (2) has also to be considered on its merits.

62. The learned Counsel for the intervener has also relied upon a judgment in the case of **Indra Pratap Tiwari vs. State of U.P.**, (2021) ILR 12 All 50, wherein a coordinate bench of this Court had rejected an application under Section 389 Cr.P.C. after taking into consideration the peculiar facts and circumstances of the case. The learned Counsel for the applicant pointed out that the Hon'ble Supreme Court has already set aside the judgment in the case of **Indra Pratap Tiwari vs. State of U.P.** by means of a judgment and order dated 12.09.2022 passed in Criminal

Appeal No. 1548 of 2022 and, therefore, it is not in existence anymore.

63. This Court is constrained to observe in the interest of purity of judicial system that when citing even an overruled judgment is considered a professional misconduct, citing a judgment which has been set aside, cannot be appreciated at all.

64. The learned Counsel for the intervener has next submitted that the conviction of the applicant cannot be stayed for protecting his life membership of a society, as the right to become a member of a society is not even a statutory right. In support of this submission, the learned Counsel for the interveners has relied upon the decision in the case of **Coop. Central Bank Ltd. v. Additional Industrial Tribunal**, (1969) 2 SCC 43 at page 53. An industrial dispute arose between 25 Co-operative Central Banks and their workmen, which was referred to the Industrial Tribunal, Hyderabad, under Section 10(1)(d) of the Industrial Disputes Act No. 14 of 1947. Before the Industrial Tribunal, one of the grounds raised on behalf of the Banks was that the reference of the disputes to the Tribunal was invalid, because such disputes were required to be referred for decision to the Registrar of the Co-operative Societies under Section 61 of the Andhra Pradesh Co-operative Societies Act, and the effect of the provisions of the Act was to exclude the jurisdiction of the Industrial Tribunals to deal with the same disputes under the Industrial Disputes Act. The Tribunal rejected the contention of the Banks. The Hon'ble Supreme Court was dealing with one single question as to whether the jurisdiction of the Industrial Tribunal to adjudicate on the industrial dispute referred to it under Section 10(1)(d) of the Industrial Disputes Act was barred

by the provisions of Section 61 of the Andhra Pradesh Co-operative Societies Act. The learned counsel appearing on behalf of the appellant Banks, however, urged a new point to challenge the jurisdiction of the Industrial Tribunal to deal with the dispute relating to conditions of service to the effect that the conditions of service having been made the subject-matter of bye-laws, an Industrial Tribunal will not be competent to alter them because even an Industrial Tribunal has no jurisdiction to make orders contrary to law. The Hon'ble Supreme Court held that in the case before it, there was no prohibition contained in the Act that the conditions of service prescribed could not be altered. The argument on behalf of the Banks, however, was that the bye-laws, which contained the conditions of service, are themselves law, so that any direction made by an Industrial Tribunal altering a condition of service contained in a bye-law would be an order contrary to law and, hence, illegal. While rejecting this submission, the Hon'ble Supreme Court held that the bye-laws of a cooperative society framed in pursuance of the provisions of the Act can be held to be law or to have the force of law.

65. The question as to what are the considerations relevant for deciding an application under Section 389 Cr.P.C., was not involved in **Coop. Central Bank Ltd. v. Additional Industrial Tribunal**. While deciding an application under Section 389 (2) Cr.P.C., apart from other relevant considerations, this Court has to keep mind what specific prejudice the applicant would suffer from the continuance of the order of his conviction. It is not necessary that the consequences suffered should involve deprivation of a statutory right. Therefore, I reject this submission of the learned Counsel for the interveners.

66. Now I proceed to examine the facts of the case in light of the law laid down in the cases discussed above. The learned Counsel for the applicant has taken the Court through the evidence on record of the trial Court in order to satisfy this Court that the applicant has a fair chance of success in the appeal. The informant Sales Tax Officer had alleged in the F.I.R. that he was performing his duties in his office on 06.10.1991, the applicant and his companions entered his office and beaten him up; that some other businessmen had abused and threatened him as to why the informant used to intercept the vehicles loaded with goods. The informant stated that other Sales Tax Officers present in the Sales Tax Office came to the spot due to which the accused persons ran away while threatening that in case any other vehicle is intercepted, the informant will be killed. The informant further alleged that earlier also, the accused persons had abused another Sales Tax Officer Sri D. C. Chaturvedi. The medico legal examination report of the informant mentions complaint of pain on the left side of face and neck, but no injury could be detected clinically. The doctor has noted that as no injury could be detected, no opinion could be given.

67. Although the F.I.R. alleged commission of offences by the applicant and 10-12 other persons, a charge-sheet was submitted against the applicant only, which indicates that the allegation of the applicant having come to the office with 10-12 other persons could not be established during investigation.

68. The informant Arun Kumar Tripathi was examined as PW-1 and he stated in his cross examination that perhaps the incident took place on a Sunday. His room is on the first floor of the office

building, the incident did not take place in his room, it had happened in the office compound. He stated that 10-12 persons had come to give effect to the incident. He stated that he had lodged the F.I.R. 15-20 minutes after the incident. The F.I.R. mentions the time of the incident to be 03:45 p.m. and the F.I.R. was lodged at 18:40, i.e. about 3 hours after the incident. He stated that when K. K. Shukla, A. K. Mishra, P. N. Singh and B. N. Singh came there shouting, the accused persons ran away. At one place he stated that when he was going towards his office after inspecting a truck, 'the accused persons' came, threatened him, slapped him and went away whereas the charge-sheet was submitted against the applicant only and the allegation of involvement of 10-12 other persons could not be established.

69. PW-2 Deep Chandra Chaturvedi did not state that the accused persons had abused him or that they had broken chairs in his chamber. In his cross examination, he categorically stated that none of the accused persons had misbehaved with him. He stated that the incident took place on a Sunday or any other holiday at around noon, but he could not tell the time of the incident even by estimation. He further stated that no incident took place till he remained present in the office.

70. The Doctor who had examined the informant, was examined as PW-3 and he stated that the injured person did not have any apparent injury, he had merely complained about pain on his face and neck.

71. PW-4 Vishnu Kumar Singh stated that the incident took place on a Sunday, but the incident did not take place in his presence.

72. PW-5 K. K. Shukla stated that the incident took place on the first Sunday of October 1991. In his cross-examination, he stated that the office of the informant was situated on the ground floor of the building, he did not see the applicant abusing or beating any person. He further stated that the applicant was a leader of the traders and he used to oppose the misdeeds of the department. He denied the suggestion that because of the behavior of the applicant the officials of the department were angry against him.

73. The informant had stated that K. K. Shukla, A. K. Mishra, P. N. Singh and B. N. Singh had come on the spot. K. K. Shukla stated that he had not seen the applicant abusing or beating any person and the other three persons named by the informant were not examined at witnesses.

74. The learned trial Court found that there was no eye-witness of the incident but the informant had stated that the applicant had beaten him and that all the witnesses have stated that the applicant had raised a hue and cry in the office of Deep Chandra Chaturvedi. For the aforesaid reasons, the trial Court found that the offence under Section 332 I.P.C. stands proved, but the offence under Section 504 could not be proved.

75. The trial Court further held that in his examination-in-chief, the informant stated that the applicant and 10-12 persons who had come with him, had beaten him and created obstruction in performance of his public duty by beating him and they had threatened to kill him. The trial Court held that as 10-12 persons were accompanying the applicant who was a leader of the merchants, in these circumstance the making of the statement that in case any

officer ceases any other truck, he would be killed, is sufficient to terrorize any person.

76. The trial court further held that it was also relevant that the applicant had earlier gone to the office of another officer Deep Chandra Chaturvedi, asked about a truck and raised a hue and cry and from this the Court inferred that the applicant gone to the office with the intention of threatening the officers and, therefore, the offence under Section 506 IPC was also proved.

77. While the trial Court was deciding the point of sentence to be imposed upon the applicant, a request was made on his behalf for granting benefit of the Probation of Offenders Act, 1958. The trial Court declined the request for the reason that the applicant is a leader of traders and he had been a member of the Legislative Assembly. In case such a famous person is granted benefit of probation, the public would feel that the judiciary is benefitting such famous persons and by punishing such famous persons, a sense of fear of criminal justice system will be installed in the public and the people's faith in judiciary will increase. This reason given by the trial Court appears to be extraneous as a person cannot be denied benefit of statutory provisions merely with the object of improving the social image of the judiciary, as while deciding any case, the Court has to primarily keep into mind all the relevant facts and circumstances of the case and the relevant provisions of law. The opinion of the public should not influence the decision of a Judge.

78. From the aforesaid facts, *prima facie* it appears that the judgment of the trial Court convicting and sentencing the applicant for offences under Section 332 and 506 IPC has been given ignoring the

fact that the allegation of involvement of 10-12 other persons could not be established during investigation and those persons had not been summoned to face the trial and the trial Court also ignored the relevant evidence of Deep Chandra Chaturvedi, who had stated that nobody had misbehaved with him. The evidence of all other witnesses, who stated that they did not see any incident and the statements of the informant in his cross-examination that 10-12 persons who had come with the applicant and they had beaten him for ½ minute but he could not tell as to which of those persons had beaten him was also ignored by the trial Court. The aforesaid facts indicate that the applicant has strong chances of success in the appeal filed by him against the order of conviction and sentence.

79. The applicant is a 78 year old person who is a leader of the traders, a former member of Rajya Sabha and a former member of Legislative Council of Uttar Pradesh. He is a life member of an educational society and is membership is sought to be terminated because of his conviction for the offences under Section 332 I.P.C. and 506 I.P.C. alleging that those offences involve moral turpitude, whereas in some of the cases noted above, even the offence of murder has been treated to be an offence not involving moral turpitude. There may be serious consequences of the applicant's conviction, which cannot be undone or reversed in case his appeal against conviction is allowed.

80. In view of the aforesaid discussion, I am of the considered view that the applicant's conviction deserves to be stayed.

81. Accordingly, The application under Section 389 (2) Cr.P.C. filed by the applicant is **allowed** and it is ordered that order of conviction dated 23.02.2023 passed by Additional Chief Judicial Magistrate-III, Court No. 27, Lucknow in Criminal Case No.2824/2022 (State vs. Banwari Lal Kanchhal) arising out of Case Crime No.1039/1991, under Sections 332, 506 I.P.C., Police Station Hazratganj, District – Lucknow, shall remain in abeyance till decision of Criminal Appeal No. 46 of 2023 in the Court of Sessions Judge, Lucknow filed against the aforesaid order.

82. Before parting with the case, this Court is constrained to observe that on date of commencement of hearing in the present case, one of the learned Counsel for the interveners had made a request for passing over the case for sometime as the other learned Counsel was busy in some other Court. When the case was called out again after sometime, the same request was repeated. The Court declined the request and started hearing submissions of the learned Counsel for the applicant in presence of the other learned Counsel for the interveners and the learned Government Advocate. A serious objection was taken against the hearing having commenced in absence of one of the Counsel and it was said that it has been the normal practice of this Court to accommodate Advocates. It is true that in the past the Courts were more liberal in granting adjournments and even presently the Courts normally accommodate Advocates. But we cannot lose sight of the changing scenario of the entire judicial system. The work load is ever increasing and this Court has not less than 150 matters listed before it on any single day, several of those are not taken up due to paucity of time. The practice of

passing over the matters due to engagement of the learned Counsel elsewhere has also played its bit in increasing pendency of the cases as every such request consumes at least a minute or two and in case such requests are accepted in numerous matters, it would result in a considerable waste of time, because every minute of the Court is precious and should be used productively.

83. The pendency of some types of cases in the Lucknow Bench of this High Court is being mentioned in the following chart: -

	31.12.1990	31.12.2000	31.12.2010	31.12.2020
Bail	28	1471	8701	12806
Criminal Appeals	6,134	10,568	28,244	39835
Criminal Revisions	2577	1724	3861	7363
482 petitions	350	1471	8701	12806
Criminal Writs	222	2866	4507	5890
Total pendency	61718	17432	250301	214410

84. The Allahabad High Court is generally talked about for its highest pendency, which at the start of this day was 10,60,451, out of which, 4,96,876 cases are of criminal nature. It is seldom mentioned that the average number of cases decided per Judge of this Court per year is the maximum in the Country. The Judges are trying to reduce the pendency by enhancing the speed of dispensation of justice, but they cannot do so without the fullest cooperation of the learned Advocates.

86. I take this opportunity to request to all the learned Counsel to cooperate in speedy dispensation of justice by decreasing the non-productive expenditure of the Court's time. The learned Counsel should decrease the number of adjournments sought and they should not object to the submissions being heard in their absence, more so when there is a learned Counsel present to take notes of the submissions. The precious time of the Court can also be better utilized if the learned Counsel refrain from citing multiple case-laws on a single point. The same old practices will continue to produce the same old results but as the society needs faster disposal of matters, all of us should change our practices to produce better results.

Counsel for the Respondents:

(C) The Motor Vehicles Act, 1988 - Sections 168 & 169 - Tribunal's Jurisdiction in Accidents - Claims Tribunal has to be less adversarial and more inquisitorial - not always to act as a Court of civil jurisdiction trying an action according to the provisions of the Code of Civil Procedure, 1908 - to hold an inquiry into the accident and determine just compensation payable to the injured, or

the legal representatives of the deceased, as the case may be.(Para - 41, 42)

(D) The Uttar Pradesh Motor Vehicle Rules, 1998 - Rule 215 - Power of examination - Claims Tribunal may if it thinks necessary, examine any person likely to be able to give information relating to the injury irrespective of the fact whether such person has been or is to be called as a witness or not.(Para - 45)

Accident between offending truck and ill-fated car - truck approached and hit the car head-on - Three persons reported seriously injured - averment in claim petition - drivers of both vehicles were not individually vigilant - written statement by owner - denied allegations - Tribunal erred by attempting to pick holes in evidence - claim that Tribunal should not decide a motor accident claim as a criminal trial - to prove factum of accident - tribunal adopted hyper technical approach - two witnesses produced by claimants not eye-witnesses of occurrence - two other passengers on board the ill-fated car - names mentioned by P.W.2 in witness box - not produced on behalf of claimants - Seven appellants (legal representatives) filed claim petition - rejected - hence appeal. **(Para - 1, 2, 3, 16, 39)**

HELD:-Tribunal's findings on Issues 1, 2, and 3 cannot be sustained. Not to disturb findings of Tribunal on Issue Nos. 4 and 5 that has been inquired into by Tribunal, holding both vehicles to be validly insured on the date of accident. Finding on Issue 6 is bad due to vitiated findings. Finding on Issue No. 7 is perverse as it does not attribute any income to deceased. Deceased's oral testimony and partnership deed show that he supported three children, parents, and a brother. Award set aside award and Claim remitted to competent Tribunal for de novo inquiry/trial. Tribunal will examine the claim, considering all evidence necessary to determine claimants' entitlement to compensation within six months of receiving certified copy of judgment. **(Para - 47, 48, 49, 50)**

Appeal partly allowed. (E-7)

LIST OF CASES CITED:-

1. Rajwati @ Rajjo & ors. Vs U.I.I. Co. Ltd. & ors., 2022 SCC Online SC 1699

2. Nagindas Ramdas Vs Dalpatram Ichharam @ Brijram & ors., (1974) 1 SCC 242

3. Sri. S.K. Singh Vs Sri. P.A. Nair & ors. , 2019 (4) TAC 920: 2018 SCC Online Cal 5308

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

This is a claimants' appeal, arising out of the judgment and award passed by Mr. Naresh Singh, the then Motor Accident Claims Tribunal/Special Judge (Dacoity Affected Areas) Etawah dated 31.07.2003, rejecting the claim petition.

2. The seven appellants here are the legal representatives of the late Dinesh Kumar Tripathi, who died in a motor accident. A detailed reference to each of the seven appellants before this Court shall be made a little later in this judgment, disclosing their relationship to the deceased and other matters.

3. The facts giving rise to Motor Accident Claims Petition No. 127 of 1997 are that on the 29th of May, 1996, at about half past nine in the evening hours, Dinesh Kumar Tripathi was riding Maruti Car bearing registration No. UP 78L/9280, belonging to a friend of his. The car was proceeding from Kanpur to Agra. As the car reached Village Kanaita within the local limits of Police Station Matsena, District Firozabad, a truck bearing registration No. UP 83/9831 approached from the opposite direction and hit the Maruti Car head-on. As a result of the impact, Dinesh Kumar Tripathi died, whereas all other occupants in the car were badly injured.

4. A First Information Report was lodged with the Police, giving rise to Crime

No. 88 of 1996, Police Station Matsena, District Firozabad. Later on, Section 304A of the Indian Penal Code, 1860 was added. According to the claimants, the First Information Report was lodged against the driver of truck bearing registration No. UP 83/9831. It is the further case of the claimant-appellants that at the time of the accident, the driver of the Maruti Car was proceeding from Kanpur to Agra at a controlled speed, whereas the offending truck approached from the Agra end of the road at a high speed, driven negligently. The driver of the offending truck did not bear in mind the other vehicles moving on the road and hit the ill-fated car, moving to the wrong side of the road. The injured in the accident were rushed to the District Hospital, Firozabad by members of the public who had gathered at the site of accident. The driver of the offending truck, abandoned his vehicle at the site of the accident and fled away.

5. The claimant-appellants say that at the time of the accident, Dinesh Kumar Tripathi was a healthy man. He was gainfully employed at Kanpur in the business of property dealing and transport. He provided for all members of the family out of the profits of his business and all of them were dependent upon him. His death in the accident has destituted the family, leaving them no means of sustenance. Dinesh Kumar Tripathi's wife had predeceased him, leaving behind three minor children. With the passing away of Tripathi, the minors have been utterly orphaned. They were provided for by the deceased, who would look after them. There is, according to the claimants, no means of sustenance for the minors in future. The claimant-appellants also say that Tripathi's brothers, his father and mother were all dependent upon him. The

deceased would provide for all the claimant-appellants. His demise has plunged the family into a financial crisis. Their future has turned bleak. Tripathi's death has caused the claimants to suffer physically, mentally and economically, a loss that is irreparable.

6. It is averred in the claim petition that the drivers of both the vehicles were not individually vigilant. The driver of the offending truck was driving at an uncontrolled speed, whose negligence caused the unfortunate accident. The claimants demanded a total compensation of ₹20,60,000/- under Section 166 of the Motor Vehicles Act, 19881 and a sum of ₹4,62,833.34 under Section 163A, claiming that the sum of compensation be ordered to be paid with interest at the rate of 18% per annum from the date of institution of the claim until realisation.

7. Devendra Singh Yadav, opposite party No. 1 to the claim petition and respondent No. 1 to this appeal, is the owner of the offending truck. He shall hereinafter be called 'the owner'. The New India Assurance Company Limited, Station Road, Etawah through the Branch Manager are the insurers of the offending truck. They shall hereinafter be called 'the insurers'. The insurers are impleaded as opposite party No. 2 to the claim petition and respondent No. 2 to the appeal.

8. Ashok Bhatia, son of Kishan Lal Bhatia, is the owner of the ill-fated Maruti Car. He has been impleaded as opposite party No. 3 to the claim petition and respondent No. 3 to this appeal. He shall hereinafter be called 'the car owner'. The United India Insurance Company Limited, Branch Office, Devi Road, Mainpuri through its Branch Manager are the

insurers of the ill-fated car. They shall hereinafter be referred to as 'the Insurance Company'.

9. The seven claimant-appellants to this appeal shall be hereinafter called 'the claimants', unless the context necessitates an individual or different reference.

10. A written statement was filed on behalf of the owner bearing Paper No. 25. The owner generally denied allegations in the claim petition, except that he was the owner of the offending truck and that the offending vehicle was insured with the insurers. In the additional pleas, it was averred that the driver of the offending truck was operating it at a slow speed, in accordance with the traffic rules. The accident happened entirely on account of the negligence of the ill-fated car's driver, who was operating the vehicle at a high speed and negligently. The truck was plying with all valid documents, permitting it to move on the road. The truck driver was driving it at a controlled speed. It is averred that there are no particulars pleaded, giving out the deceased's income, age and business. It was also pleaded that no documentary evidence has been produced in support of the claimants' case. According to the owner, they were not liable to compensate the claimants, and, if at all, the offending vehicle be found involved and the owner liable, it is the insurers who would have to bear the burden, inasmuch the offending truck was insured under a policy bearing number 313200205244 from 07.04.1996 to 06.04.1997-98. It was a comprehensive cover.

11. A separate written statement was filed on behalf of the insurers, bearing

Paper No. 14. The insurers took an objection that the claim petition under Sections 163A and 166 of the Act of 1988 was not maintainable together. It is the insurers' further case that the deceased was said to be aged 28 years and his income ₹4,000/- per mensem. According to the insurers, these facts are incorrect and concocted in order to bolster the claim. The deceased did not do business of property dealing or transport, nor did he have a monthly income of ₹4,000/-, as alleged. It was also said that burden to prove the deceased's income lay upon the claimants. It was also pleaded that if the claimants did not succeed in establishing the deceased's age, as alleged, they would not be entitled to compensation. It was pleaded in the alternative that if the petitioner produced evidence, oral or documentary in support of the deceased's income, the insurers reserve their right to file an additional written statement and produce evidence in rebuttal. The insurers came up with a plea that the claimants were not the legal representatives of the deceased. Therefore, they had no right to institute the present claim. The burden to prove that the claimants were, indeed, the deceased's legal representatives lay upon them. According to the insurers, on 29.05.1996, at half past nine at the Etawah-Agra Road, between Kaneta and Goda, no accident took place nor the one subject matter of the claim. It is also averred that on 29.05.1996, the deceased was not moving in his friend's Maruti Car from Kanpur to Agra, nor did the offending truck hit the car. The accident subject matter of the claim petition never happened. Therefore, the insurers have no liability in the matter. In the alternative, it is pleaded that on the date of the accident, the driver of the ill-fated car was driving it callously and negligently. The accident happened because of negligence of the ill-

fated car's driver, not the offending truck's driver. The insurers would, therefore, not be liable. The insurers further on said that if in the judgment of the Tribunal, the accident happened because of the negligence of both the drivers, liability to make good compensation would not entirely be that of the insurers. Instead, the accident being caused by contributory negligence of both drivers, the insurers and the Insurance Company would both be liable.

12. It is next pleaded by the insurers that the claimants as well as the car owner would have to prove that the drivers of both vehicles held valid and legal driving licenses, and that both were not inebriated. If the aforesaid facts are not established by the claimants, the owner and the insurers would not be liable. The existence of a route permit with the offending truck was also denied and, on that basis, the insurers' liability. It was also pleaded that in paragraph No. 17 of the claim petition, the cover note number and its validity is mentioned along with the registration number of the offending truck, but no particulars of the policy have been given. In view of these state of pleadings, the insurers deny their liability. If the owner later on file the policy, the same would be got verified, and, which, if verified, the insurers would accept their liability. The insurers also pleaded that in the event collusion was discovered between the owner and the claimants, the insurers are entitled to protection under Section 170 of the Act of 1988.

13. A plea was also raised that if the premium on the date of the accident was not found deposited by the owner, it would be regarded as a violation of Section 64VB of the Insurance Act, 19382 and the

insurers not liable to indemnify. It is also the insurers' case that there has been no notice or information to the insurers about the accident, which is required by the conditions of the policy. Therefore, it is a violation of the policy, discharging the insurers of their obligation. There is also a plea to the effect that it is asserted that apart from the deceased Tripathi, there are others said to be injured. But, in the claim petition, the names of those persons have not been disclosed. It is, therefore, to be regarded that no one else sustained injuries. If any evidence regarding the injuries sustained by others is produced, it ought to be regarded as got up and based on afterthought. It is then asserted that the claim being one both under Sections 163 and 166 of the Act of 1988, is misconceived.

14. A separate written statement was filed on behalf of the car owner, Paper No. 11३. After a general denial of the facts asserted in paragraph Nos. 1 to 23 of the claim petition, in the additional pleas, it is asserted that the ill-fated car was plying with all valid documents. It was not being driven negligently, but, that the offending truck was driven at a high speed and callously, resulting in the accident. The compensation claimed is excessive, both on facts and law. It is pleaded in paragraph No. 29 that the driver of the ill-fated car died in the accident. The liability to pay compensation lies with the owner and the insurers. The claimants are not entitled to compensation.

15. A written statement, Paper No. 24३ was filed on behalf of the Insurance Company. Paragraph Nos. 1 to 23 of the claim petition are generally denied in a solitary paragraph, and in the additional pleas, it is averred that instituting a claim

both under Sections 163A and 166 of the Act of 1988, it is against the law. The compensation claimed is exaggerated. The owner has not given any information regarding the accident to the Insurance Company.

16. A perusal of the claim petition would show that there was no negligence by the driver of the ill-fated car, and, therefore, the Insurance Company is not liable. The averments in the claim petition show that the accident happened due to the truck driver's negligence, and, therefore, if, in the Court's opinion, the claimants are entitled to compensation, the liability would lie with the owner and the insurers; not the Insurance Company. When the accident happened, the driver of the ill-fated car did not hold a valid driving license. The claimants and the owner have to establish that at the time of the accident, the driver of the ill-fated car was not inebriated, and that he knew how to drive a Maruti Car. In the event the claimants and the owner are not able to prove the aforesaid facts, the Insurance Company would not be liable to compensate. The claim petition is bad for non-joinder, inasmuch as the driver of the ill-fated car has not been pleaded as a party. The car owner and the claimants are obliged to prove that on the date and time of the accident, the ill-fated car was validly registered, and plying on a valid permit and fitness certificate. If the aforesaid facts are not established by the owner and the claimants, the Insurance Company would not be liable. The facts disclosed in the petition would show that the ill-fated car was plying for hire and carrying passengers. It had, on board, passengers in excess of the prescribed seating capacity. For all these reasons, a violation of the terms of the policy is alleged. Tripathi's age

at the time of his death was not 28 years, nor did he do any kind of business. He did not support the claimants in any manner and his death has not led to any financial difficulties for the claimants. The claimants have disclosed their ages far less than their years, and a case set up to claim excessive compensation. The claimants have demanded exaggerated sums of money under different heads towards compensation, to which they are not entitled. The ill-fated car was not insured with the Insurance Company. Therefore, if the owner of the ill-fated car and the claimants establish these facts, the Insurance Company is entitled to the protection of Section 64VB of the Act of 1938.

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

(i) Whether on 29.05.1996 at about 09:30 p.m. at Mughal Road, on the Etawah-Agra Highway, between Kanata and Goda, truck No. UP 83/9831 operated by its driver at a high speed and negligently, caused the accident, in consequence whereof, Dinesh Kumar Tripathi sustained injuries, to which he succumbed?

(ii) Whether on the aforesaid date, time and place on account of the driver of Maruti Car No. UP 78/L 9280, driving it at a high speed and negligently, the accident happened, leading Dinesh Kumar Tripathi to sustain injuries, resulting in his death?

(iii) Whether on the aforesaid date, time and place, the accident involving truck No. UP 83/9831 and Car No. UP 78/L9280 happened due to contributory negligence of the drivers?

(iv) Whether on the date and time of the accident truck No. UP 83/9381 was

insured with opposite party No. 2, the New India Assurance Company Limited ?

(v) Whether on the date and time of the accident Maruti Car No. UP 78/L 9280 was insured with opposite party No. 4, the United Insurance Company Limited ?

(vi) Whether on the date and time of the accident the drivers of Truck No. UP 83/L9831 and Maruti Car No. UP 78/L 9280 held valid driving licenses ?

(vii) Whether the claimants are entitled to receive any compensation? If so, how much and from which opposite party?

18. On behalf of the claimants, Jyoti Tripathi was examined as P.W.1 and Akhilesh Tripathi as P.W.2. In their documentary evidence, the claimants produced, through a list bearing Paper No. 67π a certified copy of the First Information Report, a certified copy of the written report, a certified copy of the site-plan, a certified copy of the postmortem relating to the deceased, a certified copy of the panchayatnama, a certified copy of the charge-sheet filed in the relevant crime, and a certified copy of the technical inspection report relating to the offending truck.

19. The claimants further produced, through a list bearing Paper No. 49π, a copy of the order dated 05.10.1996 passed by the Principal Judge, Family Court, Kanpur Nagar in Case No. 78/70/96 under Section 7 of the Guardian and Wards Act, 1890, appointing the claimant, Akhilesh Tripathi, brother of the deceased, guardian of the person and property of Kumari Jyoti Tripathi, Aniruddh Tripathi and Saurabh Tripathi; a photostat copy of the High School certificate and mark-sheet issued by the U.P. Board of High School and Intermediate Education relating to the deceased and showing his date of birth, a photostat copy of the death certificate

relating to Sushma Tripathi, wife of the deceased, a certified copy of the death certificate relating to the claimant, Roopnarayan Tripathi, father of the deceased, showing his date of death to be 27.10.2001. A notarized copy of the partnership deed between five partners, including the owner Ashok Kumar Bhatia and the deceased, Dinesh Kumar Tripathi, apart from three other partners, constituting themselves into a partnership firm under the name and style of Messrs East-West Carrying Corporation was filed, besides a notarized copy of an agreement to sell dated 17.12.1994 executed in favour of the deceased, Dinesh Kumar Tripathi by Smt. Devrati Rai, widow of Ram Prasad Rai, covenanting to sell Plot No. 85, Block K, Scheme I, Kakadev, Kanpur Nagar, admeasuring 356 square yards, a notarized copy of a memo dated 07.05.1995, showing receipt of earnest for the purchase of Plot No. 745, Block W/2, Scheme No. - 2nd, Juhi, Kanpur executed by Harpal Singh son of Roopnarayan Tripathi in favour of Dinesh Kumar Tripathi and a similar memorandum of receipt of earnest for another property dated 09.02.1996, executed by its owner, and, a photostat copy of Form No. 54 attested by the Project Director, District Rural Development Agency, Kanpur relating to the accident, a photostat copy of the certificate of registration relating to the ill-fated car, and a copy of the insurance certificate relating to that car.

20. Along with still another list of documents bearing Paper No. 54π, a certified copy of the judgment and award passed by the Motor Accident Claims Tribunal/District Judge, Kanpur Nagar dated 21.08.2000 in M.A.C. Case No. 90 of 1997 was filed.

21. The owner, the insurers, the car owner and the Insurance Company have not led any oral evidence. The owner has filed, through a list of documents bearing number 27π, four documents - the first being a notarized copy of the registration certificate relating to the offending truck, the second, a notarized copy of the transport permit relating to the said truck, the third, a notarized copy of the insurance policy covering the truck, and the fourth, a notarized photostat copy of the truck driver's driving license. The insurers produced their documentary evidence vide list of documents bearing Paper No. 64π. They filed a copy of the insurance policy and the driving license of the offending truck's driver and a photostat copy of the insurance policy.

22. The Tribunal has decided Issue Nos. 1, 2 and 3 together, and it was held that on the basis of the evidence on record, it is not proved that the accident giving rise to the crime ever happened. Thus, Issue Nos. 1, 2 and 3 were answered against the claimants. Issue Nos. 4 and 5 were answered together in the manner that both the offending truck and the ill-fated car were validly insured on the date and time of the accident. Issue No. 6 was decided, holding that at the time of the accident, neither the driver of the truck nor that of the ill-fated car held a valid driving license. Issue No. 7 was decided by the Tribunal in the manner that going by the contradictory evidence on record, it was not possible to determine the deceased's income.

23. In consequence of these findings, the claim petition was dismissed by the impugned judgment and award passed by the Tribunal.

24. Aggrieved, this appeal has been preferred by claimants.

25. Heard Mr. Naushad Siddiqui, Advocate holding brief of Mr. S.D. Singh Jadaun, learned Counsel for the claimants, Mr. B.C. Naik, learned Counsel for the insurers, Mr. Shiv Nath Singh, learned Counsel for the car owner and Mr. Nagendra Kumar Srivastava, learned Counsel appearing on behalf of the Insurance Company. No one appears on behalf of the owner.

26. It is argued by the learned Counsel for the claimants that while determining Issue Nos. 1, 2 and 3, the Tribunal has approached evidence from a manifestly wrong vantage. The learned Judge has tried to pick holes in the evidence by saying that two other passengers on board car, Sub-Inspector, Gajendra Singh and Assistant Prosecuting Officer, Vikram Singh were not called to the witness box to prove the accident. The First Information Report related to the accident was lodged by one Faguni Ram. The claimants did not produce Faguni Ram to establish the factum of accident. The First Information Report was lodged on the next day following the accident, whereas a panchayatnama was drawn up a day before, under orders of the Superintendent of Police. It is argued by the learned Counsel for the claimants that the learned Trial Judge has committed a manifest error of law, ignoring the consistent authority of the Supreme Court, which holds that the Tribunal ought not to decide a Motor Accident Claim as if it were a criminal trial, and, the claimant, the prosecution. The Act of 1988 is a social welfare legislation and must receive a liberal construction, consistent with its objects. The Tribunal has placed burden upon the

claimants to prove the factum of accident and disbelieved it, adopting a hypertechnical approach. It is particularly submitted that the Tribunal has ignored from consideration the judgment and award passed in Motor Accident Claim Petition No. 90 of 1997, Vikram Singh v. Prem Shankar and another, decided on 21.08.2000 by Motor Accident Claims Tribunal, Kanpur Nagar. A certified copy of this award was duly brought on record before the Tribunal prior to the impugned judgment, but the Tribunal, despite noticing it as one of the documents, has not at all considered it while returning findings on Issue Nos. 1, 2 and 3.

27. The insurers, on the other hand, who have contested the claimant's appeal submitted through learned Counsel that the factum of accident has to be established by the claimants before the Tribunal by oral, documentary and circumstantial evidence. The claimants have relied upon the judgment of the Tribunal at Kanpur Nagar in Motor Accident Claims Petition No. 90 of 1997 instituted by an injured victim of the same accident, where the factum of accident was accepted by the Tribunal. It is urged that the judgment of the other Tribunal is not admissible in evidence to prove the accident before the Tribunal, as rightly held.

28. This Court has keenly considered the submissions of learned Counsel for the appearing parties and perused the findings of the Tribunal on Issue Nos. 1, 2 and 3.

29. The Tribunal, going by the pleadings of parties, has remarked that whereas the claimants say that the accident happened on 29.05.1996 at 09:30 p.m., there being little dispute over the place of accident, the owner, the insurers and the Insurance Company in their written

statement have denied the *factum* of accident.

30. In view of the aforesaid issue between parties that the Tribunal has noticed, it is concluded that burden lay upon the claimants to establish the factum of accident. The Tribunal has then gone on to say that according to the claimants' case, apart from the deceased, there were others on board the ill-fated car, but the claimants have not disclosed the name and address of the other passengers. The claimants have produced P.W.1 Jyoti Tripathi, who is not an eye-witness of the accident and her evidence is hearsay. The other witness, P.W.2, Akhilesh Tripathi, too did not witness the accident, and his testimony is, therefore, hearsay as well. The Tribunal has, therefore, discarded the testimony of both the witnesses produced by the claimants. It is remarked that P.W.2 Akhilesh Tripathi has said in his examination-in-chief that apart from the deceased, S.I. Gajendra Singh and A.P.O. Vikram Singh were also travelling on board the ill-fated car. There is no reason why Vikram Singh has not been examined as a witness, according to the Tribunal. It is also observed that the claimants have not given any evidence to the effect that it was not reasonably practicable to produce Gajendra Singh and Vikram Singh in Court. The persons last mentioned are eye-witnesses, and the Tribunal has remarked that by withholding the testimony of these witnesses, the claimants have prevented truth from unfolding before it. It has also been remarked that there is no testimony on behalf of the claimants to show as to who was driving the ill-fated car. The documentary evidence that has been produced shows that there is a certified copy of the First Information Report registered in relation to the accident. It was

lodged by one Faguni Ram. The claimants have not produced Faguni Ram either in the witness box. The remark of the Tribunal is that it is evident, therefore, that the claimants have not produced any eye-witness of the accident.

31. Then, there are some very odd observations by the Tribunal. The learned Judge has observed that a certified copy of the postmortem report relating to the deceased's autopsy has been filed, which shows that the autopsy was done on 30.05.1996 at 02:35 p.m. A copy of the panchayatnama has been filed, which shows that it was done on 29.05.1996 at 03:10 a.m., whereas the First Information Report was lodged on 30.05.1996 at quarter past midnight. It is observed that there is a contradiction in the First Information Report, when it was registered at the police station and the inquest report. It is also remarked that the panchayatnama carries an order of the Superintendent of Police, directing the Station House Officer, Police Station Bhatsena to take necessary action. The date mentioned below the signatures of the Superintendent of Police is 01.06.1996, which is a day after the *panchayatnama* was actually drawn up. To top it all is a remark by the Tribunal, that the claimants have not at all clarified as to what were the circumstances that the *panchayatnama* was drawn up a day prior to the S.P's. order.

32. This Court must say that so far as the factum of the accident is concerned, it has been disbelieved by the Tribunal on account of some variation of the date and time of registration of the First Information Report shown in the check F.I.R., the autopsy report and the other police papers, besides the fact that the S.P's. orders on the panchayatnama are of a later day than the inquest proceedings. These are not at all

matters which ought to have weighed with the Tribunal in disbelieving the factum of accident. The latter remarks of the Tribunal, picking holes in the claimants' case due to variation of the time of registration of the F.I.R., comparing it with other police papers, is reminiscent of the judgment of a Criminal Court in yesteryears, doubting the prosecution on the basis of ill-matching entries of date, time etc. in various police papers, such as the check F.I.R., the autopsy report and the inquest report. That could never have been the approach of the Motor Accident Claims Tribunal, where the jurisdiction is not plain adversarial, but substantially inquisitorial.

33. In this connection, reference may be made to the judgment of the Supreme Court in **Rajwati alias Rajjo and others v. United India Insurance Company Limited and others**³. In *Rajwati (supra)*, it has been held :

18. Reference in this connection may also be made to the observations made by this Court in the case of *Sunita v. Rajasthan State Road Transport Corporation**, wherein it was observed as under:—
“It is thus well settled that in motor accident claim cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place by reason of negligence of the driver of a motor vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of preponderance of probability and not the strict standard of proof beyond all

reasonable doubt which is followed in criminal cases.”

19. Similarly, in the case of *Kusum Lata v. Satbir*[#], this Court observed that it is well known that in a case relating to motor accident claims, the claimants are not required to prove the case as it is required to be done in a criminal trial. The Court must keep this distinction in mind.

34. But this is about one part of the Tribunal's reasoning, that is to say, the one where it has gone on a tangent to criticize the claimants' evidence by fishing out contradictions in police papers relating to the crime concerning the accident. It still leaves to be judged if the claimants, by any evidence aliunde, have established the factum of accident. It is true that two witnesses produced by the claimants are not eye-witnesses of the occurrence. It is also true that the two other passengers on board the ill-fated car, whose names have been mentioned by P.W.2 Akhilesh Tripathi in the witness box, were not produced on behalf of the claimants. They could have done that, but for reasons best known to them, did not do so. It is also true that the first informant, Faguni Ram, who was apparently an eye-witness of the accident, was also not produced in the witness box on behalf of the claimants. These flaws are, no doubt, there in the claimants' testimony, and the Tribunal is not wrong in pointing these out. The question that still remains is : Whether the factum of the accident is not otherwise established? It is a well-reputed principle of law that admission in pleadings is good proof of a fact in issue, let alone a relevant fact. No doubt, the factum of accident is a fact in issue, if one were to employ the parlance of the Indian Evidence Act, 1872. The owner of the offending truck has averred in paragraph No. 8 of the written statement, Paper No. 25ख :

8- यह कि कथित घटना वाद पत्र के अनुसार सही नहीं दर्शाई गयी है। उत्तरदाता का चालक सड़क नियमों का पालन करते हुए धीमी गति से वाहन चला रहा था। सम्पूर्ण घटना मारुती कार — यू.पी.-78एल/9280 के चालक की तेजी व लापरवाही से चलाने के कारण घटित हुई है। ट्रक चालक की दुर्घटना में कोई गलती नहीं थी।

35. In the written statement filed on behalf of the insurers, while it is denied in paragraph No. 7 that the accident, on the date, time and place alleged, never happened between the offending truck and the ill-fated car, the alternate plea in paragraph No. 8 of the written statement reads :

यह की मारुती स्वामी तथा याचीगण को यह भी साबित करना है की कथित दुर्घटना के समय व दिन मारुती कार नं०- यू.पी०-78एल०/9280 बैद्य रजिस्ट्रेशन, सही रूपसे परमिट व फिटनेश आदि से चल रही थी, यदि उपरोक्त तथ्य वाहन स्वामी व याचीगण साबित नहीं कर पाते हैं तो प्रतिवादी उत्तरदाता की कोई जिम्मेदारी प्रतिकर अदा करने की नहीं है।

36. Even if the plea in the alternative taken by the insurers were to be discounted, there is no case positively proved or evidence about it offered on behalf of the insurers that there was any kind of collusion between the owner and the claimants. Therefore, in the absence of a finding of collusion between the owner and the claimants, the plenary admission by the owner in his written statement, that the accident did happen between the offending truck and the ill-fated car at the date, time and place alleged by the claimants is good proof of the fact.

37. Admission in pleadings stands on a much higher foot than admission in evidence. In this connection, reference may be made to the decision of the Supreme Court in **Nagindas Ramdas v. Dalpatram Ichharam alias Brijram and others**⁴. In

paragraph No. 27 of the report in Naginadas, it is observed :

27. Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.

38. Be it noted, that the admission here is in the owner's written statement. The primary liability to pay compensation is that of the owner. The insurers step in, because they have entered into a contract to indemnify the owner in terms of the policy. Unless it be shown and proved that there was a collusion between the claimants and the owner, the insurers cannot be heard against the owners' admission about the factum of accident.

39. Quite apart from the fact that the factum of accident is proved by the owner's admission, and not very seriously disputed in their pleadings by the insurers either, in fact, admitted by them in the alternative plea, there are other relevant documents to establish that the accident did happen. These are the police papers, that is to say, the first information report, the postmortem report, the panchayatnama and the site-plan. The Tribunal has looked into some of these documents, but disbelieved them, as

already remarked, by putting them to scrutiny by the criminal standard. What, indeed, appears from a perusal of the police papers is the fact that the accident did happen between the offending truck and the ill-fated car, where the number of both vehicles is disclosed, as also the fact that the car and the truck were lying abandoned at the site of the accident. Three persons were reported seriously injured. No doubt, the F.I.R. does not name the deceased as one of the victims, but, after a full-fledged investigation, the Police have charge-sheeted the driver of the offending truck vide charge-sheet dated 30.11.1996, that is on record.

40. It is also not in dispute that the criminal case registered against the driver of the offending truck was converted to one under Section 304-A of the Penal Code, after the deceased passed away. Neither the insurers nor the owners have come up with a case that the aforesaid case was registered, investigated and the driver charge-sheeted in relation to some accident, where the deceased was not the victim. The insurers could have summoned the records of the criminal case to show, at least by one important piece of evidence of theirs, who was/were the victim(s) who died in the accident subject matter of the relevant crime. No doubt, it is true that the proceedings before the Criminal Court, or for that matter, investigation by the Police, does not bind the Tribunal at all, but the proceedings, during investigation by the Police and the Criminal Court, are relevant evidence for the Tribunal to act upon. The Tribunal has not at all considered the documentary evidence relating to the criminal case in that perspective. Instead, it has gone on to find petty faults with the police papers and investigation to

disbelieve the factum of accident. That approach is clearly flawed, as already said.

41. The approach of the Claims Tribunal, far from that of a Criminal Court holding a trial, has to be very different. In ways more than one, it has to be less adversarial and more inquisitorial. The Tribunal is not always to act as a Court of civil jurisdiction trying an action according to the provisions of the Code of Civil Procedure, 1908. The jurisdiction of the Tribunal is to hold an inquiry into the accident and determine just compensation payable to the injured, or the legal representatives of the deceased, as the case may be.

42. The provisions of the Act governing proceedings before the Tribunal in a claim petition are specified, particularly by Sections 168 and 169 of the Act of 1988. These read :

168. Award of the Claims Tribunal.—

(1) On receipt of an application for compensation made under section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:

Provided that where such application makes a claim for compensation under

section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X.

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned

expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct.

169. Procedure and powers of Claims Tribunals.—(1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.

43. The question as to what should be the approach of the Tribunal in deciding a motor accident claim, fell for consideration before a Division Bench of the Calcutta High Court in **Sri. Srikrishna Kant Singh v. Sri. Parameswar Achutanan Nair and others**⁵. The subject received the most elaborate treatment at the hands of their Lordships in **Srikrishna Kant Singh (supra)**. Though their Lordships took into consideration for some part of the reasoning, not all, the provisions of the West Bengal Motor Vehicle Rules, 1989⁶, the Uttar Pradesh Motor Vehicle Rules, 1987 framed under the Act of 1988, that came into force much after the accident were, nevertheless, rules governing the procedure when the motor accident claim here was inquired into or tried by the Tribunal. The Rules of 1998 being essentially rules of procedure governing the Tribunal constituted under the Act of 1988, would govern the procedure by which the claim would be inquired into by the Tribunal, when it came up. There is much similarity between the Bengal Rules and the Rules of 1998, leading this Court to safely depend upon the observations of their Lordships regarding the manner in which a claim under the Act of 1988 has to be inquired into by the Tribunal. In *Srikrishna Kant Singh*, the question was posited by the Court thus :

23. However, that brings me to the overwhelming question. Is a proceeding under Section 166 of the Motor Vehicles Act, 1988 an adversarial proceeding? To answer this, I am afraid, I will have to take eternity by the hand and pause while the Court looks at the provisions of the Motor Vehicles Act, 1988, the West Bengal Motor Vehicles Rules, 1989 and some authoritative precedents.

44. There is, after an elaborate reference to the provisions of the Act of 1998 and the Bengal Rules, the following remarks of their Lordships :

29. The fact that the tribunals established under Section 165 of the Act of 1988 are manned by the members of the subordinate judiciary does not change it into a Court rather than a statutory tribunal discharging statutory functions of holding an inquiry into just compensation and who is required to pay it. Similarly, the provisions in Rule 342 and Rule 343 making certain provisions of the Code of Civil Procedure directly applicable to the proceedings before the Learned Tribunal, and where there is no provision made for a certain thing in either the Act or the Rules, making the provisions of the Code applicable thereto, will not change the Learned Tribunal into a civil court.

30. This becomes clearer when the provisions of Section 169 of the Act of 1988 are considered. Sub-section (2) makes it amply clear that the Tribunal shall have all the powers of a civil court for specified and other purposes as may be prescribed and shall only be “deemed to be a civil court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure”, but not a “court” for the purposes of the Code of Civil Procedure. That is why it was required to specify the provisions under the Code of Civil Procedure which apply to proceedings before such Tribunal even while constituting it as a special tribunal. The specified and other purposes, are clearly the determination of just compensation and who shall be liable to pay it.

31. Therefore, it is evident that a “Claims Tribunal” established under Section 165 of the Motor Vehicles Act, 1988 is not a civil court though it has many

of the powers of a civil court and many of the provisions of the Code of Civil Procedure apply to it and this Court holds accordingly.

32. Once the statutory scheme read with the rules made to give effect to that scheme are considered, in the light of my above finding it is evident that the mode of proceeding before this special tribunal whose function is to inquire into and “adjudicate claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both”, is actually to hold an inquiry into the claim and make an award determining the amount of compensation which appears to it to be just and specify the person or persons to whom compensation shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be.

33. Once this conclusion is reached, it is irresistible that strict rules of adversarial action, with which the Learned Members of such a Tribunal are very familiar, due to the qualifications prescribed in Section 165(3) of the Act of 1988, would not apply to such a Tribunal and it has been empowered to act inquisitorially unless expressly forbidden. Once it is accepted that the scheme of the statute and the rules, for the purposes of determining compensation, fixation of liability, and determining who is to pay what to whom, envisages an inquisitorial procedure, the requirements of adversarial proceedings take a back-seat, in the interests of the quest for truth.

.....

35. I draw confidence from the Judgement of Mayur Arora v. Amit @Pange, reported in (2011) 1 TAC 78 where the Hon'ble High Court of Delhi, while interpreting the above statutory

provisions and the corresponding and substantially in pari materia provisions of the Motor Vehicles Rules of Delhi, in the light of the judgment of the Hon'ble Supreme Court in the case of Jai Prakash v. National Insurance Company reported in (2010) 2 SCC 607 has been pleased to hold as follows:—

“The aforesaid directions to the Tribunals are without prejudice to the discretion of each Tribunal to follow such summary procedure as it deems fit as provided under Section 169 of the Act. Many Tribunals instead of holding an inquiry into the claim by following suitable summary procedure, as mandated by Sections 168 and 169 of the Act, tend to conduct motor accident cases like regular civil suits. This should be avoided. The Tribunal shall take an active role in deciding and expeditious disposal of the applications for compensation and make effective use of Section 165 of the Evidence Act, 1872, to determine the just compensation.”

36. However, it should be noted that the said portion of the judgement in the case of Mayur Arora (supra) was a direct quotation from the case of Jai Prakash(supra) where the Hon'ble Supreme Court was concerned with accidents in respect of which proceedings were started under Sections 158(6) and 166(4) of the Act of 1988 and the directions issued to the Learned Tribunals were in respect of proceedings thereunder, which were stated to be without prejudice to the duty of the Learned Tribunal in other cases, where too the duty to hold an inquiry instead of proceeding as if it was a regular civil suit, was mandated by the Hon'ble Supreme Court.

37. Again, one of the propositions of law laid down by the Hon'ble Supreme Court in the case of United India Insurance

Co. Ltd. v. Shila Datta, reported in 2011 ACJ 2729 (SC) is that

“Though the Tribunal adjudicates a claim and determines the compensation it does not do so as in an adversarial litigation”.

(emphasis supplied)

These findings are of immense importance to the case at hand, as shall appear from the records of the case brought before this Court, and the facts apparent therefrom and the submissions made.

45. Seen thus, the fault-picking approach of the Tribunal in this case, where date and time in the police papers have been juxtaposed for fishing out the slightest of variation to hold against the claimants, cannot be countenanced, considering the inquisitorial duties of the Tribunal, while determining the compensation in a motor accident compensation claim. This Court would think that Rule 215 of the Rules of 1998 are particularly relevant. Rule 215 reads :

215. Power of examination.— The Claims Tribunal may if it thinks necessary, examine any person likely to be able to give information relating to the injury irrespective of the fact whether such person has been or is to be called as a witness or not.

46. In the present case, where the Tribunal thought that there were two other men on board the ill-fated vehicle, who had sustained injuries in the accident, but were not produced as witnesses by the claimants, ought to have invoked its powers under Rule 215 of the Rules of 1998 to summon at least one of them. Their names have figured in the impugned judgment, as Gajendra Singh and Vikram Singh. One of

them was a Sub-Inspector of Police and the other, an Assistant Prosecuting Officer. One of these victims of the accident and a survivor instituted a claim petition before the Tribunal at Kanpur Nagar, and was awarded compensation, holding the accident to be proved and the injuries sustained by him established. The judgment of the Tribunal at Kanpur Nagar was produced before the learned Judge presiding the Tribunal in this case. While the judgment of the Kanpur Nagar Tribunal may not, as such, be relevant evidence, it was certainly relevant for the Tribunal to have acted under Rule 215 of the Rules of 1998 and summoned Vikram Singh as a witness while inquiring/trying the present claim. Instead, each of the two witnesses produced by the claimants were held by the Tribunal to be of no credit, as speakers of hearsay. The approach of the Tribunal, indeed, is far from what the statute requires it to be.

47. In this view of the matter, the findings of the Tribunal on Issue Nos. 1, 2 and 3 cannot be sustained. There is no occasion to disturb the findings of the Tribunal on Issue Nos. 4 and 5 that have been inquired into by the Tribunal, holding both vehicles to be validly insured on the date of the accident. However, for all the reasons that we have held, the Tribunal's findings on Issue Nos. 1, 2 and 3 to be vitiated, the finding on Issue No. 6 is also held bad.

48. The finding on Issue No. 7 not crediting the deceased with any income, whatsoever, is perverse.

49. There is on record oral testimony and a partnership deed about the deceased's business, which mention his partners. In any case, he was supporting three of his

children and parents, besides a brother. Looking to the deceased's age, to think that he would not have any income is, in our considered opinion, a conclusion which no reasonable person can draw. We do not wish to say anything more on this issue, considering the fact that we propose to set aside the impugned award and remit the claim to the Tribunal now competent for a de novo inquiry/trial.

50. In the result, this appeal **succeeds** and shall stand **allowed in part**. The impugned judgment and award passed by the Motor Accident Claim Tribunal, Etawah is **set aside**, with a remit of the matter to the Motor Accident Claims Tribunal, Etawah, now competent under the law to inquire into the claim. Motor Accident Claim Petition No. 127 of 1997 shall, therefore, stand restored to the file of the competent Tribunal, which shall inquire into the claim, taking all such evidence as may be necessary to effectively determine the claimants' entitlement to compensation, if any. The evidence already on record too shall be considered. The claim petition shall be heard and decided within a period of six months of the date of receipt of a certified copy of this judgment, in accordance with law, bearing in mind the guidance here.

51. There shall be no order as to costs.

(2023) 11 ILRA 448

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 24.11.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Habeas Corpus Writ Petition No. 137 of 2022

**Master Vedant Mishra through his father
Amritanshu Mishra ...Petitioner**

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Anand Dubey

Counsel for the Respondents:

G.A., Anuj Pandey

A. Criminal Law -Constitution of India, 1950- Article 226 - Indian Penal Code, 1860-Sections 498A & 304-B I.P.C. - 3/4 Dowry Prohibition Act, 1961- Hindu Minority & Guardianship Act, 1956- Section 6- the father who is claiming custody is named as an accused in a criminal case relating to the death of the mother of the corpus-t deponent is facing trial for the murder of his wife cannot be ignored, which is one of the major factors to be considered and which goes against him- the detenu is residing since his birth with his maternal uncle and maternal grandparent, he is pursuing his education there and present petition has been filed in the year 2022, after five years from birth of the detenu and the delay and laches having not been explained at all, as also considering the overall interest and welfare of the detenu, in peculiar facts of this case, issue a writ of habeas corpus in favour of the petitioner will not be proper.(Para 1 to 9)

B. One of the matters which is required to be considered by a Court of law is the 'character' of the proposed guardian. considering the facts and circumstances of the case where the father was facing the charge under Section 498-A, 304-B IPC, the court did not grant custody of minor child to the father and allowed him to remain with maternal uncle and maternal grandparents. Thus, a complaint against father alleging and attributing death of mother and a case under Section 498A IPC is indeed a relevant factor and a Court of law must address to the said circumstance while deciding the custody of the minor in favour of such person. (Para 6)

The writ petition is dismissed. (E-6)

List of Cases cited:

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

2. Reshu @ Nitya & ors. Vs St. of U.P. & ors.
(2021) 6 ALJ 632

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

1. The petition seeks issuance of a writ in the nature of Habeas Corpus commanding the opposite parties to produce the corpus of detenu in Court and give him in the custody of the deponent/father Amritanshu Mishra.

2. Heard learned counsel for the petitioner and learned Additional Government Advocate as also learned counsel for respondents 4 to 6.

3. Learned counsel for the petitioner submits that the marriage of father of the detenu was solemnised on 22.4.2015 with the deceased Rani Shukla. The petitioner was blessed with one boy, i.e. detenu on 1.2.2017 out of wedlock. The mother of the detenu was in extra marital affair with one Sonu Ranjan, due to which frequent quarrel occurred between the duo. The mother of the detenu committed suicide on 9.8.2020 under impulse and anger as the father of the detenu asked her to stop having relationship with Sonu Ranjan.

After death of mother of the detenu, first information report was registered against his father, bearing case crime No.331 of 2020 under sections 498A, 304-B I.P.C. and 3/4 Dowry Prohibition Act. The father of the detenu was enlarged on bail by this Court vide order dated 4.3.2022. It is alleged that after death of mother of the detenu, respondents 4 to 6 have taken undue advantage and taken over unlawful custody of the detenu. The father of the detenu went to respondents 4 to 6 for custody of his son detenu but they refused to give his custody to the deponent.

It is submitted on behalf of the petitioner that as per Section 6 of Hindu

Minority and Guardianship Act, 1956, father is the natural guardian of child and is entitled to have the custody of the detenu. Relying on the judgment in **Nil Ratan Kundu and another** versus **Abhijit Kundu** (2008)9 SCC 413 (particularly paras 57, 58, 63, 65, 66, 67), it is submitted that the character of the proposed guardian is required to be considered to determine suitability of the father to have custody of the minor child.

It is submitted that there is no case law to the effect that the proposed guardian be denied custody of the child only on the ground of pending criminal trial against him. Welfare of the child has to be the top consideration while deciding the custody of the child.

It is also submitted that even from perusal of the statement of prosecution witnesses, it is clear that the deceased committed suicide.

4. Per contra, learned A.G.A. and learned counsel for the complainant have opposed the prayer.

It has been submitted on behalf of respondents 4 to 6 that on 9th August, 2020, mother of the detenu was murdered by the deponent who is father of the detenu, relating to demand of dowry. He is accused in first information report No.331 of 2020 under sections 498A, 304-B I.P.C. and 3/4 Dowry Prohibition Act, P.S. Raunahi, district Faizabad. Charge sheet has been submitted and the accused is facing criminal trial.

It is submitted that since his birth, the child is living safely with his maternal parents without any pressure and is pursuing his studies. It is further submitted that the deponent who is an accused of murder of mother of the detenu cannot be

given custody of the child as such custody would not only emotionally devastate and destruct proper growth of the detenu- both physical and mental, but also his overall welfare will be compromised.

Learned counsel for respondents 4 to 6 has also relied on Nil Ratan Kundu's case. It is submitted that pendency of the criminal case where father is charged of causing murder of minor's mother is relevant factor and is required to be considered before an appropriate order could be passed.

5. It is not disputed between the parties that mother of the detenu died on 9.8.2020. It is also not disputed that a first information report No.331 of 2020 under sections 498A, 304-B I.P.C. and 3/4 Dowry Prohibition Act is registered and after filing of charge sheet, the accused deponent is facing criminal trial. It is further not disputed that since birth, the detenu is residing with his maternal uncle and maternal grandparents. This Court in order to assess the wish of the detenu who is about six years of age called upon him in chamber. On a query being made, the detenu immediately expressed his will for staying with respondents 4 to 6. The detenu appears to be a bright and intelligent boy.

6. As regards submission of learned counsel for the petitioner that mere pendency of a criminal trial will not disentitle the deponent in seeking custody of the child, it will be apt to refer to the judgment in Nil Ratan Kundu's case (supra). Relevant paras 63, 64 and 66 are extracted below :

" 63. In our considered opinion, on the facts and in the circumstances of the case, both the Courts were duty bound to consider the allegations against the

respondent herein and pendency of criminal case for an offence punishable under Section 498A IPC. One of the matters which is required to be considered by a Court of law is the 'character' of the proposed guardian. In Kirit Kumar, this Court, almost in similar circumstances where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with maternal uncle.

64. Thus, a complaint against father alleging and attributing death of mother and a case under Section 498A IPC is indeed a relevant factor and a Court of law must address to the said circumstance while deciding the custody of the minor in favour of such person. To us, it is no answer to state that in case the father is convicted, it is open to maternal grand parents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and appropriate order ought to have been passed.

66. In our considered opinion, the Court was not right. Apart from statutory provision in the form of sub-section (3) of Section 17 of 1890 Act, such examination also helps the Court in performing onerous duty, in exercising discretionary jurisdiction and in deciding delicate issue of custody of a tender-aged child. Moreover, the final decision rests with the Court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. Normally, therefore, in custody cases, wishes of the minor should be ascertained by the Court before deciding as to whom custody should be given."

(Emphasised)

A perusal of the judgment in Nil Ratan Kundu's case (supra), it is evident that pendency of a criminal case is definitely

one of the considerations for assessing the character of the proposed guardian. It is true that evidence is yet to be led and the trial is yet to conclude and unless the accused is convicted, no aspersions can be cast. However, considering the ratio of the judgment in Nil Ratan's case (supra), the fact that the deponent is facing trial for the murder of his wife cannot be ignored, which is one of the major factors to be considered and which goes against him. This Court has taken note of the fact that the child since his birth, i.e. almost six years is residing with respondents 4 to 6 and is pursuing his studies.

7.A coordinate Bench of this Court in **Reshu alias Nitya and others versus State of U.P. and others** (2021)6 ALJ 632 while considering the similar allegations and also considering the judgment in Nil Ratan Kuundu's case (supra) in detail has held as under in para 58 :

"58. The aforementioned facts do not indicate that the custody of the minor with the respondent no. 4 can in any manner be said to amount to an illegal and improper detention. The child from her infancy, when she was of a tender age, appears to be living with her maternal grand-father. This together with the fact that the father who is claiming custody is named as an accused in a criminal case relating to the death of the mother of the corpus, would also be a relevant factor. The other considerations which would have a material bearing would be the necessity of the child being provided loving and understanding care, guidance and a warm and compassionate relationship in a pleasant home, which are essential for the development to the child's character and personality."

8.Thus, keeping in view the law laid down by Supreme Court in the case of Nil Ratan Kundu, the fact that the deponent is

facing trial for the murder of mother of the detenu, the detenu is residing since his birth with his maternal uncle and maternal grand parent, he is pursuing his education there and present petition has been filed in the year 2022, after five years from birth of the detenu and the delay and laches having not been explained at all, as also considering the overall interest and welfare of the detenu, in peculiar facts of this case, I am not inclined to issue a writ of habeas corpus in favour of the petitioner.

9.The petition fails and is accordingly dismissed. However, the deponent shall have the visiting rights of the detenu. Accordingly, the deponent shall be permitted to visit the detenu on every first and third Sunday between 10.00a.m and 5.00p.m.

(2023) 11 ILRA 451
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.11.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Habeas Corpus Writ Petition No. 26085of 2021

Vedant through his father Vishnu Kumar @ Vishnu Kumar Ayodhyavasi ...Petitioner
Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ramakar Shukla, Ravindra Gupta

Counsel for the Respondents:
G.A., Abhshek Misra, Anand Dubey, Firoz Ahmad Khan, Gajendra Singh Chauhan, Saurabh Verma

A. Criminal Law - Constitution of India,1950- Article 226 -Indian Penal Code,1860-Sections 498A, 304 B, 506 I.P.C. - sections 3/4 Dowry Prohibition Act-First Information Report was registered against the deponent and against his family members after two years from the death

of the mother of the detenu-Twice final report was filed in favour of the petitioner-The second protest petition, filed against the final report, was treated as a complaint case and till date, summoning order has not been passed against the petitioner-The detenu is presently 4 1/2 years of age- the deceased had made a statement that while offering prayer, she caught fire and due to that, she got burn injury-Since father is the natural guardian under section 6 of the Guardians & Wards Act, coupled with the choice of the detenu who is 4 1/2 years old and has expressed his willingness to reside with the deponent- Therefore, transferring the custody of the detenu to respondent No.4 may not be in the best and overall interest of the child as for around 4 years, he has lived with his father. (Para 1 to 12)

B. 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.(Para 8)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors. (2019) 7 SCC 42

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

3. Garv Mishra (Minor) thru his father Anurag Mishra Vs St. of U.P. & ors. HABC No.24874 of 2019

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

1. The petition seeks issuance of a writ in the nature of Habeas Corpus commanding the opposite party No.4 to produce the detenu Vedant in Court and give him in the custody of the deponent/father Vishnu Kumar alias Vishnu Kumar Ayodhyavasi Sonar.

2. Heard learned counsel for the petitioner and learned Additional Government Advocate as also learned counsel for respondent No.4.

3. Learned counsel for the petitioner submits that the marriage of father of the detenu was solemnised with Aprajita (now deceased) on 10.2.2018. Out of wedlock, the detenu was born on 19.4.2019. On 11.11.2019, Aprajita met with an accident and suffered burn injury. She was taken to Sushrut Institute of Plastic Surgery Burn and Trauma at Lucknow, however, she could not survive and succumbed to the injuries on 20.11.2019. During treatment, the doctor recorded the statement of the deceased wherein she has stated that while offering prayer, she met with an accidental burn injury. During her treatment between 11.11.2019 and 20.11.2019, respondent No.4 and his other family members were present in the hospital. During all this period, they have not levelled any allegation against the deponent Vishnu Kumar.

On 26.7.2021, respondent No.4 took the detenu to his house and confined him. The deponent Vishnu Kumar along with his

father went to the house of respondent No.4 to bring his minor son but respondent No.4 Shachindra Dev Arya refused to return the detenu. In the meantime, due to the dispute regarding the custody of the detenu between the parties, an application under section 156(3) CrPC was given by respondent No.4 on 21.8.2021.

The deponent filed the present petition of habeas corpus before this Court on 8.11.2021. After exchange of pleadings, vide interim order dated 10.12.2021, this Court has handed over custody of the detenu to the petitioner. After the custody was handed over to the petitioner, on 13.12.2021, a first information report No.342 of 2021 under sections 498-A, 304-B, 506 I.P.C. and sections 3/4 Dowry Prohibition Act, P.S. Musafirkhana, district Amethi was registered against the petitioner and other family members after more than two years of the death of mother of the detenu. After investigation, the investigating officer submitted final report in favour of the petitioner in first information report No.342 of 2021 (supra) on 25.2.2022. A protest petition was filed by the respondent No.4 and the learned Magistrate has directed for further investigation on the protest application. The petitioner deponent performed second marriage on 8.7.2022 and the detenu is enjoying the company of his father and step mother along with grand parents.

After further investigation, police did not find any complicity of the deponent and again a final report was submitted in favour of the petitioner on 14.10.2022. Second protest petition was filed by respondent No.4 on 15.2.2023 which was treated as a complaint. Till date, no summoning order has been passed.

Learned counsel for the petitioner has submitted that the detenu is aged about 4 1/2 years school going child and has been

living with the petitioner since long, and being father and natural guardian, the petitioner is entitled custody of the detenu.

In support of his contention, learned counsel for the petitioner has relied on judgment in Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari (2019)7 SCC 42 (paras 14, 19, 21), Garv Mishra (Minor) through his father Anurag Mishra versus State of U.P. and others Habeas Corpus No.24874 of 2019 (paras 5, 11, 14, 15).

4. Per contra, learned counsel for respondent No.4 has submitted that the character of the father of the detenu is suspicious in nature. He has murdered the mother of the detenu and a complaint case for the same is pending against him. The respondent No.4 has proposed to bequeath a shop featuring glass business in the name and style of the detenu to look after the overall welfares of the detenu and his financial condition. In this context, learned counsel has relied on **Nil Ratan Kundu and another** versus **Abhijit Kundu** (2008)9 SCC 413. It is submitted that the father of the detenu can be summoned at any moment in the dowry death case, as such, future of the detenu is at stake and it will be appropriate to give custody of the child with respondent No.4.

5. I have considered the submission and perused the record.

6. The facts which emanate from the pleadings made and submission advanced are that the marriage of the mother of the detenu took place on 10.2.2018. The detenu was born on 19.4.2019 out of the wedlock. Late mother of the detenu Aprajita suffered burn injury and died on 20.11.2019 after being remained under treatment for nine days. Between 11.11.2019 and 20.11.2019,

no allegation was levelled by respondent No.4 or his family members against the deponent regarding the death of mother of the detenu.

This Court vide order dated 10.12.2021 handed over custody of the detenu from respondent No.4 to the present deponent of the petition and since then, he is living with him. First Information Report No.342 of 2021 under sections 498A, 304 B, 506 I.P.C. and sections 3/4 Dowry Prohibition Act was registered against the deponent and against his family members on 13.12.2021, i.e. after two years from the death of the mother of the detenu. Twice final report was filed in favour of the petitioner, i.e. on 25.2.2022 and 14.10.2022.

The second protest petition, filed against the final report, was treated as a complaint case and till date, summoning order has not been passed against the petitioner. The detenu is presently 4 1/2 years of age. Lastly, the deceased Aprajita had made a statement that while offering prayer, she caught fire and due to that, she got burn injury. The statement is on record.

The petitioner in para 9 has pleaded that the custody of the detenu was taken by respondent No.4 on 26.7.2021. The respondent No.4 while filing first counter affidavit, though has denied the averments contained in para 9 of the petition, however, the date on which the custody of the detenu was taken has not been given.

Likewise, in the second counter affidavit dated 8.8.2023 filed by respondent No.4 again, no specific date has been given by respondent No.4. On the contrary, it has been admitted in para 8 that respondent No.4 participated in the Mundan ceremony of the detenu on 28.6.2021 and after attending Mundan ceremony on his request,

the deponent gave the custody of the detenu to respondent No.4.

7. It has been argued by respondent No.4 that the deponent/father of the detenu did not care to look after of his son for two years. This argument is contrary to record and pleadings by the parties in the writ petition. It is evident from the pleadings that the custody of the detenu was given to respondent No.4 and it remained with respondent No.4 till 10.12.2021 when the custody was again given back to the deponent and since then, the custody is with the deponent. So only for a brief period of more than four months, the custody remained with respondent No.4.

8. In **Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others** (2019) 7 SCC 42, Supreme Court has held that the detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention. Relevant paras 14, 19 and 21 are extracted below :

"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.

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.

21. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent- father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1 years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India."

9. While opposing the petition, learned counsel for respondent No.4 has relied on judgment in Kirtikumar

Maheshankar Joshi versus Pradipkumar Karunashanker Joshi (1992) 3 SCC 573 and submitted that since father was facing charges under section 498-A I.P.C., custody to the father was refused.

10. In the case of Kirtikumar (supra), the detenues were matured enough than their age. They were intelligent enough to take decision regarding their choice and they refused to go with the father. The accused of that case who was father was also facing charge under section 498A I.P.C..

11. This Court has also asked opinion of the detenu who is currently 4 1/2 years old and seems to be intelligent enough and without waiting, he has shown his inclination towards father and has stated in clear words that he wants to reside with his father. In this case, twice final report(s) have been filed. Although on the second final report, a protest petition was filed which was registered as a complaint case, this court cannot lose sight of the fact that the first information report was filed after two years from the date of death of the mother of the detenu and after custody of the detenu was transferred by court's order on 10.12.2021. The first information report was filed on 13.12.2021.

Summons in this case are yet to be issued. The trial is yet to commence. Even, at this stage, it will be premature to say, particularly in view of the statement of the deceased before the doctor that she suffered burn injury while offering prayer, that the deponent is even an accused in that case and therefore, I am of the opinion that the judgment in Kirtikumar's case (supra) is distinguishable in view of the peculiar facts of this case.

This court has noticed that the detenu since his birth was residing with his father. He is presently 4 1/2 years of age and for a brief period of about four months, he resided with respondent No.4. He has expressed his wish to stay with his father. As said above, even the summons have not been issued in the complaint case. Charges are yet to be framed. The father being the natural guardian is entitled to the custody of his child in view of the judgment in Tejaswini Gaud's case (supra).

12. On due consideration to the submission advanced and perusal of the record, it appears that initially after death of mother of the detenu on 20.11.2019, the respondent No.4 was very much present in the hospital along with the deponent. The signature of respondent No.4 on the treatment papers, precisely page No.14 of the petition, is on record, statement of the deceased at page 15 before the doctor go to show that there was no dispute whatsoever between the parties at that time. Thereafter, on 26.7.2021, the detenu was taken by respondent No.4.

It appears that the dispute started when the deponent wanted custody of the detenu back from respondent No.4 which was given by him temporarily which was resisted by respondent No.4 and then, after two years, he filed an application under section 156(3) CrPC on 21.8.2021 on which first information report was registered on 13.12.2021.

Considering the fact that the custody of the detenu has been given back to the deponent by this court vide order dated 10.12.2021, father is the natural guardian under section 6 of the Guardians & Wards Act, coupled with the choice of the detenu who is 4 1/2 years old and has expressed his willingness to reside with the deponent

who is father, in peculiar facts of this case, I am of the opinion that at this stage, transferring the custody of the detenu to respondent No.4 may not be in the best and overall interest of the child as for around 4 years, he has lived with his father.

For the reasons aforesaid, the petition is allowed and the interim order dated 10.12.2021 is confirmed. The deponent is permitted to continue with custody of the detenu, however, the respondent No.4 shall have the visiting rights on every fortnight on Sunday between 10.00a.m. and 5.00p.m. at the residence of the deponent. However, in case of changed circumstance by virtue of Court's order, it shall be open for respondent No.4 to approach this Court for change of custody.

(2023) 11 ILRA 456
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2023

BEFORE

THE HON'BLE PRAKASH PADIA, J.

S.C.C. Revision No. 25 of 2021

Umesh Chand		...Revisionist
	Versus	
Pappu		...Respondent

Counsel for the Revisionist:
 Sri Rahul Pandey, Sri Gaurav Gautam

Counsel for the Respondent:
 Ms. Babita Upadhyay, Sri Sanjeev Kumar Gaur

Non speaking judgment and decree-Suit filed for arrear of rent and ejectment of the defendant-respondent from the shop-various papers/documents were filed by the parties before the court below - without considering the same, the issue no. 1 decided against the plaintiff-revisionist-judgment should be a self-contained document -from which it should appear as to what were the facts of the case

and what was the controversy -the process of reasoning by which the Court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment-impugned judgment and decree set aside. (E-9)

Cases cited:

1. Yashpal Lal Shiv Narayan Vs Allah Tala Malik Waqf Azkhan AIR 2006 IL 115
2. R.V.E. Venkatachala Gounder Vs Arulmigu Viswesaraswami and V.P. Temple & anr. reported in (2003) 0 Supreme (SC) 994
3. Nanhe Vs Saiyad Tasadduq Husain (1912) 15 Oudh Cases 78
4. Thippaiah & ors.Vs Kuri Obaiah, ILR 1980 (2) Karnataka 1028
5. Dineshwar Prasad Bakshi Vs Parmeshwar Prasad Sinha, AIR 1989 Patna 139
6. U.O.I. & ors.Vs Manager, Jain and Associates (2001) 3 SCC 277
7. St. Bank of India & anr. Vs Ajay Kumar Sood (2023) 7 SCC 282

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Mr. Gaurav Gautam, learned counsel for the plaintiff-revisionist and Ms. Babita Upadhyay, learned counsel for the defendant-respondent.

2. The present revision has been filed with the prayer to set aside the judgement and decree dated 20.02.2021 passed by Judge, Small Causes/Additional District Judge, Bulandshahr in Small Causes Case No.6 of 2017 (CNR No.UPBU07000992017) by which suit filed by the plaintiff-revisionist was dismissed.

3. The facts in brief as contained in the affidavit filed in support of the present

revision are that the plaintiff-revisionist filed a case being Small Causes Case No.6 of 2017 in the Court of Small Causes Court/ Additional District Judge, Bulandshahr, for arrear of rent and ejectment of the defendant-respondent from the shop in dispute situated at Mohalla Nehruganj, Kasba, Pargana and Tehsil Anupshahr, District, Bulandshahr. The plaintiff had let out his shop to the defendant-respondent on rent of Rs.4,000/- per month. The rent was not received from defendant since 1.3.2015, and the defendant is continuously using the shop in question. In this regard, a registered notice under Section 106 of Transfer of Property Act, was sent by the plaintiff-revisionist to the defendant-respondent on 18.9.2017 but the premise in question was not vacated by the defendant-respondents, hence the suit was filed.

4. In the aforesaid suit, the defendant-respondent has filed his written statements on 9.3.2018 denying the statement made in the plaint. Reply to the aforesaid, a written statement was filed by the plaintiff-revisionist on 9.4.2018.

5. In the aforesaid suit following issues were framed before the court below :-

“5- पक्षकारों के अभिवचनों के आधार पर निम्नलिखित विनिश्चय बिन्दु विरचित किये गये-

1- क्या वादी विवादित दुकान का भवन स्वामी है और प्रतिवादी उसमें 4000 /- रुपये प्रतिमाह की दर से किरायेदार है तथा पक्षकारों के मध्य भवन स्वामी व किरायेदार का सम्बन्ध स्थापित है?

2- क्या प्रतिवादी के द्वारा किराये की अदायगी में चूक की गयी है?

3- क्या विवादित दुकान पर उ०प्र० अधिनियम संख्या 13 सन् 1972 के प्रावधान लागू नहीं होते हैं?

4- क्या प्रतिवादी की किरायेदारी वैध नोटिस के माध्यम से समाप्त की गयी है?

5- क्या वाद धारा 23 पी०एस०सी०सी० एक्ट के प्रावधान से बाधित है?

6- अनुतोष ?

वाद विन्दु के सम्बन्ध में पहले से पत्रावली पर साक्ष्य उपलब्ध है अन्य साक्ष्य की आवश्यकता नहीं है।"

6. The first and the main issue was that whether there is a relationship of landlord and tenant or not. The aforesaid issue was decided against the plaintiff-revisionist. Finding were recorded by the court below that there is no relationship of landlord and tenant. Since the first and main issue was decided against the plaintiff-revisionist, the other issues were also decided in the same manner. Aggrieved against the aforesaid, the present revision has been filed by the plaintiff-revisionist.

7. It is argued by learned counsel for the plaintiff-revisionist that the court below completely overlooked the evidences filed by the plaintiff-revisionist, reference of which has been made in paragraph 6 of the order impugned. It is further argued that the trial court failed to appreciate the fact that ownership of the shop in question was proved vide order dated 16.9.2019 and the house tax receipt of Nagar Palika revealed that the shop was a rented shop and the notice under Section 106 of Transfer of Property Act was duly served on the defendant-respondent. It is further argued that the trial court overlooked the mandate of Section 106 of Transfer of Property Act, 1882 which provides that the tenancy/ lease can also be created orally and the same has been affirmed by this Hon'ble Court in case of *Yashpal Lal Shiv Narayan Vs. Allah Tala Malik Waqf Azkhan AIR 2006 IL 115*. Learned counsel for the plaintiff -

revisionist has also placed reliance upon the judgment passed by Hon'ble Apex Court in case of *R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and another reported in (2003) 0 Supreme (SC) 994*, wherein it has been held that the entires in house tax register will be admissible as evidence of possession and in absence and in absence of legal claim to the property, entries made in municipal record will be treated as evidence of ownership and in the present case the defendant-respondent failed to prove the ownership of the shop in question. It is further argued that the defendant-respondent has nowhere questioned about the municipal tax receipt or the sale-deed and the order passed by the District Magistrate under Section 143 of U.P. Z.A. & L.R. Act. Lastly, it is argued that the court below has not appreciated the entire evidence and statement made by the plaintiff-revisionist.

8. On the other hand, it is argued by the learned counsel appearing on behalf of the defendant-respondents that there is no relationship between the landlord and tenant. The shop in question was build-up on the land belongs to the opposite party. It is further argued that the suit is barred by Section 93 of U.P. Revenue Code, 2006. The user of the land still has not been changed and hence the plaint is liable to be rejected as per provision contained under Section 123 of the Provincial Small Causes Court Act. It is further argued that since the plaintiff-revisionist was not able to proof that there exists any tenancy, the issue was decided against him. It is further argued that the order was rightly passed by the court below and the same does not call for any interference by this Court specially in the fact that the revisionist is not the owner of the property on which the shop in

question is situated. It is further argued that plaintiff-revisionist has not filed any rent agreement/rent receipt, hence the order passed by the court below against him.

9. Heard learned counsel for the parties and perused the record.

10. After going through the record, it transpires that though various papers/documents were filed by the parties before the court below but without considering the same, the issue no. 1 has been decided against the plaintiff-revisionist.

11. When a query in this regard has been made by the Court from the counsel for the defendant-respondents that whether these papers or documents were taken into consideration or not. It is very fairly argued by learned counsel for the defendant-respondents that though various relevant papers/documents filed before the court below but the same were not taken into consideration while deciding the issues.

12. Ultimately, it is agreed between the parties that the order passed by the court below is a non-speaking order and the same has been passed without considering the relevant aspects of the matter.

13. In this view of the matter, the Court is of the opinion that since the order passed by the court below is a non speaking order, the same is liable to be set aside and the direction be given to the court below to decide the matter afresh in accordance with law.

14. The Judgment" as defined in Section 2(9) of the Code of Civil Procedure means the statement given by the Judge on the grounds of a decree or order. What a

judgment should contain is indicated in Order 20, Rule 4 (2) which says that a judgment :

“ shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision”

15. It should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the Court and in what manner. The process of reasoning by which the Court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment.

16. In an old case, namely, **Nanhe vs. Saiyad Tasadduq Husain (1912) 15 Oudh Cases 78**, it was held that passing of a mere decree was material irregularity within the meaning of Section 115 of the Code and that even if the judgment was passed on the basis of the admission made by the defendant, other requirements which go to constitute "judgment" should be complied with.

17. In **Thippaiah and others vs. Kuri Obaiah, ILR 1980 (2) Karnataka 1028**, it was laid down that the Court must state the grounds for its conclusion in the judgment and the judgment should be in conformity with the provisions of Section 2(9) of the Code of Civil Procedure.

18. In **Dineshwar Prasad Bakshi vs. Parmeshwar Prasad Sinha, AIR 1989 Patna 139**, it was held that the judgment pronounced under Order 8 Rule 10 must satisfy the requirements of "judgment" as defined in Section 2(9) of the Code.

19. In the case of ***Union of India and others Vs. Manager, Jain and Associates reported in (2001) 3 SCC 277*** it is held that before pronouncing judgment the court has to apply its mind to arrive at the conclusion. Relevant paragraph being Paragraph 11 of the aforesaid judgement reads as follows :-

“The result is before pronouncing judgment, the Court has to apply its mind to arrive at the conclusion whether there is any cause to modify or remit the award. Further the phrase pronounce judgment would itself indicate judicial determination by reasoned order for arriving at the conclusion that decree in terms of award be passed. One of the meaning given to the word Judgment in Websters Comprehensive Dictionary [International Edition, Vol. I (1984)] reads thus : the result of judging; the decision or conclusion reached, as after consideration or deliberation. Further, Order XX Rule 4(2) C.P.C. in terms provides that Judgment shall contain a concise statement of case, the points for determination, the decision thereon, and the reasons for such decision. This is antithesis to pronouncement of non-speaking order.”

20. Very recently Hon’ble Apex Court in the case of ***State Bank of India and another Vs. Ajay Kumar Sood*** reported in ***(2023) 7 SCC 282*** has elaborated as to what should be the content of a judgement. The paragraphs 12 to 25 and 27 & 28 reads as follows :-

12. Earlier too, in ***State of Himachal Pradesh v. Himachal Aluminium and Conductors, Civil Appeal No.5032 of 2022***, Supreme Court of India, ***Sarla Sood v. Pawan Kumar Sharma, Special Leave to Appeal (C) No. 7768-7769 of 2017***,

*Supreme Court of India this Court had to remand the proceedings arising out of similar judgments of the High Court of Himachal Pradesh, so that orders could be passed afresh in language which is capable of being understood. In ***Shakuntala Shukla v. State of Uttar Pradesh as well, (2021) SCC OnLine SC 672***, a two Judge Bench of this Court, was faced with an order of the High Court of Judicature at Allahabad which made it difficult to discern between the submissions of counsel and the reasons of the court. Laying emphasis on the purpose of a judgment, this Court elaborated on what should be the content of a judgment. The court observed that:*

33. [...] “Judgment” means a judicial opinion which tells the story of the case; what the case is about; how the court is resolving the case and why. “Judgment” is defined as any decision given by a court on a question or questions or issue between the parties to a proceeding properly before court. It is also defined as the decision or the sentence of a court in a legal proceeding along with the reasoning of a judge which leads him to his decision. The term “judgment” is loosely used as judicial opinion or decision. Roslyn Atkinson, J., Supreme Court of Queensland, in her speech once stated that there are four purposes for any judgment that is written:

- i) to spell out judges own thoughts;
- ii) to explain your decision to the parties;
- iii) to communicate the reasons for the decision to the public; and
- iv) to provide reasons for an appeal court to consider

34. ***It is not adequate that a decision is accurate, it must also be reasonable, logical and easily comprehensible. [...] What the court says, and how it says it, is***

equally important as what the court decides.

35. Every judgment contains four basic elements and they are (i) statement of material (relevant) facts, (ii) legal issues or questions, (iii) deliberation to reach at decision and (iv) the ratio or conclusive decision. **A judgment should be coherent, systematic and logically organised. It should enable the reader to trace the fact to a logical conclusion on the basis of legal principles.** It is pertinent to examine the important elements in a judgment in order to fully understand the art of reading a judgment. In the Path of Law, Holmes J. has stressed the insentient factors that persuade a judge. A judgment has to formulate findings of fact, it has to decide what the relevant principles of law are, and it has to apply those legal principles to the facts. The important elements of a judgment are:

- i) Caption
- ii) Case number and citation
- iii) Facts
- iv) Issues
- v) Summary of arguments by both the parties
- vi) Application of law
- vii) Final conclusive verdict

36. The judgment replicates the individuality of the judge and therefore it is indispensable that it should be written with care and caution. **The reasoning in the judgment should be intelligible and logical. Clarity and precision should be the goal. All conclusions should be supported by reasons duly recorded. The findings and directions should be precise and specific. Writing judgments is an art, though it involves skillful application of law and logic.** We are conscious of the fact that the judges may be overburdened with the pending cases and the arrears, but at the same time, quality can never be

sacrificed for quantity. Unless judgment is not in a precise manner, it would not have a sweeping impact. There are some judgments that eventually get overruled because of lack of clarity. Therefore, whenever a judgment is written, it should have clarity on facts; on submissions made on behalf of the rival parties; discussion on law points and thereafter reasoning and thereafter the ultimate conclusion and the findings and thereafter the operative portion of the order. There must be a clarity on the final relief granted. A party to the litigation must know what actually he has got by way of final relief. The aforesaid aspects are to be borne in mind while writing the judgment, which would reduce the burden of the appellate court too. We have come across many judgments which lack clarity on facts, reasoning and the findings and many a times it is very difficult to appreciate what the learned judge wants to convey through the judgment and because of that, matters are required to be remanded for fresh consideration. Therefore, it is desirable that the judgment should have a clarity, both on facts and law and on submissions, findings, reasonings and the ultimate relief granted.

(emphasis supplied)

13. Amidst an overburdened judicial docket, a view is sometimes voiced that parties are concerned with the outcome and little else. This view proceeds on the basis that parties value the outcome and not the reasoning which constitutes the foundation. This view undervalues the importance of the judicial function and of the reasons which are critical to it. The work of a judge cannot be reduced to a statistic about the disposal of a case. Every judgment is an incremental step towards consolidation and change. In adhering to precedent, the judgment reflects a commitment to

protecting legal principle. This imparts certainty to the law. Each judgment is hence a brick in the consolidation of the fundamental precepts on which a legal order is based. But in incremental steps a judgment addresses the need to evolve and to transform by addressing critical issues which confront human existence. Courts are as much engaged in the slow yet not so silent process of bringing about a social transformation. How good or deficient they are in that quest is tested by the quality of the reasons as much as by the manner in which the judicial process is structured.

14. Lord Burrows of the Supreme Court of the United Kingdom, in his speech at the Annual Conference of Judges of the Superior Courts in Ireland stressed upon the importance of clarity, coherence and conciseness in judgment writing Lord Burrows, (Lord Burrows Justice of the Supreme Court of the United Kingdom, *Judgment-Writing: A Personal Perspective*, Annual Conference of Judges of the Superior Courts in Ireland, 20 May 2021). Lord Burrows also noted the importance of the judgment being written in a manner that it is accessible to all considering its wide and varied potential audience. He noted :

For senior judges, one's target audience must include the parties themselves, the legal advisers to those parties, other judges, other practising lawyers, academic lawyers and students, and last but by no means least the public at large.

Lord Burrows also reiterates the view of Lord Bingham, that a judgment which is unclear or not concise and therefore inaccessible may contradict the rule of law :

(T)here is the view that a judgment that is unclear or not concise and therefore inaccessible may contradict the rule of law.

*The great Lord Bingham - a master of judgment-writing if ever there was one-suggested this in his book, *The Rule of Law*. Having laid down as his first concretised element of the rule of law that the law must be accessible' he went on as follows:*

'The judges are quite ready to criticise the obscurity and complexity of legislation. But those who live in glass houses are ill-advised to throw stones The length elaboration and prolixity of some common law judgments can in themselves have the effect of making the law to some extent inaccessible.'

15. In a piece of academic writing, Justice Daphne Barak-Erez of the Supreme Court of Israel distinguished between academic writing and judgment writing. While alluding to the importance of judgments being written in an accessible manner (Justice Daphne Barak-Erez, *Writing Law Reflections on Judicial Decisions and Academic Scholarship* (2015) 41 -1 *QUEEN'S LAW JOURNAL* 255), Justice Daphne Barak-Erez notes:

For judges, the professional community is only one of their several audiences. Judges write first and foremost for the parties appearing before them, for the state's agents who are in charge of enforcement, and for the public. Although judgments are professional legal documents, and sometimes involve complex technical and legal analyses, they should also be accessible, or at least explicable, to people who are not professionals, as they define the law for a larger community.

16. *A judgment culminates in a conclusion. But its content represents the basis for the conclusion. A judgment is hence a manifestation of reason. The reasons provide the basis of the view which the decision maker has espoused, of the balances which have been drawn. That is why reasons are crucial to the legitimacy of*

a judge's work. They provide an insight into judicial analysis, explaining to the reader why what is written has been written. The reasons, as much as the final conclusion, are open to scrutiny. A judgment is written primarily for the parties in a forensic contest. The scrutiny is first and foremost by the person for whom the decision is meant - the conflicting parties before the court. At a secondary level, reasons furnish the basis for challenging a judicial outcome in a higher forum. The validity of the decision is tested by the underlying content and reasons. But there is more. Equally significant is the fact that a judgment speaks to the present and to the future. Judicial outcomes taken singularly or in combination have an impact upon human lives. Hence, a judgment is amenable to wider critique and scrutiny, going beyond the immediate contest in a courtroom. Citizens, researchers and journalists continuously evaluate the work of courts as public institutions committed to governance under law. Judgment writing is hence a critical instrument in fostering the rule of law and in curbing rule by the law.

17. Judgment writing is a layered exercise. In one layer, a judgment addresses the concerns and arguments of parties to a forensic contest. In another layer, a judgment addresses stake-holders beyond the conflict. It speaks to those in society who are impacted by the discourse. In the layered formulation of analysis, a judgment speaks to the present and to the future. Whether or not the writer of a judgment envisions it, the written product remains for the future, representing another incremental step in societal dialogue. If a judgment does not measure up, it can be critiqued and criticized. Behind the layers of reason is the vision of the adjudicator over the values which a just society must embody and defend. In a constitutional

framework, these values have to be grounded in the Constitution. The reasons which a judge furnishes provides a window- an insight into the work of the court in espousing these values as an integral element of the judicial function.

18. Many judgments do decide complex questions of law and of fact. Brevity is an unwitting victim of an overburdened judiciary. It is also becoming a victim of the cut- copy-paste convenience afforded by software developers. This Court has been providing headings and sub-headings to assist the reader in providing a structured sequence. Introduced and popularized in judgment writing by Lord Denning, this development has been replicated across jurisdictions supra (Lord Burrows)."

19. Lord Neuberger, the former President of the Supreme Court of the United Kingdom, discussed in the course of a lecture [Lord Neuberger, No Judgment-No Justice, First Annual British and Irish Legal Information Institute (BAILII) Lecture (20 November 2012)] the importance of clearly written judgments:

A second small change worth considering would be for more judges to give better guidance to the structure and contents of their longer Judgments. Some judges already provide a clear framework, sometimes with a table of contents, a roadmap, at the beginning, and often with appropriate headings, signposts, throughout the Judgment. Kimble's study confirms that this is not just a good discipline but it is what the legal professional readers want, and, if it is what lawyers want, it is a fortiori what non-lawyers will want. A clear structure aids accessibility.

20. It is also useful for all judgments to carry paragraph numbers as it allows for ease of reference and enhances the

structure, improving the readability and accessibility of the judgments. A Table of Contents in a longer version assists access to the reader.

21. On the note of accessibility, the importance of making judgments accessible to persons from all sections of society, especially persons with disability needs emphasis. All judicial institutions must ensure that the judgments and orders being published by them do not carry improperly placed watermarks as they end up making the documents inaccessible for persons with visual disability who use screen readers to access them. On the same note, courts and tribunals must also ensure that the version of the judgments and orders uploaded is accessible and signed using digital signatures. They should not be scanned versions of printed copies. The practice of printing and scanning documents is a futile and time-consuming process which does not serve any purpose. The practice should be eradicated from the litigation process as it tends to make documents as well as the process inaccessible for an entire gamut of citizens.

22. In terms of structuring judgments, it would be beneficial for courts to structure them in a manner such that the 'Issue, Rule, Application and Conclusion' are easily identifiable. The well-renowned 'IRAC' method generally followed for analyzing cases and structuring submissions can also benefit judgments when it is complemented by recording the facts and submissions.

23. The 'Issue' refers to the question of law that the court is deciding. A court may be dealing with multiple issues in the same judgment. Identifying these issues clearly helps structure the judgment and provides clarity for the reader on the specific issue of law being decided in a particular segment of a judgment. The 'Rule' refers to

the portion of the judgment which distils the submissions of counsel on the applicable law and doctrine for the issue identified. This rule is applied to the facts of the case in which the issue has arisen. The analysis recording the reasoning of a court forms the 'Application' section.

24. Finally, it is always useful for a court to summarize and lay out the 'Conclusion' on the basis of its determination of the application of the rule to the issue along with the decision vis-à-vis the specific facts. This allows stakeholders, especially members of the bar as well as judges relying upon the case in the future, to concisely understand the holding of the case.

25. Justice M.M. Corbett, Former Chief Justice of the Supreme Court of South Africa, in a lecture at an orientation course for new judges," (Justice M.M. Corbett, *Writing a Judgment-Address at the First Orientation Course for New Judges*, (1998) 115 SOUTH AFRICAN LAW JOURNAL 116) recommended a similar structure which facilitates orderliness and produces a logical, flowing judgment;

(a) An introductory section:

(b) Setting out of the facts:

(c) The law and the issues;

(d) Applying the law to the facts;

(e) Determining the relief (including order for costs); and

(f) Finally, the order of the Court.

26.....

27. While we have laid down some broad guidelines, individual judges can indeed have different ways of writing judgments and continue to have variations in their styles of expression. The expression of a judge is an unfolding of the recesses of the mind. However, while recesses of the mind may be inscrutable, the reasoning in judgment cannot be. While judges may have their own style of judgment writing,

they must ensure lucidity in writing across these styles. This has also been captured by Justice Corbett (Ibid)," in the following extract :

*For lucidity should be the prime aim of any judgment-writer. At the same time, certain aspects of style have a bearing on lucidity. In this connection, my advice (for what it is worth) is to **keep your language and your sentence construction simple. Write in short sentences and do not try to pack too many ideas into a single sentence. Particularly in setting out facts, try to maintain a simple, straightforward flow to your narrative. Try to avoid the repetition of words or phrases and observe the normal rules of grammar.** A well-known exponent of simple language and the simple sentence was Lord Denning.*

(emphasis supplied)

28. Echoing a similar sentiment, Justice Michael Kirby, a distinguished former judge of the High Court of Australia notes: (Justice Michael Kirby, *On the Writing of Judgment*, (1990) 64 *Australian Journal* 691):

Brevity, simplicity and clarity. These are the hallmarks of good judgment writing. But the greatest of these is clarity.

21. In this view of the matter, the Court is of the opinion that the judgement and decree dated 20.02.2021 passed by Judge, Small Causes/Additional District Judge, Bulandshahr is liable to be set aside and the same is hereby set aside.

22. Since the suit in question was filed initially in the year 2017 and pleadings have already been exchanged, the court concerned is directed to decide the aforesaid suit strictly in accordance with law most expeditiously and preferably within a period of one year from the date of receipt of the order without granting any

unnecessarily adjournment unless there is no legal impediment.

23. It is made clear that status quo as on today shall be maintained between the parties till disposal of the suit.

24. Office is directed to return original records to the court below forthwith.

(2023) 11 ILRA 465
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Special Appeal No. 93 of 2023

with

Special Appeal Nos. 14 of 2023, 15 of 2023
 with Special Defective Appeal Nos. 122 of 2023
 and 163 of 2023

Kapil Kumar & Ors. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
 Sri Prashant Mishra, Sri Tarun Agrawal

Counsel for the Respondents:
 C.S.C.

A. Recruitment – Selection Process – Answer Key – Judicial Review – Intra-court appeals challenging dismissal of writ petitions seeking declaration of success in written examination for Constable (Civil Police) and Provincial Armed Constabulary (PAC) posts – Question No. 68 of Test Booklet B, Series 17 – Final answer key changed correct answer from option 'C' to 'D' without provision for objections – Appellants' marks marginally below cut-off – Expert opinion from IIT Kanpur confirmed option 'C' as correct – Court held Recruitment Board's change of answer key irrational –

Judicial review permissible in rare cases where material error is evident without inferential reasoning – Appellants entitled to relief if within 2.5 marks of cut-off.

B. Relief – Moulding of Relief – 603 posts vacant after final selection – No fresh recruitment initiated – Appellants who approached Court promptly entitled to revised result, medical examination, and appointment against vacant posts – Relief limited to petitioners who filed writs before cut-off notification – Selected candidates' appointments not to be disturbed – Appellants to be placed at bottom of seniority list with salary from date of appointment.

Held: The Court set aside the Single Judge's judgment dismissing the writ petitions. The Recruitment Board was directed to revise the written examination results for appellants within 2.5 marks of their category cut-off, conduct medical examinations, and appoint successful candidates against vacant posts within six weeks. Relief restricted to appellants who approached the Court promptly, with no disturbance to already selected candidates. Appointed candidates to be placed at the bottom of the seniority list with salary from the date of appointment. (*Paras 30-31*)

Case Law Discussed:

1. Ran Vijay Singh Vs St. of U.P., (2018) 2 SCC 357
2. Bihar Staff Selection Commission Vs Arun Kumar, (2020) 2 SCC 541
3. Himanchal Pradesh Public Service Commission Vs Mukesh Thakur, (2010) 6 SCC 759
4. High Court of Tripura Vs Tiratha Sarathi Mukherjee, (2019) 16 SCC 663
5. Sanjay Singh Vs U.P. Public Service Commission, (2007) 3 SCC 720
6. S.C. Dixit Vs St. of U.P., (2003) 12 SCC 243
7. Kanpur University Vs Samir Gupta, (1983) 4 SCC 309

8. M. Sudakar Vs V. Manoharan, (2011) 2 SCC 703

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

1. The present batch of intra-court appeals filed under Chapter VIII Rule 5 of the Allahabad High Court Rules seek to challenge identical orders and judgements of learned Single Judge dated 25.11.2022 dismissing the writ petitions filed by the appellants for a direction to the respondents to declare them successful in the written examination held for the posts of Constables (Civil Police) and Provincial Armed Constabulary (PAC) in pursuance of advertisement dated 16.11.2018 issued by U.P. Police Recruitment and Promotional Board (respondent herein).

2. For sake of convenience, we treat Special Appeal No. 93 of 2023 as the leading case and the facts of that case are being noted. The facts of other cases are identical.

3. The selection was held as per the U.P. Police (Constable and Head Constable) Service Rules, 2015 as amended from time to time. It consisted of five stages i.e. (i) written examination (ii) documentary verification (iii) physical standard test (iv) physical efficiency test and (v) medical examination. A total of 31360 posts of Constables (Civil Police) and 18208 of Provincial Armed Constabulary (PAC) were advertised. The written examination was held on 27.01.2019 and 28.01.2019 in two separate shifts. The Recruitment Board notified the cut off marks of the written examination for each category on 20.11.2019 which are as follows:-

General	185.3465
OBC	172.3272
SC	145.3905
ST	114.1932

4. Thereafter by a notice dated 22.11.2019, the Recruitment Board intimated the appellants that document verification/physical standard test would be held for candidates numbering 2.5 times the total number of vacancies. Those who were successful, were made to undergo physical efficiency test. The appellants, being successful in document verification/physical standard test, were permitted to participate in physical efficiency test. The aforesaid exercise was held between 28.11.2019 and 28.1.2020.

5. The marks of individual candidates was notified on 20.02.2020 and simultaneously the list of candidates selected for medical examination was also uploaded on the website of the Recruitment Board. The final select list was uploaded on 2.03.2020 and the said list did not include the name of the appellants. All the appellants have obtained marks nearing the cut off marks in their respective category. There are eight appellants and the marks obtained by appellant nos. 1 to 8 therein are A1- 174.8497, A2-148.9982, A3-173.8156, A4-174.8497, A5-174.8497, A6-173.8156, A7-175.3667, A8-175.8837 respectively. Each correct answer was awarded plus two marks (+2) and a wrong answer minus 0.5 marks.

6. The writ petition was founded on the ground that key answer to Question No.68 of Test Booklet B, Series 17 pertaining to the candidates in Special Appeal No.93 of 2023 wrongly declares option 'D' as the correct answer, whereas the correct answer was option 'C'.

Accordingly, if their contention would have been accepted by the Writ Court, they would have become successful to participate in the medical examination and if found fit therein, being appointed against the advertised posts.

7. Question no. 68 of test booklet-B, Series-17 was as under:

Q. 68. At 9 PM, the hour hand faces north, which direction will the minute hand face at 6:30 AM?

A) North	B) East
C) West	D) South

8. The provisional key answers were initially uploaded on the website of the Board on 05.02.2019 and objections were invited on the same. According to the key answer uploaded on 05.02.2019, the correct answer to question no. 68 was option (C). Again on 12.03.2019, another set of provisional key answers was uploaded on the website and once again objections were invited by the Board. In second key answers uploaded on 12.03.2019 also, the correct answer of question no. 68 of test booklet-B, Series-17 was option (C). However, in the final answer key uploaded on 08.11.2019 on the website, the correct answer was changed to option (D). It is pertinent to mention that there was no provision for filing objections against the final answer key.

9. The writ petition filed by the appellants was dismissed by learned Single Judge with the finding that option (C) or (D) to question no. 68 (wrongly mentioned as question no. 69 in the impugned order) would be correct depending on how the question is interpreted and the Court is not well equipped to sit over the expertise of

the expert body to take a decision with regard to correct answer unless some perversity and malafide is demonstrated.

10. By order dated 08.02.2023 this Court directed the respondents to file short counter affidavit disclosing the marks obtained by the appellants, cut off merit notified, whether the appellant would be above the cut off if answer is treated to be correct and how many seats remained vacant category wise.

11. In compliance of the aforesaid order, a short counter affidavit was filed by respondent no. 2, 3 & 4 and in which it is admitted that appellants 1, 2, 4, 5, 7 and 8 would obtain mark above the cut off marks of their respective category if option (C) would be taken as correct. In paragraph no. 6 of the short counter affidavit, a chart has been given to demonstrate the above stand. The same is reproduced below :

Sl. N.	Registration No.	Roll No.	Candidate Name	Category	Normalised marks	Category Cut-Off	Status of marks if Option C is treated as correct Option	Whether marks are above Category Cut-Off
1	10056929	2112060226	Kapil Kumar	OB C	174.8497	185.3465-CP 176.3834-PAC	177.3497	Yes
2	101242072	2412300281	Manoj Kumar	SC	148.9982	159.308-CP 149.5773-PAC	151.4982	Yes

3	101298772	2412190398	Manesh Kumar	OB C	173.8156	185.3465-CP 176.3834-PAC	176.3156	No
4	102060764	2482020516	Suraj Yadav	OB C	174.8497	185.3465-CP 176.3834-PAC	177.3497	Yes
5	100613831	2442020205	Jagmohan Yadav	OB C	174.8497	185.3465-CP 176.3834-PAC	177.3497	Yes
6	101186616	2122090280	Shashank Kumar	OB C	173.8156	185.3465-CP 176.3834-PAC	176.3156	No
7	100868755	2152060325	Ajit Kumar Yadav	OB C	175.3667	185.3465-CP 176.3834-PAC	177.8667	Yes
8	10059905	2112100019	Gaurav Singh	OB C	175.8837	185.3465-CP 176.3834-PAC	178.3837	Yes

12. It has been further stated in paragraph no. 9 of the short counter affidavit that TCS, the outsourcing agency, which conducted the examination, supported the change of answer key with the following explanations -

“Explanation:

The Question was in two Parts:

Part#1: At 9 p.m. the hour hand faces north.

Part#2: Which direction will the minute hand face at 6:30 a.m.?

There was no connection between these two Parts and neither did the Question indicate that it was referring to the same Clock referred in part 1. The Statement (or Part 1) was only meant as a misdirection to confuse candidates who would attempt the answer without reading and analyzing the Question,

Actually, the Minute hand at 6.30 a.m. on all Clock always face South. Therefore, the correct answer was option D, ‘South’ and hence revised Answer Key assigned “D”.”

13. By order dated 06.04.2023, this Court directed the respondents to disclose the number of seats which had remained vacant in each category. The stand taken in the affidavit filed in compliance of said order is that after medical examination, 603 posts could not be filled up and these have been carried forward to the next recruitment, which admittedly has not been held so far.

14. These appeals were heard at length on 6.07.2023. It was contended on behalf of the appellants that the correct answer was option 'C' and for arriving at the aforesaid conclusion, no complex process of reasoning or rationalization is required. Even the Recruitment Board and the State does not dispute that when the hour hand faces North at 9:00 p.m. then minute hand would face West at 6:30 a.m. However, their contention that first part of the question was incorporated only to confuse the candidates and the same was to be ignored and only second part of the

question should have been read in isolation, is wholly unsustainable in law. A question has to be read as a whole. A candidate is never expected to shut his eyes to or ignore any part of question and thereafter answer it. On the other hand, it was vehemently contended on behalf of the State respondents that Courts should not assume the role of experts in such matters otherwise, it would result in overstepping its jurisdiction. Even in the event of doubt, the benefit should go to the Recruitment Board rather than to the appellants.

15. The aforesaid contentions were examined by this Court and a detailed order was passed on 6.07.2023 dealing with the arguments advanced by the parties. The relevant extract from the aforesaid order is extracted below:-

15. Learned Additional Advocate General and Additional Chief Standing Counsel places reliance on the judgment of Hon’ble Apex Court in **Ran Vijay Singh v. State of U.P.**¹, wherein it has been held as under: “30. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are:

30. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

30.2 If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the Court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any “inferential process of reasoning or by a process of rationalisation” and only in rare or

exceptional cases that a material error has been committed;

30.3 *The Court should not at all re-evaluate or scrutinize the answer sheets of a candidate – it has no expertise in the matter and academic matters are best left to academics;”*

Learned Additional Chief Standing Counsel vehemently submitted that this Court should not embark upon an exercise to re-evaluate the question as the Court does not have expertise in the matter.

16. In response to the aforesaid submission, it is submitted by the learned counsel for the petitioner that if the petitioners are able to demonstrate ex-facie that the answer to question no. 68 was wrong then this Court may seek opinion of experts as was done by the Hon'ble Supreme Court in case of Bihar Staff Selection Commission and others v. Arun Kumar and others², wherein the Court has held as under:

“This court reiterates that the scope of judicial review under Article 226 in matters concerning evaluation of candidates-particularly, for purpose of recruitment to public services is narrow. The previous decisions of the court have constantly underscored that in the absence of any provision for re- evaluation of answer sheets, judicial review should be rarely exercised - preferably under exceptional circumstances.”

17. The Hon'ble Apex Court even in **Ran Vijay Singh and others** (Supra) did not altogether ruled out interference by the Court but held as under :

“30.2 If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the Court may permit re-evaluation or scrutiny only if it is demonstrated very clearly,

without any “inferential process of reasoning or by a process of rationalisation” and only in rare or exceptional cases that a material error has been committed;”

(Emphasis supplied)

18. Again in paragraph 18 of the same judgement, the Supreme Court held that “a complete hands-off approach of no interference approach was neither suggested in **Himanchal Pradesh Public Service Commission vs. Mukesh Thakur and another**³ nor has it been suggested in any other decision of this Court-the case law developed over the years admits of interference in the result of an examination but in rare and exceptional situations and to a very limited extent.”

19. We have also examined the judgment of the Hon'ble Supreme Court in the case of **High Court of Tripura v. Tiratha Sarathi Mukherjee**⁴ wherein after considering number of judgements in this regard the Supreme Court has held that the Court can permit revaluation inter alia if it is demonstrated very clearly without any inferential process of reasoning or by a process of rationalisation and only in rare and exceptional cases that a material error has been committed.

20. We now proceed in the light of the principles enunciated by the Supreme Court. From the perusal of question no. 68 of the test booklet-B, Series-17, it is clear without undertaking any inferential process of reasoning that option 'C' was correct. When the hour hand faces 'North' at 09:00 P.M. then necessarily minute hand will face 'West' at 6:30 A.M. Even, respondents do not dispute that if the question is understood in its plain sense, the correct answer would be option 'C'

21. The question which now arises is whether a candidate appearing in the examination was required to interpret the

question in the manner suggested by the respondents. We cannot loose sight of the fact that the examination was for selection of Constables. It was not an examination of Engineering students in respect to whom it can be assumed that their I.Q. level would be so high that they would not read the question in its natural sense, but answer it after ignoring the first part. In any event, if the direction of 'hour hand' was fixed by the first part of the question as facing North, there was no apparent reason to ignore the same and consider the latter part alone while answering the question. Would it not lead to confusion and ambiguity?

22. In our opinion, the question posed should be very clear and capable of one meaning only. The possibility of any other interpretation should be totally ruled out.

16. We thus held that a complete hands off approach of no interference has not been suggested in any of the judgments cited on behalf of the State otherwise it would be in derogation of the power of judicial review conferred on the Constitutional Courts. At the same time, interference should be in rare and exceptional situations where the mistake is apparent and where it does not involve any inferential process of reasoning or rationalization. It was also held that in fact, the issue was not regarding option 'C' being the correct answer when the question is read in plain sense, but whether a candidate appearing in the examination is supposed to answer the question after ignoring its first part, as suggested by TCS, the agency which conducted the examination on behalf of the Recruitment Board. This would amount to entering into realm of assumption, which, according to us, is simply not acceptable. A question has to be given its plain meaning and read as a

whole. The candidates were being tested for reasoning and logic and not physics.

17. For testing logic and reasoning, often questions are based on a given assumption. The assumption on which question is founded is different from the actual state of affairs. The candidates are not supposed to import their understanding of the actual state of affairs, but answer the question on basis of the assumptive premise. A few illustrations of such questions are noted herein below:-

1. The square root of a number is defined as division of that number by 4. What shall be the square root of 64?

2. The gravitational pull on moon is one third of that of Earth. A man is able to jump 1 m on Earth with a certain effort. What height he will be able to jump to at Moon, with the same effort?

18. A square root of a number is that number which when squared gives the original number. In other words, it is the number whose product by itself gives the original number. According to the definition of square root, the answer to the first question would be 8, but in the question asked, an artificial definition has been given to "square root" and according to which, correct answer would be 16. Likewise, it is known to every one that gravitational pull of Moon is one sixth that of Earth and therefore, a man would jump 6 meters on Moon with the same effort, but according to the question asked, answer would be 3. In such kind of questions, it is preposterous to suggest that first part of the question should be ignored for the reason that statement of fact contained therein is not correct.

19. Thus, it is not one of those cases where the dispute was with regard to correctness of the key answer but whether the stand of the Recruitment Board to ignore first part of the question should be accepted or not. This, in our opinion, was something which this Court itself was empowered to decide, but we preferred to proceed with extra caution and therefore, we referred the question for opinion of subject expert of repute. Accordingly, we requested Director, Indian Institute of Technology, Kanpur to nominate an expert from the Faculty of Mathematics or any other field, who having regard to the nature of controversy, would be in position to assist this Court.

20. The Director, Indian Institute of Technology, Kanpur nominated Dr. Amit Mitra, Professor, Department of Mathematics and Statistics, IIT Kanpur as the expert. According to his report, it is option 'C' which is correct and not option 'D'. The relevant extract from his opinion is extracted below:-

“My observation regarding the question number 68 of Test Booklet B is:

It is obvious that if at 9 pm, the hour hand of the clock faces north (i.e. points towards north), then at 6:30 am the minute hand would face west. Hence, as per the statement and option list of question number 68 of Test Booklet B, the correct option should be (C) and NOT (D).”

21. Thereafter, counsel for the parties were supplied with the copy of his report. Learned counsel for the State and Recruitment Board submitted that even though the expert has opined in favour of the appellants, but this Court should dismiss the appeals as there has been considerable delay and vacancies have been

carried forward to the next recruitment. In support of the said contention, reliance has been placed on the judgement of the Supreme Court in *State of U.P. and others Vs. Pankaj Kumar* (Civil Appeal No.6860 of 2021) decided on 18.11.2021 and Civil Appeal No.1924 of 2010 **Sankar Mondal Vs. State of West Bengal and others**, decided on 15.02.2022. It is also submitted that in case of interference, it would adversely affect those who have already been selected and appointed.

22. On the other hand, counsel for the appellants submitted that the appellants approached this Court immediately after their individual scores were uploaded on the official website. It is also contended on their behalf that the Recruitment Board admits that after medical examination, 603 posts could not be filled up. It is submitted that the advertisement for the next recruitment has yet not been issued and therefore, there are sufficient vacant posts still available against which the appellants can be appointed. Thus, in pith and substance, the issue which remains unresolved is whether this Court should interfere in the matter or not and if yes, the relief to which the appellants are entitled to.

23. Before we advert to the precedents on the above aspect, we reiterate some basic facts which are not in dispute:-

(a) The final answer key was uploaded on the website on 8.11.2019. The individual marks of the appellants were disclosed on 20.2.2020 and final select list was notified on 2.3.2020. The appellants thereafter came to know that they have not been selected and were falling short by few marks in their respective category from being selected. They filed the writ petition before this

Court in the month of July, 2020. Thus, there was no delay on part of the writ petitioners in approaching this Court.

24. In **Sanjay Singh and another Vs. U.P. Public Service Commission, Allahabad and another**⁵, the unsuccessful candidates for selection on the posts of Civil Judge (Junior Division) challenged the legality of the statistical scaling system adopted by the U.P. Public Service Commission. The Supreme Court held that the scaling system approved in **S.C. Dixit**⁶ case would not be valid for the recruitment in question. Thereafter, the Supreme Court proceeded to answer question no. 4 as to whether it should interfere in the matter or not. The Supreme Court did not disturb the appointments of the selected candidates, but at the same time, granted relief to the candidates whose aggregate of raw marks in the written examination and interview was more than the last selected candidate in their respective category by directing their appointment against future vacancies. It was subject to the rider that the said relief would be available only to such petitioners who had approached the Court before 31.08.2005 (final result of the said selection was declared on 1.5.2005).

25. In **Kanpur University Vs. Samir Gupta and others**⁷ where the combined Pre-Medical Test was under scrutiny, the Supreme Court held key answers to various questions to be incorrect. While granting relief to the students before it, the Supreme Court placed embargo on entertainment of fresh petitions. The relevant observations in this behalf are as follows:-

22. We understand that some petitions are pending in the High Court on these very points. Those petitions will be disposed of by the High Court in the light of this

judgment, provided that the petitioners therein make out a case for interference as the students in these appeals have done. We however, direct that no fresh petitions should be entertained by the High Court and, of course, none will be entertained by us hereafter on the questions involved in these appeals arising out of the test which was held in 1982. The new academic session is due to commence within the next few days and these questions cannot be allowed to be raised in a leisurely fashion so as to disorganise the scheme of fresh admissions.

26. Again in **Ran Vijay Singh**, the Supreme Court, while permitting candidates who were successful before the High Court in assailing the key answers to be appointed by creating supernumerary posts, saved the appointment of the candidates already made.

27. A Division Bench of this Court in Special Appeal Defective No.343 of 2021 **Abhishek Srivastava and others Vs. State of U.P. and others**, again issued similar directions and limited the relief to candidates who had filed writ petitions by that time and not to any other candidate, while not disturbing those already appointed.

28. In **M. Sudakar Vs. V. Manoharan and others**⁸, the Supreme Court recognised the power of the writ court to mould relief depending upon the facts and circumstances of the case in order to do complete justice between the parties.

29. In **Sankar Mondal** (supra), cited by counsel for the State, the Supreme Court did not grant relief to the candidates who approached the writ court after seven years and also having regard to the fact that

twenty four years had elapsed by the time the case was decided by the Supreme Court. In **State of U.P. Vs. Pankaj Kumar**, the Supreme Court did not accept the contention of the candidates that intimation sent to them by SMS regarding stage of selection would not be sufficient and rejected the contention that intimation should have been given through post. While rejecting the claim on merits, it was also observed that the candidates had not been vigilant in approaching the High Court at the earliest opportunity, although in respect of same selection, certain other persons had approached the High Court much earlier.

30. These judgments, in our opinion, were based on facts of those cases. In the instant case, as noted above, the appellants have approached the Court immediately after their marks were notified and final result was uploaded and they came to know that they were short by a marginal difference. We have already held that the Recruitment Board has acted in a completely irrational manner in changing the key answer to Question No.68 of Test Booklet B, Series 17 at the time of notifying the revised answer key. Admittedly, there was no provision for filing objection after the changes made in the final answer key. There are still 603 posts vacant after final round of selection. Although it is alleged that these posts have been carried forward to the next recruitment, but even advertisement for fresh recruitment has not been issued so far. Therefore, we are of considered opinion that those appellants who are short of 2.5 marks (2 marks for correct answer and 0.5 marks deducted for negative marking)

or less from the cut off marks in their respective categories, are entitled to be appointed against vacant posts, provided they qualify the medical examination or any other norm prescribed in this behalf. But this benefit would be available only to those candidates who had filed the writ petitions before this Court soon after the cut off marks were notified and not to anyone who now approaches this Court. Those who have already been selected should also not be disturbed. This would balance the interest of all sides, without causing prejudice to any one.

31. Accordingly, we set aside the judgement of learned Single Judge and dispose of the instant appeals with the following directions:-

(a) The Recruitment Board will revise the result of written examination of such of the appellants who are short of 2.5 or less marks from the cut off marks in their respective categories.

(b) The Recruitment Board will hold their medical examination and in case they succeed on all other parameters, they shall be appointed against the posts which remained vacant after the final round of recruitment. The aforesaid exercise shall be carried out within six weeks from today after due intimation and public notice to all concerned.

(d) These candidates, if selected finally, will be placed at the bottom of the seniority list, while maintaining their inter-se merit position and they shall be entitled to salary and allowances only from the date of their actual appointment, as admissible under the Service Rules.

(e) The aforesaid benefits shall only be available to those who have

approached this court so far and not to any other candidate.

(2023) 11 ILRA 475
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DONADI RAMESH, J.

Special Appeal No. 541 of 2023
 with
 Spl.Appeal. No. 410 of 2023
 &
 Spl. Appeal Defective No. 536 of 2023

Authorized officer, Prathama U.P. Bank,
Moradabad **...Appellant**

Versus

Smt. Manjeet Kaur **...Respondent**

Counsel for the Appellant:
 Sri Sachin Mishra

Counsel for the Respondents:
 Sri Ajay Kumar Mishra

A. Compassionate Appointment – Scheme for Appointment on Compassionate Grounds/Payment of Ex Gratia – Interpretation of Clause 8 – Retrospective Application – Whether Scheme dated 10.5.2019 applies to deaths occurring before its enforcement on 01.03.2019 – Time limit for application under Clause 8.1 and 8.2 – Whether five-year period for filing application includes deaths prior to Scheme's enforcement.

Held: The Scheme for Appointment on Compassionate Grounds, effective from 01.03.2019, does not expressly provide for retrospective application to cover deaths of employees occurring before its enforcement. Clause 8.1, which stipulates a five-year period for filing applications, applies to deaths occurring when the Scheme was already in force, not to deaths predating its introduction.

The interpretation in *Chairman, Baroda U.P. Bank Vs Jitendra* (Special Appeal No. 270 of 2023), holding that Clause 8.2 gives retrospective effect to the Scheme, is inconsistent with Supreme Court judgments, particularly *Secretary to Government Department of Education (Primary) Vs Bheemesh alias Bheemappa*, which emphasize that compassionate appointment is not a vested right and is subject to the Scheme in force on the date of death. Judicial opinion favors strict construction of compassionate appointment schemes as exceptions to normal recruitment. Due to conflict with the Co-ordinate Bench decision in *Jitendra*, the matter is referred to a Larger Bench to determine whether the interpretation of Clause 8 in *Jitendra* is sustainable in light of Supreme Court precedents. (Paras 12-16)

B. Reference to Larger Bench – Judicial Propriety – Conflict of Interpretation – Co-ordinate Bench Decision.

Held: Where a Co-ordinate Bench decision (*Jitendra*) interprets Clause 8 of the Scheme to have retrospective effect, but such interpretation conflicts with Supreme Court rulings and another Single Judge decision (*Bechan Giri*), judicial propriety requires the issue to be resolved by a Larger Bench. Question referred: "Whether the interpretation given to Clause 8 of the Scheme dated 10.5.2019 in *Chairman, Baroda U.P. Bank Vs Jitendra and Others* and analogous Schemes, is sustainable in law, in view of judgment of Supreme Court in *Secretary to Government Department of Education (Primary) and Others Vs Bheemesh alias Bheemappa* and other judgments?" (Para 16)

Case Law Discussed:

1. Canara Bank Vs M. Mahesh Kumar
2. S.B.I. Vs Jaspal Kaur
3. Indian Bank Vs Promila
4. N.C. Santosh Vs St. of Karn.
5. St. of Madhya Pradesh Vs Ashish Awasthi

6. S.B.I. Vs Raj Kumar

7. MGB Gramin Bank Vs Chakrawarti Singh

8. Secretary to Government Department of Education (Primary) Vs Bheemesh @ Bheemappa

9. S.B.I. Vs Sheo Shankar Tewari

10. Bhawani Prasad Sarkar Vs U.O.I.

11. Umesh Kumar Nagpal Vs St. of Har Bechan Giri Vs U.O.I.

12. Chairman, Baroda U.P. Bank Vs Jitendra

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

1. The present batch of special appeals is against orders of different dates passed by learned Single Judges directing the appellants-Banks to consider the application of the contesting respondents for appointment under the Dying-in-Harness Scheme dated 10.5.2019.

2. All the appeals involve interpretation of certain Clauses of the Scheme so as to find out whether applications filed for compassionate appointment by dependents of a deceased employee of the Bank within a timespan of five years prior to the date of enforcement of the Scheme, would be covered under the Scheme or not. Consequently, all the appeals were heard together. However, for sake of convenience, the facts in Special Appeal (Defective) No. 468 of 2023 (Regular Number 541 of 2023) are being taken note of in the instant order. These are as follows: -

(i) The husband of the respondent died on 19.1.2018 while in harness. At the

relevant time, there was no scheme for appointment on compassionate grounds. The Scheme came into force on 1.3.2019.

(ii) The Bank vide a Communication dated 7.12.2021 informed the respondent that it would not be possible to consider her request for compassionate appointment as her husband had died before the commencement of the Scheme on 1.3.2019.

(iii) The respondent challenged the said order in the writ petition which has been allowed by the order impugned herein.

(iv) Learned Single Judge has taken the view that under Clause 8 of the Scheme, application for compassionate appointment could be filed within five years of death of an employee and therefore even if death had taken place before commencement of the Scheme, but application was filed within five years from the date of death, it would be covered under the Scheme.

3. Before we proceed further, it would be useful to note the relevant Clauses of the Scheme. The Scheme is known as "Scheme for Appointment on Compassionate ground/Payment of Ex gratia". The Government of India letter dated 31.12.2018 stipulated that "the Scheme shall be effective from the date on which the Board of RRB adopts the same". Accordingly, NABARD advised the individual banks to adopt the same. Board of different RRB's adopted the scheme on different dates. In case of the appellant bank, it became effective from 01.03.2019.

4. Under Clause 1, the persons covered under the Scheme are mentioned, which is as follows: -

"1. Coverage :

1.1 To a dependent family member of permanent employee of the Bank who :

(a) Dies while in service (including death by suicide).

(b) Is retired on medical grounds due to incapacitation before reaching the age of 55 years.

(Incapacitation is to be certified by a duly appointed Medical Board in a Government Medical College/Government District Head Quarters Hospitals/Panel of Doctors nominated by the Bank for the purpose).

1.2. For the purpose of Scheme "employee" would mean and include only a confirmed regular employee who was serving full time or part time on scale wages, at the time of death OR retirement on medical grounds, before reaching age of 55 years and does not include any one engaged on contract/ temporary/ casual or any person who is paid on commission basis."

5. Clause 8 of the Scheme stipulates the time limit for considering the applications and it runs as follows: -

"8. Time Limit for Considering Applications.

8.1 Application for employment under the Scheme from eligible dependent should normally be considered upto five years from the date of death or retirement on medical grounds and decision to be taken on merit in each case.

8.2 However, Bank can consider request for compassionate appointment even when the death or retirement on medical grounds of the employee took place long back, even five years ago. While considering such belated request, it should, however, be kept in view that the concept of compassionate appointment is largely related to the need for immediate assistance to the family of the employee in order to

relieve it from economic distress. The very fact that the family has been able to manage somehow all these years should normally be taken as adequate proof that the family had some dependable means of subsistence. Therefore, examination of such case would call for a great deal of circumspection. The decision to take appointment on compassionate grounds in such cases may, therefore, be taken only at the Board level."

6. It is noteworthy that the same Scheme was subject matter of consideration by a Co-ordinate Bench in **Special Appeal No. 270 of 2023, Chairman, Baroda U.P. Bank (Erstwhile Baroda U.P. Gramin Bank), Gorakhpur and Others vs. Jitendra and Others**. In the said decision also, the same view has been taken. It has been held that a conjoint reading of Clauses 8.1 and 8.2 of the Scheme leads to the conclusion that even if the employee had died "five years ago", discretion has been given to the Bank to consider such applicants for compassionate appointment. It has also been held that Clause 8.2 of the Scheme was incorporated with an intention to give it a retrospective effect. Para 19 of the said judgment wherefrom the reasoning behind the view taken is discernable, is quoted below: -

(19) Considering the aforesaid facts and circumstances of the case coupled with the fact that it is not a case where retrospective/prospective application of the revised Model Scheme 2019 is in issue and also considering Clause 8.1 and Clause 8.2 of the revised Model Scheme of compassionate appointment, as being a beneficial subordinate legislation, this Court is of the view that since Scheme, 2019 as applicable to the appellants/Bank, itself specifically provides for

encompassing all those cases for consideration, wherein the deceased employee would have died five years ago, which appears to be incorporated with an intention to give it a retrospective effect, therefore, the learned Single Judge has rightly come to the conclusion that the factum of the deceased employee (father of the respondent no.1) having died on 12.08.2014 obviously falls within the purview of Clause-8 of the revised Model Scheme, 2019 and as such the case of the respondent no.1/writ petitioner deserved to be considered for compassionate appointment.

7. Learned counsel for the appellant-Banks vehemently contended that the impugned judgment of learned Single Judge as well as the judgment of Co-ordinate Bench in Special Appeal No. 270 of 2023 which also places reliance on the impugned judgment, do not take into consideration the judgments of the Supreme Court wherein it has been held that the crucial date for determining right to compassionate appointment is the date of death of the employee and if on that date, there was no such scheme, he could not be given benefit of a subsequent scheme, unless the Scheme itself makes provision therefor. In support of the submission, reliance is placed on the judgments of the Supreme Court in **Canara Bank vs. M. Mahesh Kumar**¹; **State Bank of India and Others vs. Jaspal Kaur**²; **Indian Bank and Others vs. Promila and Another**³; **N. C. Santosh vs. State of Karnataka and Others**⁴ **State of Madhya Pradesh and others vs. Ashish Awasthi**⁵.

8. On the other hand, counsel for the respondents relied on (i) **State Bank of India vs. Raj Kumar**⁶, (ii) **MGB Gramin Bank vs. Chakrawarti Singh**⁷

9. The anchor sheet of the case of the appellants is the judgment of Supreme Court in **Secretary to Government Department of Education (Primary) and Others vs. Bheemesh alias Bheemappa**⁸. In the said judgment, the Supreme Court has in great detail noted an apparent conflict between two lines of decisions, one taking the view favouring the appellant-Banks and another supporting the case of the respondents. The Supreme Court also noted the fact that in **State Bank of India and others vs. Sheo Shankar Tewari**⁹, a Two Member Bench of the Supreme Court referred the matter to a Larger Bench. However, the reference has not been answered so far. It has also been noticed that since the reference was made, the Supreme Court had decided four more cases dealing with the same issue. These cases are (i) **Indian Bank vs. Promila**; (ii) **N.C. Santosh vs. State of Karnataka**; (iii) **State of Madhya Pradesh vs. Amit Shrivastava**; and (iv) **State of Madhya Pradesh vs. Ashish Awasthi**.

10. It has also been noted that out of these four decisions, the judgment in **N.C. Santosh** (supra) was by a Three Member Bench and it took note of the reference pending before the Larger Bench. The judgment thereafter makes a critical analysis of the two lines of judgments and takes note of the fundamental difference between the two views. It has been held that where the benefit under the existing Scheme was taken away or substituted with a lesser benefit, judicial opinion was in favour of applying the new Scheme, but in cases where the benefits under an existing Scheme were enlarged by a modified Scheme after the death of the employee, the Scheme applicable on the date of death of the employee was applied. This is fundamentally due to the fact that

compassionate appointment was always considered to be an exception to the normal method of recruitment and looked down upon with lesser compassion for the individual and greater concern for the rule of law. Paragraph nos. 17 and 18 from the said judgment which throws light on the aforesaid fundamental difference in interpreting the applicability of the Scheme are extracted below: -

17. Keeping the above in mind, if we critically analyse the way in which this Court has proceeded to interpret the applicability of a new or modified Scheme that comes into force after the death of the employee, we may notice an interesting feature. In cases where the benefit under the existing Scheme was taken away or substituted with a lesser benefit, this Court directed the application of the new Scheme. But in cases where the benefits under an existing Scheme were enlarged by a modified Scheme after the death of the employee, this Court applied only the Scheme that was in force on the date of death of the employee. This is fundamentally due to the fact that compassionate appointment was always considered to be an exception to the normal method of recruitment and perhaps looked down upon with lesser compassion for the individual and greater concern for the rule of law.

18. If compassionate appointment is one of the conditions of service and is made automatic upon the death of an employee in harness without any kind of scrutiny whatsoever, the same would be treated as a vested right in law. But it is not so. Appointment on compassionate grounds is not automatic, but subject to strict scrutiny of various parameters including the financial position of the family, the economic dependence of the family upon

the deceased employee and the avocation of the other members of the family. Therefore, no one can claim to have a vested right for appointment on compassionate grounds. This is why some of the decisions which we have tabulated above appear to have interpreted the applicability of revised Schemes differently, leading to conflict of opinion. Though there is a conflict as to whether the Scheme in force on the date of death of the employee would apply or the Scheme in force on the date of consideration of the application of appointment on compassionate grounds would apply, there is certainly no conflict about the underlying concern reflected in the above decisions. Wherever the modified Schemes diluted the existing benefits, this Court applied those benefits, but wherever the modified Scheme granted larger benefits, the old Scheme was made applicable.

11. The judgment also notices that the cleavage of opinion revolves around two dates, namely the date of death of the employee and date of consideration of the application of the dependent. It has been held that out of these two dates, only one, namely the date of death alone, is a fixed factor and does not change. It has been observed that a rule of interpretation which produces different results, dependent upon what individuals do or do not do, is inconceivable. It has been held that the interpretation as to the applicability of a modified Scheme should depend only upon a determinate and fixed criteria such as the date of death and not an indeterminate and variable factor like date of filing of the application or date of its consideration.

12. Reverting to the facts of the instant case, indisputably, on the date of death of the employee, there was no

Scheme in force for appointment of the dependent family member on compassionate basis. The Scheme for compassionate appointment came into effect from 1.3.2019. As the Scheme confers right to be considered for compassionate appointment for the first time after it was enforced, it definitely confers new and better rights than what were available at the time of death of the employee. Applying the legal principles in **Bheemesh** (supra), the Scheme perhaps would not apply. However, in the impugned order as well as the judgment of the Co-ordinate Bench, as already noted, the view taken is that by virtue of Clause 8.1 and 8.2, the Scheme would have retrospective operation.

13. Compassionate appointment is never a part of service condition of any employee or a vested right. It cannot be given in absence of rules or regulations issued in this behalf. The right comes into existence for the first time upon death of the employee in harness. If there is no scheme for compassionate appointment applicable on date of death, then no such right accrues except in cases where a future scheme unequivocally declares that it would apply retrospectively.

14. One of the factors which weighed with the Co-ordinate Bench in **Jitendra** (supra) is that the Scheme was a piece of beneficial subordinate legislation. Therefore, a wider interpretation relating to its applicability was given. However, the consistent judicial opinion is that appointment on compassionate basis being an exception should be strictly construed. (See **Bhawani Prasad Sarkar vs. Union of India**, (2022) 4 SCC 209; **Umesh Kumar Nagpal vs. State of Haryana** (1994) 4 SCC 138).

15. Clause 8 relates to time limit for considering the applications. Thus, it provides for limitation in which a claim covered by the Scheme is to be made. It is five years from the date of death, but in exceptional circumstances, a claim beyond period of five years could also be considered after thorough scrutiny and only at the level of Board. The question of reckoning the limitation would arise only when the case of any of the applicant is covered under the substantive part of the Scheme. Had there been any intention to make the Scheme applicable even to cases where death had taken place in preceding five years, it could have been stated expressly as in **Raj Kumar** (supra) and **MGB Gramin Bank** (supra). This very Scheme was considered in **Bechan Giri vs. Union of India** by a learned Single Judge and it is held that Clause 8.1 and 8.2 of the Scheme “do not envisage cognizance of cases of dependants, where death of an employee in harness has taken place before the Scheme was enforced in the Bank. The employment of the expression in Clause 8.1 “normally be considered upto five years from the date of death” refers to the period of five years of death on a date when the Scheme was already in force in the Bank; not five years or a little short of that time antedating the introduction of the Scheme.” However, it seems that the judgement of this Court in **Bechan Giri** (supra) was not cited before the Division Bench in **Jitendra** (supra).

16. With due deference, we are unable to agree to the view taken in **Jitendra** (supra). As the said judgment is by Co-ordinate Bench of equal strength, judicial propriety demand that the question be settled by a Larger Bench. Accordingly, we refer the following question for being answered by a Larger Bench: -

“Whether the interpretation given to Clause 8 of the Scheme dated 10.5.2019 in Chairman, Baroda U.P. Bank (Erstwhile Baroda U.P. Gramin Bank), Gorakhpur and Others vs. Jitendra and Others and analogous Schemes, is sustainable in law, in view of judgment of Supreme Court in Secretary to Government Department of Education (Primary) and Others vs. Bheemesh alias Bheemappa and other judgments?”

17. Let the papers of the instant batch of appeals be placed before Hon’ble the Chief Justice for constituting a Larger Bench.

(2023) 11 ILRA 481

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 31.10.2023

BEFORE

**THE HON’BLE ATTAU RAHMAN MASOODI, J.
THE HON’BLE OM PRAKASH SHUKLA, J.**

Special Appeal No. 613 of 2018
along with
other connected cases

**Mohit Kumar Dwivedi ...Appellant
Versus
Ram Janak Maurya & Ors. ...Respondents**

Counsel for the Appellant:

Apporva Tewari, Anand Kumar Yadav, Paritosh Shukla, Sudeep Kumar, Sukh Deo Singh

Counsel for the Respondents:

C.S.C., Amrendra Nath Tripathi, Durga Prasad Shukla, Gaurav Mehrotra, Himanshu Raghav, Ishita Yadu, Nand Kishore Patel, Onkar Singh, Pradeep Kumar Yadav, Sachin Kumar Srivastava, Sharad Nandan Ojha, Sudeep Kumar, Sudhir Mishra, Ujjwal Tripathi, Utsav Mishra, Vindhyawashin Kumar, Vivek Mishra

Service Law-U.P. Basic Education (Teachers) Service Rules, 1981-Rule 14

---Special Appeals filed against the judgment whereby the learned Single Judge has set aside the entire selection on the post of Assistant Teachers against 12,460 vacancies initiated in pursuance of the advertisement issued on 21.12.2016 with certain directions--- Advertisement issued for appointment of 12,460 Assistant Teachers in the Junior Schools. 5,990 candidates are already working on the said posts, 6,470 posts are still left to be filled--- Merit should always be promoted for ensuring quality education as proposed by the RTE Act in its preamble itself and the Courts have always promoted this cause, denial of appointments to meritorious candidates is prejudicial to the interest of meritorious candidates, who are future of our Nation---Thus, this court does not find any error in the preparation of merit list at District Level of the Assistant Teachers on the basis of candidates of “0” vacancy district to participate in the counseling’s for any district by marking their preference, which needless to say is in conformity to section 23 of the RTE Act. The said provisions is also not in breach of the touchstone as devised by the Apex Court for infringement of the provision of Articles 14, 15, 16 and 21-A of the Constitution of India---Impugned order set aside---Directions issued to the authorities concerned to take a decision to fill-up all the posts inclusive of residual 6,470 by preparing a common merit list of all the eligible Assistant Teachers as per NCTE Notifications read with Notification/Circular dated 26.12.2016 in the respective districts, within a period of three months from the date of production of a certified copy of this order.(E-15)

List of the cases referred:-

1. Girjesh Srivastava Vs St. of M.P. [(2010) SCC (10) 707]
2. D. N. Jeevaraj Vs Chief Secretary, Government of Karnataka & ors. [(2016) 2 SCC 653]
3. St. of Har. & anr. Vs Chanan Mal & ors. [(1977) 1 SCC 340]

4. Dhananjay Malik Vs St. of Uttaranchal & ors. [(2008) 4 SCC 171]

5. Rajan Kumar Vs St. of Bihar [(2014) 16 SCC 187].

6. Special Appeal Defective No.130 of 2014, Harsh Kumar & ors. Vs St. of U.P. & ors.;

7. Writ Petition No. 47490 of 2017, Km. Pallavi Vs St. of U.P. & ors.

8. St. of U.P. Vs Shiv Kumar Pathak [(2018) 12 SCC 595]

9. St. of U.P. Vs Shiv Kumar Pathak [(2018) 12 SCC 595]

10. Dhanraj Vs Vikram Singh & ors. [2023 SCC OnLine SC 724]

11. Ch. Tia Ramji & ors. Vs St. of U.P. & ors. [1956 SCC OnLine SC 9]

12. M. Karunanidhi Vs U.O.I. & anr. [(1979) 3 SCC 431]

13. Ashish Kumar Vs St. of U.P. & ors. [(2018) 3 SCC 55]

14. Malik Mazhar Sultan & anr. Vs U.P. Public Service Commission & ors. [(2006) 9 SCC 507],

15. Dr. (Major) Meeta Sahai Vs St. of Bihar & ors. [(2019) 20 SCC 17],

16. Raj Kumar & ors. Vs Shakti Raj & ors. [(1997) 9 SCC 527]

17. Dharmendra Kumar & ors. Vs Abhishek Kumar & ors. [(2017) SCC OnLine All 2716].

18. Ambika Prasad Mishra Vs St. of U.P. & ors. [(1980) 3 SCC 719].

19. Misc Bench No. 5320 of 2017 (Ambrish Kumar & 20 Ors. Vs St. of U.P Thru Prin. Secy. Basic Education & Ors.),

20. Shiv Kumar Sharma Vs St. of U.P. & ors. (2013) (6) ADJ 310 (FB)

21. Ranjan Kumar Vs St. of Bihar, (2014) 16 SCC 187.

22. St. of U.P. Vs Shiv Kumar Pathak [(2018) 12 SCC 595,

23. Society for unaided Private Schools of Rajasthan Vs U.O.I. & anr. (2012) 6 SCC 1)

(Delivered by Hon'ble Attau Rahman Masoodi, J. & Hon'ble Om Prakash Shukla, J.)

PRELUDE

(1) Heard extensively at length **Sri Anil Tewari, learned Senior Advocate** assisted by Sri Apoorva Tiwari, learned Counsel for the appellant in Special Appeal No. 613 of 2018, **Dr. L. P. Mishra** assisted by Sri Onkar Singh and Sri Man Bahadur Singh, learned Counsel for the appellants in Special Appeals Nos. 609 of 2018 and 617 of 2018, **Sri Himanshu Raghav**, learned counsel for the appellants in Special Appeal No. 634 of 2018, 670 of 2018, 193 of 2020 as also in Special Appeal Defective Nos. 276 of 2021, 13 of 2022, 267 of 2022 387 of 2023 and 413 of 2023, **Sri Vinay Prakash Tiwari**, learned Counsel for the appellants in Special appeal No. 92 of 2020, **Sri Dilip Mishra**, learned counsel for the appellants in Special Appeal Defective No. 207 of 2020, **Ms. Shreya Chaudhary**, learned counsel for the appellants in Special Appeal Defective No. 65 of 2023, **Sri Priyam Mishra**, learned counsel for the appellants in Special Appeal Defective No. 68 of 2023, **Sri Upendra Nath Mishra**, learned Senior Advocate assisted by Sri Neel Kamal Mishra, learned counsel for the appellants in Special Appeal Defective No. 377 of 2023 and 379 of 2023, **Sri Sushil Pandey**, learned counsel appearing for the appellants in Special Appeal Defective No. 399 of 2023 and **Sri Durga Prasad Shukla**, learned Counsel for the appellants in Special appeal No. 450 of 2023, Sri Ran Vijay Singh, learned

Additional Chief Standing Counsel appearing for the State-respondents in Special Appeal No. 319 of 2018 and **Sri J. N. Mathur, learned Senior Advocate** assisted by Sri Amrendra Nath Tripathi, Sri Gaurav Mehrotra and Sri Sanjeev Kumar Mishra, learned Counsel appearing for the respondent Nos. 1 to 6 in most of the Special Appeals, who were the original writ petitioners.

(2) In Special Appeal Defective Nos. 276 of 2021, 13 of 2022, 267 of 2022, 65 of 2023, 68 of 2023, 377 of 2023, 379 of 2023, 387 of 2023, 399 of 2023, 413 of 2023 and 450 of 2023, applications for condonation of delay supported by an affidavit have been filed on account of appeals being instituted with an inordinate delay.

Without delving into the merits, all the parties have urged that the applications may be allowed.

In view of above, all the applications for condonation of delay filed in Special Appeal Appeal Defective Nos. 276 of 2021, 13 of 2022, 267 of 2022, 65 of 2023, 68 of 2023, 377 of 2023, 379 of 2023, 387 of 2023, 399 of 2023, 413 of 2023 and 450 of 2023 are allowed and the delay in filing the appeals are **allowed**.

(3) An application for leave to file Special Appeal has been filed in Special Appeal No. 634 of 2028, Special Appeal No. 670 of 2018, Special Appeal No. 92 of 2020, Special Appeal Defective No. 193 of 2020, Special Appeal Defective No. 207 of 2020, Special Appeal Defective No. 276 of 2021, Special Appeal Defective No. 267 of 2022, Special Defective No. 68 of 2023, Special Appeal Defective No. 377 of 2023, Special Appeal Defective No. 379 of 2023,

Special Appeal Defective No. 399 of 2023, Special Appeal Defective No. 413 of 2023 and Special Appeal Defective No. 450 of 2023 for the reason that either the appellants could not succeed in the selection for appointment on the post of Assistant Teacher or the appellants belong to D.Ed./B.El.Ed and all of them have not filed writ petition before this Court. In these circumstances, they have prayed that they may be granted leave to file Special Appeal as they have not been heard before the Writ Court.

Since sufficient cause has been shown by the applicants/ appellants, the application for leave to file Special Appeal moved in Special Appeal No. 634 of 2028, Special Appeal No. 670 of 2018, Special Appeal No. 92 of 2020, Special Appeal Defective No. 193 of 2020, Special Appeal Defective No. 207 of 2020, Special Appeal Defective No. 276 of 2021, Special Appeal Defective No. 267 of 2022, Special Defective No. 68 of 2023, Special Appeal Defective No. 377 of 2023, Special Appeal Defective No. 379 of 2023, Special Appeal Defective No. 399 of 2023, Special Appeal Defective No. 413 of 2023 and Special Appeal Defective No. 450 of 2023 is allowed.

(4) The aforesaid Special Appeals filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 assails the judgment and order dated 01.11.2018 passed in a bunch of writ petitions, leading being Writ Petition No. 11375 (SS) of 2018, Ram Janak Maurya and others v. State of U.P. and others, whereby the learned Single Judge has set aside the entire selection on the post of Assistant Teachers against 12,460 vacancies initiated in pursuance of the advertisement issued on 21.12.2016 with certain directions. The

operative portion of the judgment and order dated 01.11.2018 reads as under:-

“The respondent Nos.3 and 4 are directed to initiate fresh proceeding of selection by fixing a cut of date to appear in the counselling for selection and appointment on the post of Assistant Teachers in accordance with Rule 14 of U.P. Basic Education (Teachers) Service Rules, 1981 as existing on the date of initiation of selection proceeding by issuing notice in the widely circulated newspapers of the state level as well as of the locality permitting the eligible and qualified candidates to appear in the counselling.”

CATEGORIZATION OF APPEALS

(5) Different categories of appellants have challenged the impugned judgment and order dated 01.11.2018 and the said categories are enumerated herein under for ready reference:

(i) The first category is of the appellants of Special Appeal Nos. 609 of 2018 and 617 of 2018, **who are already working on the post of Assistant Teacher** based on the selection in question.

(ii) The **second** category is of the appellants of Special Appeal No. 613 of 2018 and Special Appeal Defective Nos.207 of 2020, 276 of 2021, 13 of 2022, 377 of 2023, 379 of 2023, 387 of 2023 and 450 of 2023 **who belong to ‘0’ district vacancy and succeeded in the selection process** but are yet to be appointed.

(iii) The **third** category is of the appellants of Special Appeal Defective Nos. 267 of 2022, 68 of 2023, 399 of 2023 and 413 of 2023 **who belong to ‘O’ district vacancy and could not succeed in the selection process based on merit.**

(iv) The **fourth** category is of the appellants of Special Appeal No.634 of 2018 and 670 of 2018 as also Special Appeal Defective No.193 of 2020, **who are having the requisite qualification of D.Ed./B.El.Ed. and have not filed the writ petition.**

(v) The **fifth** category is of the appellant, who belongs to **‘zero vacancy district’** i.e., Special Appeal No. 92 of 2020 and has joined on the post of Assistant Teacher on the strength of interim order passed in writ proceedings on 03.05.2018. **It is a peculiar case where the appointment order of the appellant, who belongs to ‘o’ vacancy district, has been issued by mistake and it is said that it is a human error.**

(vi) The **sixth** category is that the appellants of Special Appeal Defective No. 65 of 2023 who belong to ‘o’ vacancy district and have not been permitted to participate in the counselling.

(vii) The **seventh** category is that the State has challenged the impugned judgment and order in the Special Appeal No. 619 of 2018.

SUBJECT MATTER

(6) Succinctly, the common case of the parties is that vide Government Order dated 15.12.2016, the U.P. Basic Shiksha Parishad, Allahabad initiated a selection process for appointing of 12,460 Assistant Teachers in the Primary Schools. Pursuant to the said Government Order dated 15.12.2016, the Secretary, U.P. Basic Shiksha Parishad, Allahabad issued a Letter dated 20.12.2016 declaring the schedule as also the vacancies in the districts across the State of U.P. Subsequently, online applications were invited from eligible candidates for the post of Assistant Teachers by the respective District Basic

Education Officers. It also gave a chart of district-wise vacancies which shows that out of 75 districts in the state of Uttar Pradesh, in 24 districts no vacancies were advertised. These 24 district were termed as “0” vacancy districts.

(7) Pursuance to the Circular dated 20.12.2016, the advertisement was issued on 21/22.12.2016 and the Board then issued detailed guidelines vide notification dated 26.12.2016. Apparently, the Secretary, U.P. Basic Education Board issued guidelines on 26.12.2016, providing necessary instructions in Clause 6 (ख), wherein it is provided that candidates from the districts, where no vacancies has been notified, could apply from anyone district of their first preference across the State. It is also allowed that the candidates with D.Ed. (Special Education) and four years B.L.Ed. could apply in similar manner.

(8) Thereafter, the Secretary, U.P. Basic Shiksha Parishad, Allahabad issued another Circular dated 02.03.2017 fixing schedule from 18.03.2017 to 20.03.2017 for First round Counselling. After first round of counselling, **combined select lists of home district candidates and the outside/zero district candidates were prepared and published for all districts on 21.03.2017 and 22.03.2017.**

(9) However, in the interregnum the recruitment process was withheld by the Board vide its order dated 23.03.2017 till further orders only on the ground that after the Legislative Assembly Elections, there is change of Government and on the oral instructions of the State Government, the entire process of recruitment has been abruptly stopped. It is stated herein that a bunch of writ petitions came to filed challenging the said order, the lead being

Writ Petition No. 27870 of 2017, *Neeraj Pandey v. State of U.P. and others*, wherein a Single Bench of this court vide judgment and order dated 03.11.2017 found that the withholding of the recruitment process to be not justifiable and without any reasons and thus set-aside the said order dated 23.03.2017. The said order of the Single Bench was taken by the State Government in Special Appeal No. 648 of 2017.

(10) In the meantime, Clause 9(Ka) of the Circular/guidelines dated 26.12.2016 issued by the Board was challenged by some candidates in Writ Petition No. 3293 of 2017, *Gyan Chandra & others v. State of U.P. & Others*, which was disposed of vide judgment and the order dated 16.05.2017 quashing the Clause 9(Ka) of the said guidelines. It may be mentioned herein that Clause 9(Ka) specified the procedure of selection and provided that the selection was to be made on the basis of quality point marks which was dependent on the division obtained by a candidate. Apparently, the concept of division on the basis of percentage of marks obtained for the trainee of 2012 BTC was changed to Grades for 2013 BTC and thus an anomaly crept in the quality marks methodology for candidates of 2012 and 2013 batch of BTC, which led to the said challenge in the aforesaid writ petition. Subsequently, the judgment and order dated 16.05.2017 passed by the Single Bench was challenged in Special Appeal Defective No. 365 of 2017 which was finally disposed of vide judgment and order dated 06.02.2018 whereby Clause 9(Ka) of the guidelines was restored and the State Government was directed to take a decision in respect of recruitment of 12,460 Assistant Teachers as per the then existing Rules within four weeks from the date of passing of the order.

(11) The state Government, after taking into account the aforesaid judgment and order dated 06.02.2018 passed in Special Appeal Defective No. 365 of 2017, issued a Government Order dated 11.04.2018 directing the respondent Nos.2 and 3 of the aforesaid Appeal to proceed with the recruitment of 12,460 Assistant Teachers as per U.P. Basic Education (Teachers) Service (15th Amendment) Rules, 1981 subject to the final decision of Special Appeal No. 648 of 2017, *State of U.P. v. Neeraj Kumar Pandey & others*. The said Appeal was ultimately dismissed vide order dated 12.04.2018 directing the respondent authorities to complete the selection process within two months.

(12) In compliance of the order dated 12.04.2018, the Board issued a Circular dated 16.04.2018 directing the District Basic Education Officers to conduct counselling of the selected candidates on 23.04.2018 and to issue appointment orders on 01.05.2018.

(13) In pursuance of the Circular dated 16.04.2018, the District Basic Education Officers concerned made advertisements in their respective districts on 19.04.2018 whereby they had directed the candidates to appear again for the first counselling on 23.04.2018.

(14) When the intra-district candidates who had lower merit than that of the inter-district candidates got edged out in 51 districts (having vacancy) and could not be selected, some candidates of Gonda District filed Writ Petition No. 11375 (SS) of 2018, *Ram Janak Maurya and others v. State of U.P. and others*. Subsequently, the writ petitions filed were tagged with the aforesaid writ petition. In three petitions, namely, Writ Petition No. 11947 (SS) of

2018, 12656 (SS) of 2018 and 5734 (SS) of 2018, the petitioners prayed for issuance of a writ of Certiorari quashing instruction No. 6(Kha) issued on 26.12.2016 to the extent it allows the candidates of other districts where there are 'O' vacancies and notification dated 15.03.2017 to the extent it allows the candidates of other districts, where there are 'O' vacancies to be eligible for selection in other districts on the basis of first preference.

(15) In Writ Petition No. 11375 (SS) of 2018, an interim order was passed directing the authorities to verify the original documents of the candidates pursuant to the notification dated 18.04.2018 published in the newspapers on 19.04.2018 but the appointment letters of the candidates who obtained BTC Training from other than Gonda district shall not be issued till the next date of listing and if it is required, it may be issued after seeking leave from the Court.

(16) In compliance of the interim order dated 19.04.2018, the Secretary of the Board of Basic Education issued a Circular dated 27.04.2018 restraining all the District Basic Education Officers from issuing appointment orders to the selected candidates of 'Zero Districts' who had participated in the first round of counselling.

(17) The aforesaid bunch of writ petitions was allowed vide impugned judgment and order dated 01.11.2018, which set-aside the entire selection process on the ground that there was no provision under the rules permitting the candidates from '0' vacancy districts to participate in the selection proceeding and therefore, their participation is contrary to Rule

14(1)(a) of U.P. Basic Education (Teachers) Service Rules, 1981.

(18) The present bunch of special appeals have been filed by the respective parties against the aforesaid impugned order dated 01.11.2018.

ARGUMENTS OF LEARNED COUNSEL FOR THE PARTIES

(19) Dr. L. P. Misra, learned counsel appearing for the appellants submits that the Secretary of the Board issued detailed guidelines dated 26.12.2016 for conducting the selection process. In order to accommodate the candidates from Zero Vacancy districts, the Secretary of the Board inducted Clause 6(Kha) wherein it was provided that the candidates having D.Ed. (Special Education)/4 Years B.El.Ed. and the candidates belonging to Zero Vacancy districts may apply from any of the districts having vacancies as their first preference districts. According to the learned Counsel, the said arrangement made by the Secretary of the Board was without any authority of law and rather, it was in violation of Rule 14(1)/14(1)(a) of the Rules, 1981. Not only this, the Secretary of the Board was also not a competent authority to issue any such guidelines.

(20) Dr. L.P. Misra, learned counsel in his usual maverick manner, further submits that as per guidelines dated 26.12.2016, a select list containing 12,460 candidates was prepared wherein the candidates from Zero Vacant districts were also included. Almost 6,470 candidates from the district of Zero Vacancies were included in the select list and almost 5,990 candidates including the appellants of Special Appeal Nos. 609 of 2018 and Special Appeal No. 617 of 2018

and similarly situated meritorious candidates, who have completed their B.T.C. training from 51 districts, where the vacancies were advertised, have been selected on the post of Assistant Teachers. In the Special Appeal No. 617 of 2018, a Co-ordinate Bench of this Court, vide order dated 17.11.2018 directed the respondent-State not to give effect to the directions given by the learned Single Judge with regard to selection and appointments qua appellants till the next date of listing, which has been extended till further orders by subsequent interim order dated 22.07.2019.

(21) He further submits that the result of the aforesaid interim order is that the interim order dated 19.04.2018 passed by the Single Bench during the pendency of the impugned writ petition has been restored along with the Circular dated 27.04.2018 issued by the Board and as such the appointment letters, which were issued to these 5,990 selected candidates of home districts in the first week of May, 2018 also stands restored and as a matter of fact & records, these aforesaid appellants and similarly situated selected candidates who gave their joining in their allocated schools are continuing working as such till date.

(22) Next he submitted that the selection/appointment of the aforesaid 5,990 meritorious candidates has never been challenged in any of the writ petitions before the learned Single Judge nor they had been impleaded in any of the writ petitions even in the representative capacity and the writ petitions filed before the learned Single Judge had been disposed of without their representation.

(23) Considering the aforesaid aspect of the matter, Dr. L. P. Misra has contended that **since the selection and appointment**

of 5,990 candidates had been made in accordance with the Rules existing on the date of initiation of selection process, they had substantiated their rights of selection on the post of Assistant Teacher, therefore their appointment deserves to be protected.

(24) Elaborating his submissions on Clause 6(Kha) of the guidelines dated 26.12.2016, Dr. L.P. Mishra has submitted that this clause has three-fold instructions. Firstly, B.T.C. trained candidates are to apply in the district of their training (as per Rule 14 (1)(a) of Rules, 1981); Secondly, B.Ed. (Special Education) and B.El.Ed. trained candidates to apply in any district of their choice as first priority district and thirdly, candidates having passed B.T.C. training from 24 Zero Vacancy districts were also allowed to apply in any district of their choice as first priority district (which according to him was in violation of Rule 14(1)(a) of Rules, 1981).

(25) Next he has contended that the petitioners/respondents herein belonging to 24 zero vacancy districts participated in the recruitment and when they failed to secure selection, they challenged Rule 14(1)(a) of Rules, 1981 and Clause 6 (Kha) of the guidelines dated 26.12.2016 so far as it provides preference to the candidates having completed their training from the district concerned. Further, **candidates of 51 districts, who failed to secure selection on account of participation of candidates of zero vacancy districts, challenged Clause 6(Kha), so far as it opened window for the participation of candidates of 24 Zero vacancy districts by means of Writ Petition No. 11375 (SS) of 2018 and the learned Single Judge restrained the authorities from issuing appointment letters who obtained B.T.C.**

training from ‘Zero Vacancy Districts’ and the said writ petition was finally allowed vide impugned judgment and order dated 01.11.2018 setting aside the entire selection.

(26) Attacking the impugned judgment and order dated 01.11.2018, preliminary objections of Dr. L.P. Mishra are that (i) impugned order has been passed beyond the scope of writ petition, (ii) cancellation of entire selection en block was unjustified, (iii) there was no challenge to the selection and appointment of working teachers, (iv) comparatively, 5,990 selected and appointed teachers have higher merit as they have substantiated their rights on their posts (v) writ petitions suffer from the defect of non-joinder of parties, (vi) cancellation of entire selection is without any cogent finding and lastly, (vii) order passed is in violation of principles of natural justice.

(27) Dr. L.P. Mishra has further submitted that a Division Bench of this Court in a bunch of writ petitions, leading Writ Petition No. 5320 (MB) of 2017, Ambrish Kumar and 20 others v. State of U.P. others, vide judgment and order dated 13.01.2020, dismissed the writ petitions upholding the validity/vires of Rule 14(1)/14(1)(a) of the Rules, 1981. Thus, he submits that this Court is to test the validity of the impugned judgment and order dated 01.11.2018 in light of Rule 14 as it existed on the date of initiation of the selection proceeding of 12,460 recruitment, i.e., 15.12.2016 and the validity of guidelines dated 16.12.2016 which has been issued by an incompetent authority in utter violation of Rule 14 (1)(a) as existing on the date of selection of Assistant Teaches.

(28) To sum up his arguments, Dr. L.P.Misra has submitted that the selection and appointment of 5,990 candidates who had been selected in the districts from where they completed their B.T.C. training are absolutely in accordance with the provisions of Rule 14(1)/14(1)(a) of the Rules, 1981 and accordingly, they had been appointed. The learned Single Judge was not justified to set aside the entire selection of 12,460 recruitment en block merely on the ground that Clause 6(Kha) of the Guidelines dated 26.12.2016 providing an opportunity for participation and consideration of selection to the candidates from 24 Zero Vacancy Districts was per se illegal and is in violation of Rule 14 (1)/14(1)(a) of Rules, 1981. Further, he submits that the entire selection cannot be cancelled en block. To buttress his submissions, he has relied upon the citation of Apex Court in the case of **Girjesh Srivastava v. State of M.P. [(2010) SCC (10) 707]**, wherein in para – 25 it has been reported as under:-

“25. On a more detailed analysis of this issue, in Union of India and others v. Rajesh P.U., Puthuvalnikathu and another [(2003) 7 SCC 285 at p. 290, paragraph 6], this Court held that "In the light of the above and in the absence of any specific or categorical finding supported by any concrete and relevant material that widespread infirmities of an all pervasive nature, which could be really said to have undermined the very process itself in its entirety or as a whole and it was impossible to weed out the beneficiaries of one or other of irregularities, or illegalities, if any, there was hardly any justification in law to deny appointment to the other selected candidates whose selections were not found to be, in any manner, vitiated for any one or other reasons. Applying an unilaterally

rigid and arbitrary standard to cancel the entirety of the selections despite the firm and positive information that except 31 of such selected candidates, no infirmity could be found with reference to others, is nothing but total disregard of relevancies and allowing to be carried away by irrelevancies, giving a complete go bye to contextual considerations throwing to winds the principle of proportionality in going farther than what was strictly and reasonably required to meet the situation. In short, the Competent Authority completely misdirected itself in taking such an extreme and unreasonable decision of cancelling the entire selections, wholly unwarranted and unnecessary even on the factual situation found too, and totally in excess of the nature and gravity of what was at stake, thereby virtually rendering such decision to be irrational".

(29) Sri Anil Tewari, learned Senior Advocate assisted by Sri Apoorva Tewari, learned Counsel appearing for the appellant in Special Appeal No. 613 of 2018 has submitted that the appointment of Assistant Teachers in Junior Basic School is regulated by the U.P. Basic Education (Teachers) Service Rules, 1981 as well as The Right of Children to Free and Compulsory Education (RTE) Act, 2009. Before enforcement of RTE Act, Rule 8 and Rule 14 of Rules, 1981 were in force for academic qualification and procedure of selection respectively. However, after enforcement of RTE Act, minimum qualification to be appointed as an Assistant Teacher is in the domain of Central Government who has authorized the National Council under Section 23 (1) of the RTE Act.

(30) In continuation of his submissions, he has submitted that the State Government issued a Government Order on 15.12.2006 for appointment of Assistant Teachers on vacant posts of 12,460 in Basic Schools of U.P. run and managed by the U.P. Basic Education Board. He next submitted that the Secretary, Basic Education has further issued guidelines on 26.12.2016 providing necessary instructions wherein it has been mentioned that in view of Harsh Kumar's judgment passed in Special Appeal Defective No. 130 2014, para 6(Kha) has been included for those candidates who have obtained B.El.Ed. and D.Ed. Qualification as also for those candidates who have obtained B.T.C. training from the districts where no vacancies have been advertised.

(31) The appellant/Mohit Kumar Dwivedi of Special Appeal Defective No. 613 of 2018, who is the resident of Gonda and has obtained B.T.C. training from Lucknow has applied for appointment on the post of Assistant Teacher. On 15.03.2017, the District Basic Education Officer, Gonda and other District Basic Education Officers had published a notice for participation for those candidates who had applied in their districts in the first counselling to be held from 18.03.2017 to 20.03.2017.

(32) Pursuant to the above notice, the appellant and respondent Nos.1 to 6 of Special Appeal Defective No. 613 of 2018 had participated in the first round of counselling and on 20.03.2017, cut-off was declared by the Basic Education Officer, Gonda in which the appellant was declared successful whereas respondent Nos.1 to 6 were declared unsuccessful. He has further pointed out that original documents of the appellant and other successful candidates

were retained whereas the original documents of respondent Nos.1 to 6 were returned on the next date.

(33) Sri Tewari has brought to our notice that on 23.03.2017, when the State Government has issued a Circular for halting the current selection process until further order, on intervention of High Court in Writ Petition No. 27870 of 2017, the aforesaid Circular was quashed vide judgment and order dated 03.11.2017 directing the State Government to complete the selection process within two months. In compliance of the order dated 03.11.2017, the State Government has issued a Government Order dated 11.04.2018 for completing the selection process by 15.06.2018.

(34) Next he has pointed out that in the meantime, on 08.02.2018, the State Government has amended Rule 14 (1)(a) of Rules 1981 to the effect that the condition 'District concerned' has been deleted.

(35) Pursuant to the Government Order dated 11.04.2018, when the Secretary, Basic Education Board has issued a Circular on 16.04.2018 declaring the successful candidates, Writ petition No. 11375 (SS) of 2018, Ram Janak Maurya v. State of U.P. and others with the following prayer came to be filed:-

“(i) To issue writ of Mandamus commanding the respondent Nos. 3 and 4 to prepare fresh cut off mark after 1st round of counselling by excluding the persons who had obtained B.T.C. Training from outside the district Gonda and accordingly a fresh cut off of 1st round of counselling to be declared in pursuance of the Government Order dated 15.12.2016/11.04.2018 and notification of

respondent No.3 dated 26.12.2016, 02.03.2017 and 16.04.2018 for appointment of 12460 posts of Assistant Teachers by allowing only the persons who had completed B.T.C. degree from the District Gonda only and outsiders to be allowed in subsequent rounds of counselling only as per policy of the State Government reflected in counter affidavit filed by it in Writ Petition No. 10131 of 2015 (M/B) Om Prakash Singh and others v. State of U.P.

(ii) *To issue any other writ or direction, which this Hon'ble High Court may deem fit in the circumstances of the case."*

(36) He has next pointed out that from perusal of the above prayers made by the respondents, it is crystal clear that the respondents have not challenged the provision of Clause 6(Kha) of Circular dated 26.12.2016 and the only prayer made by them is to exclude the candidates who had obtained training from outside district Gonda in the first round of counselling and permit them in the subsequent round of counselling.

(37) The contention of the learned counsel for the appellant is that the writ petition filed by the respondent Nos.1 to 6 is not maintainable on the ground that in view of the judgment passed by the Apex Court in ***Dhananjay Malik v. State of Uttaranchal and others [(2008) 4 SCC 171]***, the unsuccessful candidates have no right to question the selection proceedings. Further, he has submitted that in order to maintain the writ of Mandamus, they must make a clear demand before the competent authority, but in the instant case, they have had never made any demand before the competent authority. To buttress his submissions, he has drawn our attention

towards the judgments of the Apex Court in ***D. N. Jeevaraj v. Chief Secretary, Government of Karnataka and others [(2016) 2 SCC 653]*** and ***State of Haryana and another v. Chanan Mal and others [(1977) 1 SCC 340]***. In both the judgments, it has been held that the petitioner shall first call upon the authority concerned to discharge its legal obligation and show that it has refused or neglected to carry it out within a reasonable time before approaching the Court for such an order even where the alleged obligation is established.

(38) Further, he has submitted that the writ petition filed by the respondents is also not maintainable on the ground of non-joinder of parties as they have not impleaded any selected candidate in the representative capacity.

(39) The next submission of Sri Anil Tewari is that the writ petition filed by the respondents has been allowed by the learned Single Judge mainly on the ground that the Secretary, Basic Education Board was not competent to issue Circular dated 26.12.2016 containing clause 6(Kha) which permitted the candidates of Zero Vacancies to participate in the selection process, specifically when there was no such provision under the Rules and the State Government has not authorized the Board to issue such a Circular. However, according to the learned Counsel, the learned Single Judge, while passing the impugned judgment, has failed to appreciate the fact that the said circular was issued strictly in consonance of the judgment passed by this Court in Special Appeal Defective No. 130 of 2014, ***Harsh Kumar and another v. State of U.P. and others.***

(40) Learned Counsel for the appellant has further drawn our attention towards the dismissal order dated 13.01.2015 passed by the Apex Court in Special Leave Petition No. 12060-12061 of 2014 preferred against the order passed in Special Appeal Defective No. 130 of 2014.

(41) Lastly, he has submitted that in these circumstances, U.P. Basic Education Board has included the provision of Clause 6(Kha) in the Circular dated 26.12.2016, therefore, there was no infirmity in the Circular dated 26.12.2016 and the impugned judgment and order dated 01.11.2018 is liable to be set aside paving a way for the appellant to participate in the counselling process.

(42) Sri Upendra Nath Mishra, learned Senior Advocate assisted by Sri Neel Kamal Mishra, learned counsel appearing for the appellants in Special Appeal No. 207 of 2020 has submitted that the main ground on which the entire selection has been set aside by the learned Single Judge was that the Board of Basic Education was not competent to issue the Circular dated 26.12.2016 containing Clause 6(Kha) permitting the candidates from 'O' vacancy districts to participate in the selection proceedings, especially when there was no such provisions under the Rules and the State Government had not authorized the Board to issue such a circular. According to the learned Senior Counsel, the said Circular issued by the Board was strictly in consonance with Rule 23 of RTE Act enacted by the Parliament read with Office Memorandum dated 23.08.2010 alongwith similar other notifications of Government of India and he submits that there is no infirmity in the aforesaid Circular dated 26.12.2016 due to which the entire selection was quashed.

Thus, he prays that the appellants who have been selected on the basis of their higher merit deserves to be appointed.

(43) Sri Ran Vijay Singh, learned Additional Chief Standing Counsel appearing for the State-respondents in Special Appeal No. 619 of 2018 has submitted that once the petitioners have participated in the selection process, they have no right to challenge it. In support of this, he has placed reliance on the judgment of the Apex Court in ***Ranjan Kumar v. Stat of Bihar [(2014) 16 SCC 187]***.

(44) He has contended that no pleading is made in the entire writ petition that the petitioners were unaware of the circulars issued by the State Government whereby participation of 'Zero Vacancy District Candidates' was permitted. Since they have participated and declared unsuccessful, they cannot take the nosedive stand.

(45) Further, he has submitted that Section 23 of the RTE Act has an overriding effect. As per Entry 25 in the List III Concurrent List of the Constitution of India, it covers 'education' including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; Vocational and Technical Training of Labour. Since this entry covers education, by implication both Center and State Legislatures are competent to enact a law with regard to it. However, as per the Scheme of the Constitution under Article 254 (1), it is provided that if any legislation enacted by the State Legislature is repugnant to the legislation enacted by the Parliament, then the State Legislation will be declared void and the legislation enacted by the Parliament will prevail over the

former as the legislation enacted by the State has to give way to the Central legislation.

(46) He further submits that on 26.08.2009, the Parliament enacted the Statute which provides for fee and compulsory education to all children of the age of 06 to 14 years, namely, The Right of Children to Free and Compulsory Education Act, 2009. Section 23 of the RTE Act provides for qualification for appointment and terms and conditions of service of Teachers.

(47) Section 23 of the RTE Act grants the mandate of determining eligibility of the person to be appointed as a Teacher to an academic authority authorized by the Central Government. The National Council for Teachers Education (NCTE) is an authorized academic authority under Section 23 of the RTE Act which is competent to issue notification determining the eligibility of persons to be appointed as Teacher. The NCT is constituted under NCTE Act, 1993 and in this regard, it has issued notifications on 23.08.2010, 29.07.2011, 12.11.2014 and 28.11.2014.

(48) As per U.P. Basic Education Act, 1972, it provides establishment of Board of Basic Education and Section 19 empowers the State Government to make Rules for carrying out the purposes of this Act by notification including Rules pertaining to the recruitment and conditions of service of persons appointed to the post of Teacher under Section 6 of the Act.

(49) In exercise of powers conferred under Section 19 of Act, 1972, the State Government has notified the U.P. Basic Education (Teachers) Service Rules, 1981 and are subservient to the legislation or

Rules made under the Right to Education (RTE) Act, 2009.

(50) The said Rules under Part IV provide for qualification. Rule 8 provides 'academic qualifications' for the purpose of appointment as Mistress of Nursery Schools and Assistant Master and Assistant Mistress of Junior Basic Schools. However, Rule 14 deals with the determination of vacancies and preparation of list and Clause I of it provides for inviting applications from candidates possessing prescribed training qualification from the district concerned. Apparently, the said Rule is meant to provide for the procedure and manner of determining the vacancies and making the list of candidates to be appointed as 'Teacher'. The said Rule is only of procedural nature but through Clause I it fixes an additional qualification of the person to have the prescribed training qualification from the district concerned only where the vacancy has arisen.

(51) Therefore, Rule 14(1)(a) is in consistent with Section 23 of the RTE Act inasmuch as both of them determine the qualification of the candidates to be appointed as Teachers in primary schools. RTE Act being Central Act would prevail over the **Executive Rules**.

(52) Since the guidelines dated 26.12.2016 are in consonance with the NCTE Notifications providing for the qualification of the candidate to be appointed as a Teacher in Primary Schools and therefore, the guidelines are valid in the eyes of law and cannot be set aside on the premise of being in conflict with Rule 14(1)(a).

(53) Section 8 of the RTE Act deals with duties of appropriate Government and clause (g) casts a duty upon appropriate Government to ensure good quality elementary education conforming to the standards and norms specified in the schedule.

(54) Section 9 of the RTE Act deals with duties of local authority and clause (h) provides for ensuring good quality elementary education conforming to the standards and norms specified in the schedule.

(55) From the above provisions of law, it emanates that the duty cast upon the Central Government as well as upon the State Government is to impart quality elementary education conforming to the standards and norms specified in the schedule.

(56) In the present case, when the candidates from the zero vacancy districts are allowed to participate in the selection process, the merit would certainly go up and the present scheme is in tandem with the mandate of Section 8 (g) and Section 9(h) of RTE Act which would ultimately benefit the students.

(57) He has further submitted that the U.P. Board of Basic Education is competent under Section 4 of the Act, 1972 to issue guidelines dated 26.12.2016 whereby candidates from zero vacancy districts have been allowed to participate in the selection process which has caused the induction of more meritorious Teachers in the service. Further, he has submitted that the Board being a statutory authority cannot be said to be subservient to the executive rules. Thus, the guidelines dated 26.12.2016 are not inferior in comparison to the Rules 1981

inasmuch as stating the qualification of the candidates.

(58) Learned Additional Chief Standing Counsel has further submitted that earlier when the writ petitions were filed challenging Rule 14 (I) of Rules 1981, the State Government has taken a stand that the said Rules are made in order to provide teachers fluent in local dialect at the primary level. However, the State realized that the said Rule is discriminatory as it provides employment on the basis of place of training of the candidate and therefore, it is repugnant to the Scheme of RTE Act. Subsequently, the said Rule stands amended inasmuch as it now provides equal opportunity to all the candidates irrespective of the place of training. Thus, he has submitted that it is a settled law that the State can alter its stand and is not barred by principle of estoppel in case of policy decisions. To strengthen his submission, he has relied upon the judgment and order dated 13.01.2020 passed in Writ Petition No. 5320 (MB) of 2017, *Ambrish Kumar and 20 others v. State of U.P. and others* in which Rule 14 (i) of Rules, 1981 had been challenged.

(59) He has next contended that the writ petition challenging the selection process cannot succeed without impleading all the successful candidates as held by the Apex Court in the case of *Rajan Kumar v. State of Bihar [(2014) 16 SCC 187]*.

(60) Learned Additional Chief Standing Counsel has strenuously emphasized that **this Rule was made when there was single Teachers Training Institute in one district, but since now multiple institutions have opened in each district, the rule has become onerous in itself and meaningless.**

(61) The impugned judgment is in conflict with the earlier judgments rendered in the cases of **(1) Special Appeal Defective No.130 of 2014, Harsh Kumar and other v. State of U.P. and others;** **(2) Writ Petition No. 47490 of 2017, Km. Pallavi v. State of U.P. and others and** **(3) State of U.P. v. Shiv Kumar Pathak [(2018) 12 SCC 595].**

(62) The grounds of attack of the impugned judgment and order dated 01.11.2018 are that no prejudice has been caused to any other candidates and Rule 14(1)(a) of Rules 1981 restricting the vacancies to the candidates who have done their training from the same district has become redundant after the qualifications required for the post of Assistant Teacher have been laid down by the NCTE by its notification dated 23.08.2010 allowing all those candidates who have done two years Diploma in Elementary Education from NCTE recognized institution whether from the State of U.P. or any other State. Any person who hold such qualification could not be ousted on the ground of restrictions in the Rule or Circular as has been held by the Apex Court in **State of U.P. v. Shiv Kumar Pathak [(2018) 12 SCC 595].**

(63) On the other hand, Sri J. N. Mathur, learned Senior Advocate assisted by Sri Amrendra Nath Tripathi and Sri Gaurav Mehrotra, learned counsel for the respondent/intervenor in Special Appeal No. 613 of 2018 has submitted that the appellants in the instant bunch of Special Appeals has vehemently pleaded that Rule 14(1)(a) of the Rules, 1981 as amended by the 15th Amendment of Rules 1981 is repugnant to Section 23 of the RTE Act, in light of Article 254 of the Constitution of India, and as such, the same is nullity in the eyes of law. According to him, the validity

of Rule 14(1)(a) of the Rules 1981 was challenged in a bunch of Writ Petitions, leading Writ Petition No. 5320 (MB) of 2017, **Ambrish Kumar and others v. State of U.P. and others**, which was dismissed by a Co-ordinate Bench of this Court vide judgment and order dated 31.01.2020. In the S.L.P. (Civil) No. 8536 of 2020, **Umesh Chandra v. State of U.P. and others**, filed against this judgment, notice has been issued and the matter is still pending adjudication before the Hon'ble Supreme Court.

(64) He has further submitted that once the validity of Rule 14 (1)(a) of the Rules 1981 has been upheld by a Co-ordinate Bench of this Court, it is not open for the appellants to agitate the issue of vires of the aforesaid Rule.

(65) He has further submitted that the plea of repugnancy has to be specifically taken before the Writ Court where the Constitutionality of provision has to be tested by inviting counter affidavit from the stakeholders. In absence of any specific pleading, the issue of repugnancy cannot be raised. He has placed reliance on the judgment of Apex Court in **Dhanraj v. Vikram Singh and others [2023 SCC OnLine SC 724].**

(66) The question of repugnancy arises only when there is overlap in the relevant provisions of the Central Legislation and the State Legislation as has been held by the Apex Court in **Ch. Tia Ramji and others v. State of Uttar Pradesh and others [1956 SCC OnLine SC 9].**

(67) According to the learned Counsel, repugnancy arises only when there is inconsistency between the Central Act and the State Act which is absolutely

irreconcilable. In this regard, he has relied on the judgment of Apex Court in ***M. Karunanidhi v. Union of India and another* [(1979) 3 SCC 431]**.

(68) Further, placing reliance on ***Ashish Kumar v. State of Uttar Pradesh and othes* [(2018) 3 SCC 55]** and ***Malik Mazhar Sultan and another v. U.P. Public Service Commission and others* [(2006) 9 SCC 507]**, he has stated that in case of conflict between the relevant statutory rule and the advertisement, it is statutory rule which shall prevail.

(69) Principle of estoppel by conduct is not applicable in cases where unsuccessful candidates challenge the selection procedure, which was conducted contrary to the statutory rules, as has been held by the Apex Court in the cases of ***Dr. (Major) Meeta Sahai v. State of Bihar and others* [(2019) 20 SCC 17]**, ***Raj Kumar and others v. Shakti Raj and others* [(1997) 9 SCC 527]** and ***Dharmendra Kumar and others v. Abhishek Kumar and others* [(2017) SCC OnLine All 2716]**.

(70) In support of the submission that judgment will not lose binding precedent even if inadequately considered and/or fallaciously reasoned, he has relied on the judgment of Constitution Bench of the Apex Court in ***Ambika Prasad Mishra v. State of U.P. and others* [(1980) 3 SCC 719]**.

(71) This Court has given its anxious consideration to the submissions made by the learned Counsels for the parties and perused the material placed on record including the impugned judgment and order dated 01.11.2018. The selection to the post of Assistant Teachers against 12,460 vacancies initiated in pursuance of the

advertisement issued on 21.12.2016 has a chequered history and has been marred by controversy. Several round of litigation has been filed pertaining to the said selection process.

ANALYSIS

(72) Apparently, for the purpose of advertisement, vacancies were determined district-wise and the total number of posts having been found vacant were decided at the state-level for being filled-up and a direction was accordingly issued to advertise the same as per Rules. However, a decision was taken by the State Government with the issuance of Government Order dated 20.12.2016 and thereafter, the requisite process was initiated at the district level for advertisement of the vacancies which came to be determined at the district-level. Some of the districts did not report any number of vacancies as available, therefore, those districts where no vacancies existed for being filled-up were classified as ‘zero vacancy districts’. The vacancy position can be gathered from the letter dated 20.12.2016 and a brief chart indicating the vacancy district-wise is extracted below:-

Sl. No .	Name of the District	Number of posts allocated
01.	Meerut	0
02.	Baghpat	0
03.	Bulandshahar	0
04.	Ghaziabad	0
05.	Hapur	0
06.	Gautambudh Nagar	0
07.	Agra	0

08.	Firozabad	105
09.	Mainpuri	195
10.	Aligarh	125
11.	Etah	335
12.	Kasganj	252
13.	Hathras	535
14.	Mathura	216
15.	Bareilly	0
16.	Badaun	60
17.	Pilibhit	189
18.	Shahjahanpur	0
19.	Allahabad	0
20.	Fatehpur	252
21.	Pratapgarh	360
22.	Kausabi	108
23.	Varanasi	36
24.	Chandauli	216
25.	Gazipur	0
26.	Jaunpur	108
27.	Mirzapur	180
28.	Sonbhadra	216
29.	Badohi	324
30.	Lucknow	0
31.	Hardoi	288
32.	Sitapur	1268
33.	Raibareli	126
34.	Unnao	126
35.	Lakhimpur Kheri	0
36.	Gorakhpur	0
37.	Deoria	324
38.	Kushinagar	104

39.	Maharajganj	360
40.	Basti	324
41.	Sant Kabir Nagar	0
42.	Siddharth Nagar	389
43.	Jhansi	0
44.	Lalitpur	36
45.	Jalaun	72
46.	Chitrakoot	288
47.	Banda	270
48.	Mahoba	126
49.	Hamirpur	206
50.	Faizabad	108
51.	Barabanki	287
52.	Sultanpur	288
53.	Amethi	382
54.	Ambedkar Nagar	72
55.	Gonda	788
56.	Balrampur	158
57.	Bahraich	251
58.	Shravasti	79
59.	Moradabad	0
60.	Sambhal	0
61.	Rampur	432
62.	Bijnor	180
63.	Amroha	72
64.	Kanpur Nagar	0
65.	Kanpur Dehat	144
66.	Etawah	0
67.	Auraiya	29
68.	Farrukhabad	180
69.	Kannauj	144

70.	Azamgarh	0
71.	Balia	720
72.	Mau	0
73.	Saharanpur	0
74.	Muzaffar Nagar	0
75.	Shamli	27

(73) Rule 14(1)(a) of the U.P. Basic Education (Teachers) Service Rules, 1981, (in short '1981 Rules') provides the appointing authority to invite applications from candidates possessing prescribed training qualification from the district concerned. The whole controversy erupted with the issuance of condition 6 (Kha) as contained in the guidelines dated 26.12.2016 issued by the Secretary, U.P. Basic Shiksha Parishad, Allahabad. Apparently, the said conditions 6(kha) says that the candidates doing B.T.C. Training shall be allowed to apply in the district of their training alone in the first instance and the said clause also permitted the candidates from 'O' Vacancy districts to participate in the selection proceedings of any district chosen by their first preference.

(74) As far as the first controversy relating to the conditions imbibed in clause 6(kha) of the circular dated 26.12.2016 relating to allowing those candidates doing B.T.C. Training in the district of their training alone to apply in the first instance in the said district is concerned, a Division Bench of this Court has already settled the said issue vide a detailed judgment dated 13.01.2020 passed in a bunch of Writ Petitions, leading being 'Misc Bench No. 5320 of 2017 (Ambrish Kumar & 20 Ors. V/s State of U.P Thru Prin. Secy. Basic Education & Ors.)', which inter alia framed the following questions to be answered:

"34. The instant bunch of writ petitions have been filed before this Court to answer the following substantial questions:

"(1) Whether in view of the frame and purport of The Right of Children to Free and Compulsory Education Act, 2009, the engagement or appointment of Assistant Teachers (Primary) by preparing a merit list at District Level, not at State Level is against the provisions of Articles 14, 15, 16 and 21-A of the Constitution of India as stated by the petitioners?

(2) Whether in view of the frame and purport of The Right of Children to Free and Compulsory Education Act, 2009, the engagement of the Assistant Teachers (Primary) giving preference to the place of domicile or residence and/ or local area is permissible in law?"

Thereafter, the Division Bench had been pleased to record its discussion and findings as herein below

"64. In view of the aforesaid discussions, we are of the view that the 1981 Rules contains a provision that a candidate who has obtained training from a district will be given preference in selection and appointment on the post of Assistant Teacher in the district concerned. The said provision has got a purpose and object i.e. the children are taught by a person who is very well familiar with the local habitat and also speaks local dialect. Further the first preference for appointment is given to the candidates who have undergone the training qualification from the district concerned because such candidates are already acquainted with the demographic conditions, local dialect and traditions from where the children who are to be taught come from. The knowledge and

understanding of local dialect is essential for a teacher in the rural areas for a better classroom transaction with small children and their parents. The preference in appointment of a candidate who completed his training from a particular district is justified for the reason that if a candidate who has completed his training from Mathura where Braj Bhasha is spoken, is appointed in Gorakhpur where Bhojpuri is spoken will face difficulty in communicating the small children of that area and also their parents and due to lack of communication between the teacher and the child including parents, the quality of education will certainly be affected and, therefore, the provisions of preference is not at all violative of Article 14 and 16 of the Constitution of India.

65. In the present case, the State has shown that the purpose of a region/ district wise recruitment is to ensure that the teachers in local primary schools are attuned to the local requirements, which, needless to say, differs from district to district and region to region in a vast state like Uttar Pradesh. Moreover, to reiterate, the petitioners cannot contest that any discrimination has been meted out to them, since the region/ district wise selection process was open to all candidates. Therefore, the State has discharged its burden by demonstrating that there were cogent reasons for prescribing region/ district wise recruitment, which is open to all candidates, and that no discrimination/ arbitrariness resulted from prescribing such a process.

66. In view of the discussions made above, the preparation of merit list at District Level is not against the provisions of Articles 14, 15, 16 and 21-A of the Constitution of India and the engagement of the Assistant Teachers (Primary) on the basis of domicile or place of residence in

the selection process is not violative of Articles 14 and 16 Constitution of India.

67. Accordingly, all the writ petitions being devoid of merit are hereby dismissed. No order as to costs."

(75) It has been contended that the aforesaid Judgment has been interdicted in S.L.P. (Civil) No. 8536 of 2020 being Umesh Chandra v. State of U.P. and others, wherein notice has been issued and the matter is still pending adjudication before the Hon'ble Supreme Court. On a specific query of this court as to whether there is any stay of operation of the order, it has been stated that there is no stay of the said impugned order dated 13.01.2020. In any case, judicial proprietary warrants that this bench should follow the judgment passed by a coordinate bench of equal strength and in case of difference, may refer the same to a larger bench. However, this court finds that, the issue adjudicated by the Division bench in the said matter, is merely an ancillary issue only to the present issue engaging the attention of this court.

(76) Be that as it may, as aforesaid, a Division Bench of this court has already repelled all the arguments and contentions, which ran contrary to the analogy of permitting only those candidates doing B.T.C. Training in a particular district to apply for that district in the first instance. This court finds that Dr. L.P. Mishra, learned Counsel appearing for some of the parties has submitted that as per guidelines dated 26.12.2016, a select list containing 12,460 candidates was prepared wherein the candidates from Zero Vacancy districts were also included. According to Dr. L.P. Mishra, learned Counsel, almost 5,990 candidates including the appellants of Special Appeal Nos. 609 of 2018 and Special Appeal No. 617 of 2018 and

similarly situated meritorious candidates, who have completed their B.T.C. training from 51 districts, where the vacancies were advertised, have been appointed on the post of Assistant Teachers.

(77) According to this court, as far as the selection of 5990 candidates, who had completed their BTC training from 51 districts, where the vacancies were advertised is concerned, the same is severable from the selection of the total number of candidates and there was no legal impediment in their selection and appointment. Thus, to cancel even their candidature is overreaching the judgment passed by the Division bench mentioned (supra) and also amounts to Judicial Impropropriety. This court finds that the selection of these candidates of 51 districts to be in consonance to the judgment of this court in *Ambrish Kumar* Case (supra). Apparently, the learned Single Judge finding fault in the issuance of clause 6(kha) in the direction dated 26.12.2016 relating to participation of those candidates belonging to the "O" vacancy districts in any other district by giving their first preference has held the same to be in the teeth of the U.P. Basic Education (Teachers) Service Rules, 1981 and as such has cancelled the entire selection process, without appreciating the fact that a coordinate Division bench of this Court has already upheld clause 6(kha) of the direction dated 26.12.2016 issued by the Secretary, U.P. Basic Shiksha Parishad, Allahabad and as such the setting aside of the entire selection process was not correct in the peculiar facts of the present case. Thus, it is right on the part of the Learned Counsel to argue that these candidates, who had been selected in the counseling's by virtue of their B.T.C. Training in the respective district has to be protected,

however needless to say, the same would always be subject to the outcome of the Umesh Chandra case (supra) presently pending before the Hon'ble Apex Court.

(78) As far as the second controversy relating to the conditions imbibed by clause 6(kha) of the circular dated 26.12.2016 relating to permitting the candidates from "O" Vacancy districts to participate in the selection process of any other district by giving their first preference to the said district is concerned, various arguments have been put forth by the learned Counsels. However, the fulcrum of the argument rests on the fact that the said condition was supposedly inserted because of purposive understanding of the judgment of a coordinate Division Bench of this Court passed in Special Appeal Defective No. 130 of 2014, *Harsh Kumar and another v. State of U.P. and others*, which was also subsequently upheld by the Apex Court vide dismissal order dated 13.01.2015 passed in Special Leave Petition No. 12060-12061 of 2014 preferred against the said Special Appeal Defective No. 130 of 2014.

(79) This court finds that the Division bench in the aforesaid judgment dated 5th of February, 2014 of Harsh Kumar has extensively dealt with the provisions of the RTE. The said judgment gives for an interesting reading and it would be profitable to quote the said judgment in extenso. The said Judgment was dealing with an aspect, wherein selection/appointment of Assistant Teachers in the Primary Schools run by the Basic Shiksha Parishad as part of a special drive for the recruitment of ten thousand teachers was engaging the attention of the said Division Bench. The contention of the appellants in that case, was that in view of

notifications that were issued by the National Council for Teacher Education (NCTE) on 23 August 2010 and 29 July 2011, the minimum qualifications have been prescribed by the NCTE for appointment of Assistant Teachers in primary schools for Classes I to V and hence, it was not open for the State Government to exclude persons, such as the appellants who hold the Diploma in Education (Special Education), which is otherwise recognized as an eligible qualification for appointment as Assistant Teachers in primary schools for teaching Classes I to V. The Appellant in that case, also placed their reliance on a judgment of a Full Bench of this Court in *Shiv Kumar Sharma Vs. State of U.P. & Ors.* (2013) (6) ADJ 310 (FB), in which it was held that the notification dated 23 August 2010 of the NCTE would have an overriding effect and could not have been ignored. The Division Bench after hearing the parties, held inter-alia:

“8. On 23 August 2010, the NCTE prescribed the minimum qualifications for a person to be eligible for appointment as a teacher for Classes I to VIII in a school referred to in Section 2 (n) of the Act of 2009 with effect from the date of notification. This notification was amended by the notification dated 29 July 2011. As per the amended notification, the minimum qualifications which have been prescribed for appointment of an Assistant Teacher for teaching students from Classes I to V are now as follows:

“(i) Classes I-V

(a) Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Elementary Education (by whatever name known)

OR

Senior Secondary (or its equivalent) with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure) Regulations, 2002

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor of Elementary Education (B.El.Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Education (Special Education)

OR

Graduate and two year Diploma in Elementary Education (by whatever name known)

AND

Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose.”

9. At this stage, it may also be necessary to note that the Parliament enacted the National Council for Teacher Education (Amendment) Act, 2011 to provide that the Act shall apply, inter-alia, to schools imparting pre-primary, primary, upper primary, secondary or senior secondary education and to colleges providing senior secondary or intermediate education and to teachers of such schools and colleges. Similarly, the expression 'school' was defined in Section 2(ka) to mean any recognised school imparting pre-primary, primary, upper primary, secondary or senior secondary education, or a college imparting senior secondary education. Section 12A was inserted into the principal legislation to empower the NCTE to determine the qualifications of persons to be recruited as teachers in any pre-primary,

primary, upper primary, secondary, senior secondary or intermediate school or college, by whatever name called, established, run, aided or recognised by the Central Government or by a State Government or a local or other authority. The provisions of the Act and Regulations have been held to be binding by a Full Bench of this Court in Shiv Kumar Sharma (supra). Prior to the enforcement of the amending Act, the Supreme Court had referred for consideration by a larger Bench of three Hon'ble Judges, an earlier view taken in Basic Education Board, U.P. Vs. Upendra Rai & Ors. (2008) 3 SCC 432 in which it had been held that the NCTE Act does not deal with ordinary educational institutions like primary schools, high schools, intermediate colleges or universities and would, consequently, not override the U.P. Basic Education Act and the Rules made thereunder. In view of the amending Act, a Bench of three learned Judges of the Supreme Court, while deciding the reference on the correctness of the view in Upendra Rai (supra), observed that during the pendency of the appeals, the Amending Act had rendered the issues for consideration referred to the larger Bench as academic. These developments have been taken due note of in a recent judgment of a Full Bench of this Court in Ram Surat Yadav & Ors. Vs. State of U.P. & Ors. (Spl. Appeal No. 12342013 decided on 19 December, 2013)

10. Thus, the point to be noted is that after the enforcement of the Act of 2009 and the issuance of the notification of 23 August 2010, the qualifications which have been prescribed for appointment of primary teachers must necessarily be those that are stipulated in the notification dated 23 August 2010, as amended by the notification dated 27 August 2011.

11. Undoubtedly, the Rules of 1981 do prescribe the essential qualification for appointment of Assistant Teachers in Junior Basic Schools where education is imparted from Classes I to V. The relevant qualifications which are prescribed in Rule 8 are as follows: “(ii) Assistant Master and Assistant Mistress of Junior Basic School A Bachelor's Degree from a University established by law in India or a Degree recognised by the Government as equivalent thereto together with the training qualification consisting of a **Basic Teacher's Certificate, Vishist Basic Teachers Certificate (B.T.C.) two years BTC Urdu Special Training Course, Hindustani Teacher's Certificate, Junior Teacher's Certificate, Certificate of Teaching or any other training training course recognised by the Government as equivalent there:**

Provided that the essential qualification for a candidate who has passed the required training course shall be the same which was prescribed for admission to the said training course.

12. The qualifications, which have been prescribed by the NCTE in the notification dated 29 July 2011 include Senior Secondary with at least 50% marks together with a 2-year Diploma in Education (Special Education). 9 Once, these qualifications have been prescribed by the NCTE, this would necessarily be binding and it is not open to the State Government to exclude (from the zone of eligibility) the persons who are otherwise qualified in terms of the notification dated 23 August 2010 as amended on 29 July 2011.

13. In this view of the matter, we are of the opinion that the learned Single Judge was in error in coming to the conclusion that since the recruitment was in pursuance of a special drive, the Government was

justified in confining the eligibility qualifications only to those who held the BTC qualifications for the reason that such candidates could not be adjusted earlier for want of TET qualification. The passing of the TET was introduced as a mandatory requirement by the notification dated 23 August 2010 issued by the NCTE. Persons who did not fulfill the eligibility conditions prescribed in the notification dated 23 August 2010, as amended on 29 July 2011, were not qualified for consideration for appointment as primary school teachers. Hence, there was no occasion for the State to contend or for that matter the learned Single Judge to accept the submission that in order to adjust such BTC qualified candidates, the present advertisement had been issued. The learned Single Judge held that the appellants could not claim equivalence with those candidates who possess BTC qualification. This, in our view, begs the question because once the Diploma in Education (Special Education) is held to be a qualification which is recognized for appointment of Assistant Teachers for teaching Classes I to V, it would be impermissible for the State Government to exclude them from being considered for appointment. In a special drive or otherwise, it is not open to the State Government to exclude one class of teachers who fulfill the qualifications for eligibility prescribed by the NCTE. Any such action would be impermissible for the simple reason that the exclusive power to prescribe eligibility qualifications for such teachers is vested in the NCTE. Once the NCTE has spoken on the subject, as it has through its notification, those qualifications must govern the eligibility requirement. Jurisdiction and power of the NCTE to do so is now settled beyond any doubt, as noted by the Supreme Court”

(80) The aforesaid judgment of the Division Bench, which was also upheld by the Hon’ble Apex Court, in clear and loud terms says that it is not right for the State Government to exclude one class of teachers who fulfill the qualifications for eligibility prescribed by the NCTE from the zone of consideration. In other words, the class of candidates, who belonged to the “O” vacancy district cannot be simply excluded from the consideration zone because the district from where they had completed their BTC training did not report any vacancy. As rightly pointed out by the Division Bench, any such action would be impermissible for the simple reason that the exclusive power to prescribe eligibility qualifications for such teachers is vested in the NCTE. Once the NCTE has spoken on the subject, as it has through its notification, those qualifications must govern the eligibility requirement. Jurisdiction and power of the NCTE to do so is now settled beyond any doubt, as noted by the Supreme Court.

(81) It may be noted that it is nobody’s case that these candidates belonging to the “O” vacancy districts do not satisfy the minimum qualification as prescribed by the NCTE nor it is the case that they have been given any advantage in the counseling’s process as they come from the “O” vacancy districts. The only ground to discriminate these candidates from participating in the counseling’s is the mere fact that they belong to “O” vacancy district. **Based on residence or training from a particular district, this Court cannot discriminate the candidates in public employment, save as provided under Article 16(3) of our constitution. In any case, when these candidates meet the minimum qualification as prescribed by NCTE and no vacancies have been**

reported of their respective district, this Court sees no valid reason as to why they should not be allowed to participate and come within the consideration zone for appointment of Assistant Teachers in other district for which they have exercised their preferences.

(82) Further, as rightly contended by the learned Senior Counsel Sri Upendra Nath Mishra that the said circular of 26.12.2016 issued by the Board was strictly in consonance with Section 23 of RTE Act enacted by the Parliament read with notifications of 2010 & 2011 of Government of India and as such there was no infirmity in the aforesaid Circular dated 26.12.2016, which in any case gives prominence to higher merits as the consideration zone stands enlarged to more candidates coming from the “0” vacancy districts. Further, this court is not able to find any reasoning accorded by the learned Single Judge, which points towards the factum of compromising the merits of the candidates, in case a candidate of “0” vacancy district is allowed to participate in the counseling’s or for that matter any reasons as to their meeting the minimum qualification etc.

(83) In the present case, when the candidates from the zero vacancy districts are allowed to participate in the selection process, the merit would certainly go up and the present scheme is in tandem with the mandate of Section 8 (g) and Section 9(h) of RTE Act which would ultimately benefit the students.

(84) The reliance of the learned Additional Standing counsel Mr. Ran Vijay Singh, is also noteworthy. The said learned Counsel has raised a very valid technical point. According to him, it is not the case of

those candidates, who have sought to challenge clause 6(kha) of the circular dated 26.12.2016 at this belated stage, that they are more meritorious than the already selected candidates from “0” vacancy district nor it is the case of these petitioners that they were unaware of such a clause or circular and still went ahead with the counseling’s/selection process. Thus, it is right on the part of the learned Addl. Standing counsel to contend that since these petitioners have participated and failed in the selection process, they have no right to challenge the said process in view of the judgment of the Apex Court in *Ranjan Kumar V/s State of Bihar, (2014) 16 SCC 187*.

(85) Moreover, there is another aspect of the matter, in as much as it has also been argued that the circular dated 26.12.2016 issued by the secretary, Secretary, U.P. Basic Shiksha Parishad, Allahabad was subservient to the rules. According to the impugned order, since, the rules and specifically Rule 14(1) or Rule 14(1)(a) does not permit participation of candidates belonging to "0" vacancy districts, therefore it was held that the very participation of these candidates have adversely effected the entire selection proceeding and consequently the entire selection process was set-aside. According, to this court the said analogy drawn by the learned Single Judge is flawed as the U.P. Board of Basic Education is competent under Section 4 of the Act, 1972 to issue guidelines dated 26.12.2016 whereby candidates from zero vacancy districts have been permitted to participate in the selection process, thereby causing induction of more meritorious Teachers in the service. This court has already held that increasing the consideration zone of candidates by permitting candidates of “0” vacancy

district to participate in the counseling's for any district by marking their preference has been for the betterment of the students only and is in conformity to section 23 of the RTE Act as it increases the chances of engaging more meritorious candidates in the selection process. Further, the Board being a statutory authority is duty bound to act taking a holistic view of the statute and Rules applicable. The guidelines dated 26.12.2016 conforming to the standards laid down by the NCTE are not inferior in comparison to the Rules 1981 as far as it permits the candidates of the "0" vacancy district to participate in the counseling's process. In any case, the learned Additional Chief Standing Counsel is right in submitting that the rule of permitting candidates to participate in their respective district of training might have held good, when there was single Teachers Training Institute in one district, but since now multiple institutions have opened in each district, the rule has become onerous in itself and meaningless. Further, restricting the vacancies to the candidates who have done their training from the same district has even become redundant after the qualifications required for the post of Assistant Teacher have been laid down by the NCTE by its notification dated 23.08.2010 allowing all those candidates who have done two years Diploma in Elementary Education from NCTE recognized institution whether from the State of U.P. or any other State. This court finds force in the judgment of the Apex Court in *State of U.P. v. Shiv Kumar Pathak [(2018) 12 SCC 595]*, which held that any person who hold such qualification could not be ousted on the ground of restrictions in the Rule or Circular.

(86) It is no longer debatable that elementary education for children is today

a Fundamental Right enshrined under Article 21A of Part III of the Constitution of India. Every child (upto 14 years of age), has a fundamental Right to have 'free' and 'compulsory' elementary education. But then 'free' and 'compulsory' elementary education is of no use unless it is also a 'meaningful' education. In other words, elementary education has to be of good 'quality', and not just a ritual or formality! A robust foundation has to be laid for a brighter and glorious future. Elementary education must sustain the basic foundation for any education system.

(87) In order to fulfil the above mandate Right to Education Act, 2009, was passed by the Parliament on August 20, 2009, which became effective from 01.04.2010. The object and reasons of the Act declared loud and clear that what the Act seeks to achieve is not merely 'free' and 'compulsory' elementary education, but equally important would be the 'Quality' of this education! The Preamble to the Act states "that every child has a right to be provided full time elementary education of satisfactory and equitable 'quality' in a formal school which satisfies certain essential norms and standards.

(88) It is quite historical to note that when the validity of the Act was challenged before the Apex Court, the Hon'ble Supreme Court, while upholding its validity emphasized that the Act, was intended not only to impart "free" and "compulsory" education to children, but the purpose was also to impart 'quality' education. A 3-Judge Bench of the Apex Court in *Society for unaided Private Schools of Rajasthan Vs. Union of India & Anr. (2012) 6 SCC 1*), held at para 8 as follows:

“The provisions of this Act are intended not only to guarantee right to free and compulsory education to children, but it also envisages imparting of ‘quality’ education by providing required infrastructure and compliance of specified norms and standards in the schools.”

(89) Since the children are entitled for good quality education under the provisions of the RTE Act and as also held by the Hon’ble Supreme Court, the same cannot be achieved without appointing meritorious candidates. Our State or for that, our country has an abundance of talent, skill and knowledge and no particular, state or district can claim a monopoly on the said talent. It ought to be equally distributed and as such even distribution of proper opportunity and employment for all the meritorious students should be applied, so that they can reach to their fullest potential. This equality of opportunity cannot be scuttled by a candidate’s place of training juxtaposed to his skill, merit or excellence, which should be the only criteria for his selection.

(90) As far as the appointment of Assistant Teachers by the Basic Sikha parishad is concerned, so far, three advertisements were issued for filling up the posts of Assistant Teachers. The first selection was held in the year 2014 where there was no district with ‘0’ vacancy. Thereafter, on 16.06.2016 second selection was held for 16,448 vacancies of Assistant Teachers and the guidelines were issued by the Board on 25.06.2016. In the said selection, almost 3 districts were reported as ‘0’ vacant districts, namely, Baghpat, Hapur and Jalun, thus the Board had supplemented the procedure by adding two provisions in Clause 6(Kha) and 6 (Cha). This was done to fill-up the yawning gap in

statutory provisions as the State Act and Rules were silent about the situation of ‘0’ vacancy in a district. Next, the advertisements in the instant matter were issued in the year 2016 for filling up of 12,460 Assistant Teachers for which schedule of selection was issued on 20.12.2016.

(91) It is evident from the record that after first round of counselling, combined select lists of home district candidates and the outside/zero district candidates were prepared and published in all districts on 21.03.2017 and 22.03.2017.

(92) Apparently, as an aftermath to tide over the aforesaid controversy, the State Government in the year 2018 has already amended Rule 14(1)(a) and has completely done away with the provisions of district preference. Thus, there is no longer any requirement for a candidate to have B.T.C. qualification from the same district from where he applies. However, since this amendment was to be applied only prospectively, the present controversy erupted leading to several rounds of litigations.

(93) It is an admitted position that the advertisement has been issued for appointment of 12,460 Assistant Teachers in the Junior Schools. As stated here-in-above, 5,990 candidates are already working on the said posts, meaning thereby 6,470 posts are still left to be filled.

CONCLUSION

(94) Merit should always be promoted for ensuring quality education as proposed by the RTE Act in its preamble itself and the Courts have always promoted this cause, denial of appointments to

meritorious candidates is prejudicial to the interest of meritorious candidates, who are future of our Nation. Thus, this court does not find any error in the preparation of merit list at District Level of the Assistant Teachers on the basis of candidates of “0” vacancy district to participate in the counseling’s for any district by marking their preference, which needless to say is in conformity to section 23 of the RTE Act. The said provisions is also not in breach of the touchstone as devised by the Apex Court for infringement of the provision of Articles 14, 15, 16 and 21-A of the Constitution of India.

(95) Before we part, this court wishes to record that vide an order dated 07.05.2022, a Co-ordinate Bench of this Court has passed the following order:-

“Sri Abhinav N. Trivedi, learned Chief Standing Counsel has submitted that all the issues engaging attention of this Court in this Bunch of Special Appeals are under active consideration of the State Government at an appropriate level. He has stated that the State Government in the department of Basic Education has instructed him to make a prayer to the Court to adjourn the matter for four weeks so that process of resolution which is pending in the State Government may be expedited and appropriate decision may be taken for resolving the issues.

The other learned counsel representing the rival parties have though welcomed the suggestion given on behalf of the State Government for resolution of the issues at the level of the State Government itself, however, they simultaneously have expressed their apprehension that such requests in this matter have been made earlier also at the instance of the State Government, however, till date no solution

could be found and presented before the Court.

Sri Abhinav N. Trivedi, learned Chief Standing Counsel allays such apprehensions and has submitted that the State Government is serious to find out some solution of the issues which are pending consideration in this matter.

Thus, on the prayer made by learned Chief Standing Counsel, we adjourn this case to 26.05.2022, on which date, learned State Counsel shall bring on record if any decision is taken at the end of the State Government to resolve the issues.

We express our solemn hope and trust that during this intervening period the State Government shall make all its honest and sincere endeavour to find out a solution. We also make it clear that no further time shall be granted and in case no solution is found by the next date, the matter shall not be adjourned and shall be argued finally.

List this case on 26.05.2022.”

Thereafter, number of times the case has been taken up, but the stand of the Government has not come forward. The callousness approach of the Basic Education department in resolving the present issue is apparent from the aforesaid facts. The state has neither come forward with a solution nor have suggested a via media for resolving the issue and the only thing which can be depicted from the various orders of this court is that they have been seeking adjournment after adjournment and had been delaying the hearing and decision in the present matter, without appreciating the fact that the recruitment process had been notified some seven years ago in the year 2016.

(96) In view of what has been stated above, while setting aside the impugned order dated 01.11.2018 passed by the Single Bench, we **dispose of** all the Special

Appeals with a direction to the authorities concerned to take a decision to fill-up all the posts inclusive of residual 6,470 by preparing a common merit list of all the eligible Assistant Teachers as per NCTE Notifications read with Notification/Circular dated 26.12.2016 in the respective districts as discussed here-in-above, within a period of three months from the date of production of a certified copy of this order. Subject to the preparation of merit list as directed, the interim order dated 17.11.2018 & extended vide order dated 22.07.2019 shall remain in operation for three months or till preparation of said merit list, whichever is earlier.

(2023) 11 ILRA 508

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 03.11.2023

BEFORE

**THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE SURENDRA SINGH-I, J.**

Special Appeal No. 717 of 2023

State of U.P. & Ors. ...Appellants
Versus
Suresh Chandra. ...Respondent

Counsel for the Appellants:
C.S.C., C.S.C.

Counsel for the Respondents:
Sri Lal Babu Lal

Recovery of arrears -of 6th Pay Commission - respondent was paid arrears of 6th Pay Commission in pursuance of the Government Order dated 29.7.2010 -aforesaid amount was deducted from his gratuity - excess payment was not done due to any misrepresentation or fraud committed on the part of the respondent petitioner- recovery done after more than 08 years on the date of his retirement- his case is

covered under Clause(ii) of para-18 of Rafiq Masih (Whitewasher) case -Section 13 of the Act, 1972 prohibits attachment of any gratuity payable under the Act in execution of any decree or order of any Civil, Revenue & Criminal Court-no infirmity in the impugned order.

Appeal dismissed. (E-9)

Cases cited:

1. High Court of Punjab & Haryana Vs Jagdev Singh, MANU/SC/0831/2016
2. Shyam Babu Verma Vs U.O.I. reported in (1994) 2SCC 521
3. Punjab & ors.Vs Rafiq Masih (Whitewasher) & ors., 2015 (4) SCC 334
4. Thomas Daniel Vs St. of Kerala, MANU/SC/0569/22
5. Calcutta Dock Labour Board & anr.Vs Smt. Shandhya Mitra & ors.(1985) 1985 SCR (2) 826

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

1. This special appeal has been instituted against the order dated 26.4.2023 passed by learned Single Judge in Writ-A No. 33297 of 2013 (Suresh Chandra Asthana, S/O, S. N. Lal Asthana Vs. State Of U.P. And 3 Others). Vide impugned order, the learned Single Judge has directed the appellant no.2, Commissioner, Rural Development to refund the amount deducted from gratuity dues to the respondent-petitioners.

2. The writ petition was filed by the respondent-petitioner for quashing the order dated 31.10.2019 passed by the respondent no.2 Project Director, District Rural Development Authority, Chandauli (hereinafter referred as 'DRDA'). By the aforesaid order, Project Director passed an

order for recovery of excess arrears of salary paid to the respondent-petitioner.

3. The writ petition was filed by the petitioner Surendra Chandra Asthana with the following prayer :-

"I. Issue a writ, order or direction in the nature of certiorari quashing the order dated 15.11.2011 passed by Commissioner Rural Development U.P. Lucknow respondent no. 2 and its consequential order dated 30.05.2013 Annexure no. 3 to this writ petition to the extent it relates to the recovery of amount of arrears paid to the petitioner in terms of the recommendation of the VI pay Commission.

ii. issue a writ, order or direction in the nature of certiorari calling for the records and quashing the impugned orders dated 15.11.2011, 19.06.2013 (so far as it relates to petitioner) and 31.10.2019 passed by the respondent nos. 2 and 3 respectively (Annexure Nos. 4,5 and 6 to the writ petition)"

4. The averments made by the petitioner-respondents in the affidavit filed in support of the writ petition that the petitioner was posted in the Pay-scale of Rs. 8000-13500 (pre revised) as Assistant Engineer DRDA Chandauli in terms of the order dated 7.4.2000 issued by the Government of U.P. Rural Development, Lucknow (Annexure no.1). The petitioner by virtue of his services rendered to the Government was granted revised pay-scale in terms of the recommendation of 6th Pay Commission. The amount of aforesaid arrears of pay was paid to the petitioner in terms of the relevant rules admissible for implementation of recommendation of 6th Pay Commission. No misrepresentation or fraud was played by the petitioner to get the arrears of amount of 6th Pay Commission.

5. It has been averred that the Commissioner Rural Development, U.P. sent a proposal for grant of Rs. 44,56,620/- to the State Government vide its letter dated 13.11.2011 for payment of arrears of salary to the employees of DRDA on the implementation of the recommendation of 6th Pay Commission. On rejection of this proposal granted by the Government, a direction was issued by the Commissioner, Rural Development to the Project Director, District Rural Development Agencies to make recovery of arrears which has already been paid to the employees. The Commissioner Rural Development, Government of U.P. has issued a letter dated 15.11.2011 to all the Chief Development Officer/Executive Director, Project Director, District Development Agencies, U.P. to make recovery of the arrears paid to the employees on the recommendation of 6th Pay Commission. The above order passed by the Commissioner Rural Development dated 15.11.2011 was stayed by this Court vide orders dated 16.3.2012, 27.2.2012, 28.5.2012 and 27.3.2012 passed in Service Single No. 1339 of 2012 (Akhilesh Chandra & 2 Ors. Vs. State of U.P. Through Prin. Secy. Rural Development Lko.& Ors.), Service Single No. 1064 of 2012 (Raghupal Singh & 3 Ors. Vs. State of U.P. Through Prin. Secy. Rural Development Lko.& Ors.), Service Single 1109 of 2012 (Virendra Kumar Verma & 22 Ors Vs. State of U.P. Through Prin. Secy. Rural Development) and Writ- A No. 15064 of 2012 (D.D. Gupta & Ors Vs. State of U.P. & Ors.) respectively (Annexure No. 2 to the writ petition).

6. The Authorities of DRDA did not recover the amount of arrears paid to their employees in view of the order passed by this Court in the aforesaid writ petitions. Notwithstanding the aforesaid stay orders

of this Court, the Commissioner, Rural Development U.P. sent letter dated 30.5.2013 to the Project Director DRDA, Chandauli to recover the amount from the petitioner (annexure no.3), in pursuance of the orders dated 15.11.2011 & 30.5.2013 of the Commissioner Rural Development, the Project Director Chandauli has issued impugned notice dated 19.6.2013 after more than five years (annexure no.5) whereby the amount of Rs. 2,86,851/- has been directed to be recovered from the petitioner.

7. It has also been averred by the petitioner that the impugned order dated 15.11.2011, 30.5.2013 and recovery notice dated 19.6.2013 has been passed by the respondent in violation of principle of natural justice as much as no notice and opportunity of hearing has been given to him before the passing the same. By office order dated 31.10.2019 passed by the Project Director, DRDA, Chandauli alleged excess amount of Rs. 2,86,851/- determined by the impugned order dated 19.6.2013 has been recovered from the gratuity amount of Rs 10,00,000/- payable to the petitioner. The petitioner functioning as Assistant Engineer in DRDA, Chandauli has retired on 31.10.2019 on attaining the age of superannuation. It has also been submitted that there is no provision under which the amount of gratuity payable under the Payment of Gratuity Act 1972 could be deducted against the alleged excess amount paid to him. In absence of any such provision, it is incumbent upon the respondents to pay full amount of gratuity payable to the petitioner.

8. In the Counter affidavit filed in Writ-A No. 33297 of 2013 (Suresh Chandra Asthana, S/O, S. N. Lal Asthana Vs. State Of U.P. And 3 Others), averments

have been made that in compliance of Government Order dated 8th December 2008 payment of arrears of salary as per the recommendation of 6th Pay Commission has been disbursed to the employees of DRDA.

9. It has also been stated that as per the Government order dated 8th December, 2008 the payment of arrears of salary to the employees working in DRDA, Chandauli has been done on 9.1.2009. It has also been stated that since the Government order dated 29.7.2010, Government had decided to make payment of arrears to the employees of DRDA from 29.7.2010 whereas the petitioner was paid arrears of salary from 1.1.2006 to 29.7.2010 which was without any Government Order, hence the excess salary amount has rightly been recovered from the petitioner.

10. The learned Single of this Court vide order dated 26.4.2023 quashed the order dated 31.10.2019 passed by the Project Director, DRDA Chandauli for recovery of excess payment of arrears of 6th Pay Commission on the grounds mentioned in paragraph no.5 of the judgment which is follows as under:-

“5. By bare perusal of the above judgments, it is crystal clear that no recovery of excess payment can be fastened against the retired Government employee especially in case of class 3 and class 4 and ratio of judgment says that if excess amount was not paid on account of any misrepresentation or fraud of employee or if such excess payment was made by employer by applying a wrong principle for calculating pay/allowances or on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous, such excess payment of

emoluments or allowances are not recoverable and as such the relief against recovery is granted not because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from hardship that will be caused if recovery is ordered. The Apex Court has further held that if in a given case, it is proved that employee had knowledge that payment received was in excess of what was due or wrongly paid or in cases where error is detected or corrected within a short time of wrong payment, the matter being in realm of judicial discretion, Court may on facts and circumstances of any particular case order for recovery of amount paid in excess. And as such it has been held that no administrative authority is empowered to fasten the recovery against any retired employee without holding due process of law."

11. The learned Single Judge has relied upon the judgment of Hon'ble Apex Court in **State of Punjab and others Vs. Rafiq Masih (Whitewasher) and others 2015 (4) SCC 334**.

12. It has been argued by learned Standing Counsel for the State that although the State Government vide G.O. dated 8.12.2008 had directed the payment of the arrears of 6th Pay Commission to the employees of State Government vide letter dated 29.7.2010 the Commissioner, Rural Development U.P. directed the payment of arrears of 6th Pay Commission to the employees of DRDA. It was made clear vide order dated 15.11.2011 of Commissioner, Rural Development, U.P. that employees of DRDA are not entitled to get arrears of 6th Pay Commission therefore, the order dated 30.5.2013 passed by the Commissioner Rural Development,

U.P. Lucknow directed the recovery of amount of arrears wrongly paid to the employees of DRDA thus, as per the Government order, the aforesaid amount has rightly been recovered from the gratuity amount of respondent-petitioner. It has been further argued that recovery against the respondent-petitioner has been initiated during his service period i.e. in the year 2013 whereas he retired on 31.10.2019. Lastly, it has been argued that in its judgment dated 29.7.2016 passed in **Civil Appeal No. 3500 of 2016 decided in 29.7.2016** by the Hon'ble Apex Court in the case of **High Court of Punjab & Haryana & Ors. Vs. Jagdev Singh**, the Hon'ble Apex Court has held that in case an undertaking has been given by the employee to the effect that if amount paid is found excess in future it may be recovered from him even after his retirement therefore, recovery has rightly been made from the respondent-petitioner.

13. Per contra learned counsel for the respondent-petitioner has argued that the arrears of 6th Pay Commission was paid to the respondent petitioner without any misrepresentation or fraud practised by him. Therefore, it cannot be recovered from him. It has also been argued that no undertaking was executed nor any such affidavit has been given by the respondent-petitioner that the excess amount may be recovered if the payment is found excess in future. The payment was made entirely at the behest by the appellants in which respondent-petitioner had no role at all. It has also been submitted that the recovery of arrears of 6th Pay Commission was made on 31.10.2019, on the date of superannuation of respondent-petitioner on 31.10.2019. The Project Director, DRDA Chandauli deducted the amount of aforesaid arrears from the gratuity amount

payable to the respondent-petitioner, which is not permissible under the law. It is also been submitted that the aforesaid recovery was made after more than five years of its payment on the date of his retirement against the judgment of Hon'ble Surpeme Court in **Rafiq Masih(whitewasher) case (supra)**. It has also been argued that as respondent -petitioner does not receive any pension. Therefore, the recovery of the arrears of 6th Pay Commission, which was repaid to him after the judgment and order dated 26.4.2023 passed in Writ A No.33297/2013 will be against the equitable consideration.

14. We have heard the rival submissions advanced by learned counsel for the parties and perused the material on record.

15. There is no statutory law regarding recovery of excess payment made by the employer to the employee. The recovery of excess payment is based on equitable consideration, which has been settled by the Judgment of Hon'ble Apex Court In **Sayed Abdul Qadir Vs. State of Bihar reported in (2009) 3 SCC 475**. In this case, the Hon'ble Apex Court quashed the order directing the recovery of excess payment made to the teachers for their no fault after ten years. The Hon'ble Apex Court observed as under:

"58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or

corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess.....

"59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible.

.....Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."

16. In case of **Shyam Babu Verma Vs. Union of India reported in (1994) 2SCC 521**, the Hon'ble Apex Court observed as under:-

"11. Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. 1-1-1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year

1984 with effect from 1-1-1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same.”

(emphasis supplied)

17. After considering several judgments of the Hon'ble Apex Court in **Punjab and others Vs. Rafiq Masih (Whitewasher) and others, 2015 (4) SCC 334** as ready reference, the Hon'ble Apex Court has summarized the following few situations , wherein recoveries by the employer would be impermissible in law:-

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

18. In **High Court of Punjab & Haryana Vs. Jagdev Singh, MANU/SC/0831/2016**, while opting for the revised pay-scale, the respondent had given an undertaking to refund any excess payment if it was so detected and demanded subsequently. The revised pay-scale in the selection grade was allowed to the respondent on 7.1.2000 and eventually, he was compulsorily retired from service on 12.2.2003 . On 18.2.2004, a letter for recovery of an amount as Rs. 1,22,003/- was served upon the respondents pursuant to the direction of the Registrar of the High Court. The Hon'ble Apex Court held that since in the present case an undertaking was specifically furnished by the respondent officer at the time of his accepting revised pay-scale, to the effect that any payment found to have been made in excess would be liable to be adjusted, while putting for the benefit of the revised pay-scale, respondent was clearly on notice of the fact that in future any payment found excess shall be refunded and adjusted the petitioner was entitled to refund/adjust the excess payment made. The principle enunciated in **Jagdev Singh case (supra)** cannot apply in the present case, in that case the officer to whom payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would require to be refunded. The Officer furnished an undertaking while opting for the revised pay-scale. He was bound by the undertaking. The respondent was directed to refund the excess amount in monthly instalments spread over a period of two years. In the present present case no such undertaking was furnished by the respondent-petitioner regarding the money paid to him.

19. In **Thomas Daniel Vs. State of Kerala, MANU/SC/0569/22** where the excess amount was not paid to the employee on the account of any misrepresentation or fraud of the employee but due to mistake in interpreting Kerala Service Rules, which was attempted to be recovered after passage of 10 years of the retirement of the employee, the Hon'ble Apex Court held that the said recovery cannot be made as it will be iniquitous and arbitrary.

20. The facts of the present case is that the respondent-petitioner was working on the post of Assistant Engineer in DRDA, Chandauli in the pay-scale of 8000-13500 (pre revised) from 4.7.2000, he was paid arrears of 6th Pay Commission in compliance of the order dated 29.7.2010. Vide notice dated 19.6.2013 issued by the Project Director, DRDA, Chandauli directed the respondent-petitioner to deposit of Rs. 2,86,851/- as irregular payment of arrears of 6th Pay Commission received by him. This notice was in pursuance of the letter dated 15.11.2011 &* 14.6.2013 issued by the Commissioner Rural Development, U.P. to the Project Director DRDA, Chandauli. The aforesaid arrears of 6th Pay Commission was not recovered from the respondent-petitioner while he was in service. The aforesaid amount of arrears of 6th Pay Commission was deducted from his gratuity amount of Rs. 10,00,000/-, payable to the respondent-petitioner on the date of his retirement i.e. on 31.10.2019.

21. From the aforesaid discussion, it is clear that respondent was paid Rs. 2,86,851/- as arrears of 6th Pay Commission in pursuance of the Government Order dated 29.7.2010 and the aforesaid amount was deducted from his

gratuity in compliance of the letter dated 15.11.2011 and 14.6.2013 issued by the Commissioner Rural Development, U.P. and notice dated 19.6.2013 issued by Project Director, DRDA Chandauli, the excess payment was not done due to any misrepresentation or fraud committed on the part of the respondent petitioner. The recovery of the aforesaid amount of arrears of 6th Pay Commission was done after more than 08 years on 31.10.2019 on the date of his retirement. Since the aforesaid recovery of arrears of 6th Pay Commission was done on the date of retirement of the respondent-petitioner and his case is covered under Clause(ii) of para-18 stipulated by the Hon'ble Apex Court in **Rafiq Masih (Whitewasher) case (supra)**, recovery of such amount is illegal.

22. Apart from the above mentioned judgments of the Hon'ble Apex Court **Section 13 of the Payment of Gratuity Act, 1972** prohibits attachment of any gratuity payable under aforesaid Act in execution of any decree or order of any Civil, Revenue & Criminal Court. Section 13 of the Payment of Gratuity Act, 1972 is as follows:

“13. Protection of gratuity.—No gratuity payable under this Act [and no gratuity payable to an employee employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop exempted under section 5] shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court.”

23. In **Calcutta Dock Labour Board & Anr. Vs. Smt. Shandhya Mitra & Ors. (1985) 1985 SCR (2) 826**, the Hon'ble Apex Court held that Section 13 of the Payment of Gratuity Act gives total

immunity to gratuity from attachment. Thus, the deduction of the amount of arrears of 6th Pay Commission of Rs. 2,86,851/- from gratuity money payable to him is illegal and was rightly directed to be refunded to the respondent-petitioner vide impugned order dated 26.4.2023 passed by the learned Single Judge in Writ-A No. 33297 of 2013.

24. The amount of Rs. 2,86, 851/- which was deducted from the gratuity amount of the respondents on 31.10.2019 has been refunded to the respondent-petitioner in compliance of the order dated 24.6.2023 passed by the learned Single Judge in Writ-A No. 33297 of 2013 (Suresh Chandra Asthana, S/O, S. N. Lal Asthana Vs. State Of U.P. And 3 Others).

25. In the facts and circumstances of the case, the recovery of payment of arrears of 6th Pay Commission would be iniquitous and arbitrary and cannot be permitted.

26. It is our considered opinion that there is no illegality or infirmity in the impugned judgment and order dated 24.6.2023 passed by learned Single Judge of this Court, there is no merit in the special appeal and is liable to be dismissed.

27. The appeal is dismissed accordingly.

(2023) 11 ILRA 515
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.09.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 2986 of 2010
 connected with

Writ A Nos. 2001249 of 2014, 10278 of 2016 &
 1517 of 2014

Ali Safdar Anhsari & Ors. ...Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioners:

G.C. Verma, Amol Kumar, Anupam Mehrotra,
 Bhoopal Singh

Counsel for the Respondent:

C.S.C., Aakarsh Sood, Amit Bose, Ashok Shukla,
 Manjive Shukla, Mohd. Shujaiddin Waris,
 Niranjana Singh, Prashant Singh Gaur, Prem
 Chandra, Ramesh Pandey, Surya Mani Singh,
 Upendra Nath Misra

**Civil Law - U.P. Government Servants
 Seniority Rules, 1991 – Rule 5 – U.P.
 Secretariat Accounts Service Rules, 1993
 – Rule 20 – Seniority – Direct Recruitment –
 Merit List vs. Date of Joining – Certiorari –
 Mandamus**

The petitioners, appointed as Assistant Accountants in 2000 from the main select list of a 1995 recruitment, challenged the seniority list dated 23.04.2010, which placed respondents (wait-listed candidates appointed in 2001) above them, seeking its quashing and restoration of the 29.12.2005 seniority list. The petitioners argued that seniority should be determined by the date of joining, as they joined earlier, and that the appointments of wait-listed candidates were illegal, violating G.O.s and judicial precedents. The respondents contended that Rule 5 of the Seniority Rules, 1991, mandates seniority based on the merit list for a single selection, and both groups were part of the same 1995 selection process. Held: (1) The writ petitions were dismissed, upholding the seniority list dated 23.04.2010. (2) Rule 5 of the Seniority Rules, 1991, governs seniority for direct recruitment from one selection, requiring it to be based on the merit list prepared by the Commission, not the date of joining. (3) Both petitioners and respondents were selectees of the same 1995 selection, making the combined merit list dated 05.06.2003 binding, as it was unchallenged. (4) The seniority list dated 29.12.2005, based on joining dates and Bhey Ram Sharma Vs Haryana St. El. Bd., was erroneous, as it involved two separate selections, unlike the single selection here. (5) The Yogendra Kumar Pal Vs St. of U.P. case was

inapplicable, as it involved wait-listed candidates appointed to new vacancies, not unfilled ones. (6) The St.'s preparation of the 23.04.2010 seniority list complied with Rule 5 and Rule 20 of the 1993 Service Rules. (7) Seniority is a statutory, not fundamental, right, and no violation of Articles 14 or 16 was established. (8) The St. was directed to prepare a fresh seniority list for Review Officer (Accounts) based on the 23.04.2010 list and consider promotions to Section Officer (Accounts), accounting for long-standing service without disturbing established seniority.

Case Law Cited:

1. Sub-Inspector Rooplal Vs Lt. Governor, (2000) 1 SCC 644
2. D.P. Sharma Vs U.O.I., 1989 (Supp) 1 SCC 244
3. Surendra Jai Narain Vs St. of U.P., C.M.W.P. No. 34043/2001, decided on 09.12.2005
4. Girdhar Kumar Dadhich Vs St. of Raj., (2009) 2 SCC 706
5. St. of J & K Vs Sat Pal, (2013) 4 SCC 737
6. Pt. MSM Sharma Vs Sri Krishna Sinha, AIR 1959 SC 395
7. Bhey Ram Sharma Vs Har. St. El. Bd., 1994 Supp (1) SCC 276
8. R.N. Gosain Vs Yashpal Dhir, (1992) 4 SCC 683
9. St. of Karnataka Vs AIMO, (2006) 4 SCC 683
10. U.P. Power Corpn. Ltd. Vs Rajesh Kumar, (2012) 7 SCC 1
11. Kamraj Nadar Vs Kunju Thevar, AIR 1958 SC 687
12. Prafulla Kumar Das Vs St. of Orissa, (2003) 11 SCC 614
13. St. of U.P. Vs Dinkar Sinha, (2007) 10 SCC 548
14. St. of U.P. Vs U.P. Excise Subordinate O.M. Association, (2002) 9 SCC 718
15. Pankaj Kumar Vs St. of U.P., C.M.W.P. No. 41701/2008, decided on 03.01.2011
16. Anil Kumar Sharma Vs St. of U.P., 1997 SCC Online All LJ 2003
17. Bhoodev Singh Vs Chairman, U.P. St. Electricity Board

(Delivered by Hon'ble Irshad Ali, J.)

1. 1. Heard Shri Anupam Mehrotra, learned counsel for the petitioners, Shri Upendra Nath Misra, learned Senior Advocate assisted by Sri Neel Kamal Mishra, learned counsel for the respondent-State, Shri R.K. Upadhyaya, learned counsel for respondent no.3, Shri Shujauddin Waris, learned counsel for respondent nos.4 and 10 and Shri Surya Mani Singh, learned counsel for respondent nos.8 and 11.

2. This bunch of writ petitions is being decided by means of a common judgment and order treating Writ-A No.2986 of 2010 to be leading writ petition and the judgment and order passed therein, shall be equally applicable to all the connected writ petitions.

3. By means of the present writ petition, the petitioner has prayed for the following reliefs:

"(i) issue a writ order or direction in the nature of Certiorari for quashing the impugned order dated 23.4.2010 along with seniority list against the attached with impugned order.

(ii) issue a writ order or direction in the nature of Mandamus commanding the opposite parties to restore back seniority list dated 29.12.2005 by placing the opposite party no.4 to 11 below from the petitioners.

(iii) issue a writ order or direction of mandamus commanding the opposite party no.1 and 2 not to take any action for promotion to the opposite parties nos.4 to 11 according to the impugned seniority list on the next higher post.

(iv) issue a writ order or direction in the nature and manner which deemed just and proper in the circumstances of the case.

(v) Allow the writ petition with costs."

4. Factual matrix of the case is that in the year 1995, 82 posts of the Assistant Accountants were notified by the opposite party no.3 against which the selection was held and finalized for appointments of the Assistant and also finalized for appointment of the Assistant Accountant in Secretariat U.P., Lucknow.

The opposite party no.3 notified the result of the 82 vacancies in which the opposite party nos.4 to 11 were not selected as they were in waiting list. The opposite party no.3, in the select list of 75, selected candidates on 6.12.1997; selected again for 4 candidates on 6.8.1998; and for 3 candidates on 28.10.1999.

The appointment letters were issued to the petitioners for the appointment on the posts in question between 26 February, 2000 upto March, 2000 and they have submitted their joining as per dates mentioned in the impugned seniority list.

After joining of the petitioners and other persons as per selection held by the opposite party no.3 the final seniority list of the cadre of the Assistant Accountants was issued on 20.9.2001 in which the names of the opposite party nos.4 to 11 are not find place as they were in waiting list.

One Sri Ghan Shyam Singh along with 2 others filed Writ Petition No.7775 of 2001 before this Hon'ble Court at Allahabad by making prayers that certain posts yet has not been filled up and some selected candidates did not turn up or after joining they have resigned. This Hon'ble Court directed for sending the requisition for calling the names for filling the unfilled vacancy, vide judgment and order dated 17.5.2001.

In compliance of the aforesaid judgment, the State Government asked for the names of the persons who were in waiting list and accordingly, the opposite party no.3 sent the name of the 23 persons for appointment against unfilled vacancies through letter dated 24.7.2001.

The opposite party no.2 issued the appointment letters to the opposite party nos.4 to 11 on 27.9.2001 and on other dates and they have submitted their joining in the Department as Assistant Accountants upto 31.10.2001 as per dates mentioned in the impugned seniority list.

Before giving the appointments to the opposite party nos.4 to 11, Special Appeal No.507/ 2000 was filed by the opposite parties against the judgment and order dated 14.5.2001, therefore, the opposite party no.1 issued the appointment letters to the opposite party nos.4 to 11 for appointing to the opposite party nos.4 to 11 as mentioned and their appointments will be subject to final decision of special appeal.

Petitioner nos.9 and 10 along with others 41 persons promoted from the post of Assistant Accountant to the post of Accountant even before joining of the opposite party nos.4 to 11 in the cadre vide

order dated 11.9.2001 according to the seniority prepared by the opposite party no.1.

After joining of the opposite party nos.4 to 11, they have moved their applications for including their names in the seniority list of Assistant Accountants. The opposite party no.1 issued a letter to the opposite party no.3 for fixing the merit of the persons likewise the opposite party nos.4 to 11 along with main list. The opposite party no.3 illegally issued the merit list by including their names of persons who were in waiting list and on that basis the opposite party no.1 again issued the tentative seniority list for placing the opposite party nos.4 to 11 above the petitioners. Thereafter, the petitioners filed their objections but the opposite party no.2 finalized the seniority list on 11.3.2004 in which the opposite party nos.4 to 11 who were not in any cadre, were placed above the petitioners.

Feeling aggrieved by the said seniority list, some of the petitioners filed Writ Petition No.1517/2004 (SS) before this Court which is pending, however, during pendency of the writ petition, the good sense was prevail to the opposite party nos.1 and 2 that they themselves after taking advise from Law Department again issued the tentative seniority list in view of the law laid down by the Hon'ble Supreme Court for amending the seniority list dated 11.3.2004. The tentative seniority list was again issued on 16.12.2004 in which the opposite party nos.4 to 11 were placed below petitioners on their right place, as they have joined in the cadre/ service in October, 2001. The final seniority list was issued correctly on 29.12.2005.

Against the seniority list dated 29.12.2005, the opposite parties namely Rama Shankar Tiwari and Mohd. Tanveer Haidar filed Writ Petition No.114 of 2006 (SS) before this Court without impleading the affected persons, wherein some of the petitioners put in appearance through their counsel and the petitioners were impleaded as opposite parties; then this Hon'ble Court has been pleased to pass an order on 15.1.2006 by granting time for filing the counter affidavit and the promotion, if any on higher post, shall be subject to final decision of the writ petition.

Even after finalization of the final seniority list the opposite party no.1 was not taking any action for promotion on the next higher post then the some of the petitioners filed the writ petition for their promotion as per Rules, 1993. This Hon'ble Court directed for considering the promotion of Assistant Accountant according to the Rules, 1993 against the vacancies which were occurred before the amendment of the Rules, if any, on 24.8.2006 in the Writ Petition No.4531/2006.

In pursuance of the seniority list dated 29.12.2005 as well as direction issued by this Court, the opposite party no.1 considered the case of the petitioners for promotion on the post of Accountants vide order dated 23.2.2007. The petitioners were promoted on the next higher post which is post of Accountants and since then, the petitioner are working on the promotion post.

Two opposite parties namely Surendra Kumar Pandey and Amit Chaudhary filed Writ Petition No.1179 of 2007 against the seniority list dated 29.12.2005 in the year 2007 when the promotion of the petitioners

were under consideration. This Hon'ble Court was pleased to pass an interim order by directing therein that result of D.P.C. will not be declared, however, the learned counsel for the opposite party no.1 has produced the judgment passed in Writ Petition No.34043/2001 in which the question of seniority from the appointee of main list and appointee of the waiting list at later stage was raised, this Hon'ble Court finding that there is no good ground for interference in the matter, hence the interim order granted earlier vide order dated 22.2.2007 was kept in abeyance.

In the order dated 22.2.2007 it was noted and observed that the seniority list prepared by the opposite parties was challenged in Writ Petition No.34043/2001 was finalized, the contention was that similar case was finally decided and the question of seniority of Panchayatee Raj was under consideration in the judgment and order dated 9.12.2005, however, the question was the same, therefore correction application was moved by the State in Writ Petition No.1179 of 2007 against the order dated 22.2.2007. The special appeal was filed by the petitioner of the said writ petition, the same was also decided by the Division Bench by relegating the matter before the Hon'ble Court where the writ petition is pending.

During pendency of Writ Petition No.1179 of 2007 as well as Writ Petition No.114 of 2006 against the seniority list dated 29.12.2005, the opposite party no.1 moved application before this Hon'ble Court for granting leave for preparation of the seniority list according to law after canceling the seniority list dated 29.12.2005 which was allowed by this Hon'ble Court on 6.5.2009 as mentioned in the impugned order itself.

It appears that the opposite party nos.4 to 11 have succeeded to peruse the opposite party no.1 to take decision in their favour even against the final verdict of this Hon'ble Court affirmed by the Hon'ble Supreme Court, accordingly the Principal Secretary Panchaytee Raj has prepared the seniority list of the employees in compliance of the same by placing the selectees of the main list over and above the selectees of waiting list.

The opposite party no.1 again issued tentative seniority list for restoring the seniority list dated 11.3.2004 on 15.2.2010 by which the objections were invited from affected persons, all the petitioners filed their objections which have been mentioned in the impugned order itself. In their objections the petitioners have raised several pleas, most important pleas were that the selection was held in the year 1995; the select list was prepared in the year 1997 and was issued for the appointment as per G.O.; there is no provision for waiting list, but appointment were given to the opposite party nos.4 to 11 in the year 2001 on that very ground that the special appeal is pending filed by the opposite party no.1 itself, therefore they cannot be included in seniority list.

Ind most important plea was that the Division Bench of this Hon'ble Court has been pleased to decide the matter finally in Writ Petition No.34043/2001 which was affirmed by the Hon'ble Supreme Court, wherein this Hon'ble Court has decided the selectees of the main list will be placed over and above the selectees and appointees from the waiting list.

The opposite party no.1 decided all the objections by stating that the judgment passed in Writ Petition No.34043/2001 is

not related from the post in question, therefore the same will not be applicable in the matter. The opposite parties while deciding the objections have committed gross illegality by raising factum while law laid down by this Hon'ble Court and affirmed by the Hon'ble Supreme Court has already been complied with by the State Government in which it has been held that selectees of the waiting list even of general category having more marks than the petitioners reserve category likewise the O.B.C. cannot be placed above from the O.B.C. category as they are not the selectees in the main list. But the opposite party by overlooking the judgment and on his own way issued the impugned order by committing the gross illegality.

Undisputedly the opposite party nos.4 to 11 are not finding place in the merit list of main list of 82 persons, therefore they cannot be said as selectees of one selection.

In compliance of the judgment the opposite party nos.4 to 11 have given the appointment in 2001 while the petitioners were already appointed in March, 2000 upto preparation of the seniority list dated 20.9.2001 the opposite party nos.4 to 11 were not in cadre, therefore, in evident they cannot be placed over and above the petitioners.

It has been settled by this Hon'ble Court as well as Hon'ble Supreme Court that the persons will gain seniority from the date of their joining and not before that. The provisions of Rule 5 clearly indicates that if the persons even fail to join being selectee of the same one selection then he will loose his seniority, in the case in hand the opposite party nos.4 to 11 cannot be given any reason for their joining as they are not selectee of the main list. In these

circumstances they cannot be placed above the petitioners.

Recently, this Hon'ble Supreme Court has been pleased to hold that no one can claim the seniority before taking birth in the cadre, in case in hand the opposite party nos.4 to 11 have been appointed in October, 2001 and they are claiming their seniority above the petitioners who have been appointed from main list in February and March, 2000 as per dates mentioned in the impugned seniority list but the opposite party nos.1 and 2 have placed arbitrarily the opposite party nos.4 to 11 above the petitioners in very illegal and arbitrary manner while they are liable to be placed at bottom as they have been placed in the seniority list dated 29.12.2005.

Opposite parties are taking recourse of merit list which was prepared by the opposite party no.3 in 2003 after request made by the opposite party no.1 after including the opposite party nos.4 to 11 who were not find place in the main list, therefore it cannot be said in any manner they are senior.

Opposite party nos.4 to 11 are not the selectees of same selection in fact they were in waiting list and not in select list and as per decision of State Government itself as were taken by the State Government not once but in the year 1992 and later in the years 1994 and 1999, earlier the provision was that waiting list will remain valid only for one year as per G.O. dated 29.8.1992 and same was reiterated on 31.1.1994 but in case in hand elect list was prepared along with waiting list for the year 1997 which was valid only up to the year 1998 but the appointments have been given to the opposite party nos.4 to 11 from the waiting list which was even not in

existence after expiry of one year. The State Government vide G.O. dated 15.11.1999 has taken decision that no waiting list will be prepared along with main list.

The appointment of the opposite party nos.4 to 11 are itself illegal and not in accordance with provision of the G.O. issued by the State Government but the opposite parties against their own decision for providing favouritism to the opposite party nos.4 to 11 have placed them over and above the petitioners was impugned seniority.

Undisputedly all the petitioners have been promoted to the next higher post in the year 2001 and 2007 as per details given in preceding paragraphs but the opposite parties have placed the petitioner below from the opposite party nos.4 to 11 but yet have not been promoted.

The opposite party nos.1 and 2 are going to promote to the opposite parties nos.4 to 11 from the different date to the next higher post even from the date when they were not in service while as per the Rules 1993 at least the 5 years continuous service is required on the post of Assistant Accountant. Having no other alternative and efficacious remedy open to the petitioners expect to approach to this Hon'ble court by filing the writ petition under Article 226 of the Constitution of India.

5. Learned counsel for the petitioners submitted that the opposite party no.1 again issued tentative seniority list for restoring the seniority list dated 11.3.2004 on 15.2.2010 by which the objections were invited from affected persons; all the petitioners filed their objections which have

been mentioned in the impugned order itself. In their objection the petitioners have raised several pleas most important pleas were that the selection was held in the year 1995 and select list was prepared in the year 1997 and was issued for appointment as per G.O. there is no provision for waiting list, but appointments were given to the opposite party nos.4 to 11 in the year 2001 on that very ground that the special appeal is pending filed by the opposite party no.1 itself, therefore they cannot be included in the seniority list. And most important plea was that the Division Bench of this Hon'ble Court has been pleased to decide the matter finally in Writ Petition No.34043/2001 which was affirmed by the Hon'ble Supreme Court, this Court has decided that the selectees of the the main list will be placed over and above the selectees and appointees from the waiting list.

6. Learned counsel for the petitioner next submitted that the opposite party no.1 decided all the objections by stating that the judgment passed in Writ Petition No.34043/2001 is not related from the post in question, therefore the same will not be applicable in the matter. The opposite parties while deciding the objections have committed gross illegality by raising factum while law laid down by the Hon'ble Court and affirmed by the Hon'ble Supreme Court has already been complied by the State Government in which it has been held that selectees of the waiting list even of general category likewise the O.B.C. cannot be placed above from the O.B.C. category as they are not the selectee in the main list. But the opposite party by over looking the judgment on his own way issued the impugned order by committing the gross illegality.

7. Learned counsel for the petitioner next submitted that in compliance of the judgment the opposite party no.4 to 11 have given the appointment in 2001 while the petitioners were already appointed in March, 2000 upto preparation of the seniority list dated 20.9.2001 and the opposite party nos.4 to 11 were not in the cadre, therefore, in evident they cannot be placed over and above the petitioners.

8. Learned counsel for the next submitted that it has been settled by this Hon'ble Court as well as Hon'ble Supreme Court that the persons will gain seniority from the date of their joining and not before that. The provisions of Rules 5 clearly indicates that if the persons even fail to join being selectee of the same one selection then he will loss his seniority, in the case in hand the opposite party nos.4 to 11 cannot be given any reason for their joining as they are not selectee of the main list. In these circumstances they cannot be placed above the petitioners.

9. Learned counsel for the petitioner next submitted that recently, this Hon'ble Supreme Court has been pleased to hold that no one can claim the seniority before taking birth in the cadre, in case in hand the opposite party nos.4 to 11 have been appointed in October, 2001 and they are claiming their seniority above the petitioners who have been appointed from main list in February and March, 2000 as per dates mentioned in the impugned seniority list but the opposite party nos.1 and 2 have placed arbitrarily the opposite party nos.4 to 11 above the petitioners in very illegal and arbitrary manner while they are liable to be placed at bottom as they have been placed in the seniority list dated 29.12.2005.

10. Learned counsel for the petitioner next submitted that the impugned order as well as impugned seniority list is wholly illegal, arbitrary and against the settled principle of law.

11. Learned counsel for the petitioner next submitted that it is very well evident from the facts and circumstances of the case that favoritism has been given to the opposite party nos.4 to 11 in fixing the impugned seniority list by ignoring the final verdict by this Hon'ble Court for reason best known to the opposite party nos.1 and 2 themselves.

12. Learned counsel for the petitioner next submitted that the impugned order has been passed in malice of law and against the provision of Articles 14 and 16 of the Constitution of India, therefore the same cannot be sustained.

13. Learned counsel for the petitioner next submitted that permission was granted by this Hon'ble Court for fixing the seniority list according to law by looking application, that it is not means in any manner that license was granted to the opposite party no.1 to ignore the provisions of law and final verdict of this Hon'ble court while fixing the impugned seniority list.

14. Learned counsel for the petitioner next submitted that the decision rendered by this court as well as Hon'ble Supreme Court are binding upon the opposite parties and they are under legal obligation to act as per directions issued by this Hon'ble Court.

15. Learned counsel for the petitioner next submitted that the opposite parties are taking recourse of merit list which was prepared by the opposite party no.3 in 2003

after request made by the opposite party no.1 after including the opposite party nos.4 to 11 who were not find place in the main list, therefore, it cannot be said in any manner they are senior.

16. Learned counsel for the petitioner next submitted that the appointment of the opposite party nos.4 to 11 are itself illegal and not accordance with provisions of the G.O. issued by the State Government but the opposite parties against their own decision for providing favoritism to the opposite party nos.4 to 11 have placed them over and above the petitioners was impugned seniority list.

17. Learned counsel for the petitioners next submitted that undisputedly all the petitioners have been promoted to the next higher post in the year 2001 and 2007 as per details given in preceding paragraphs but the opposite parties have placed the petitioners below from the opposite parties have placed the petitioners below from the opposite party nos.4 to 11 but yet have not been promoted.

18. Learned counsel for the petitioners next submitted that the opposite party nos.1 and 2 are going to promote to the opposite party nos.4 to 11 from the different date to the next higher post even from the date when they were not in the service while as per the Rules,1993 at least the 5 years continuous service is required on the post of Assistant Accountants.

19. Learned counsel for the petitioners next submitted that the impugned order including the main seniority list is wholly illegal and arbitrary and is against the provisions of Rules as well as law laid down by this Hon'ble Court.

20. In support of his submissions, learned counsel for the petitioners placed reliance upon the following judgments:

(i) Sub-Inspector Rooplal v. Lt. Governor reported in (2000)1 SCC 644

(ii) D.P. Sharma v. Union of India reported in 1989 (Supp) 1 SCC 244

(iii) C.M.W.P. No.34043/2001 (Suprendra Jai Narain v. State of U.P.) decided on 9.12.2005.

(iv) Girdhar Kumar Dadhich v. State of Rajasthan reported in (2009)2 SCC 706

(vi) State of J & K v. Sat Pal reported in (2013) AA SCC 737

(vii) Pt. MSM Sharma v. Sri Krishna Sinha reported in AIR 1959 SC 395

(viii) Bhey Ram Sharma v. Haryana State El. Bd. Reported in 1994 Supp (1) SCC 276

(ix) R.N. Gosain v. Yashpal Dhir reported in (1992) 4 SCC 683

(x) State of Karnataka v. AIMO reported in (2006)4 SCC 683

(xi) U.P. Power Corpn. Ltd. v. Rajesh Kumar reported in (2012)7 SCC 1

(xii) Kamraj Nadar v. Kunju Thevar reported in AIR 1958 SC 687

21. Per contra, Shri U.N. Mishra, learned Senior Advocate appearing for the respondents-State submitted that in service jurisprudence, it is settled position of law that seniority is only a statutory right, which is conferred to an employee either by way of specific provisions contained in Service Rules, especially prepared for respective services or by way of General Rules prepared under Article 309 of the Constitution of India.

22. Learned counsel for the respondents next submitted that though the petitioners have challenged the seniority list dated 23.4.2010 on the ground that they should have been placed in the said seniority list, according to their date of appointment/ joining in the department and not according to the combined merit list dated 5.6.2003 prepared by the U.P.P.S.C. but they have utterly failed to indicate as to under what statutory legal provision, they can sustain such a claim of seniority from the date of substantive appointment, which is applicable only in the cases covered by provision-2 of Rule-5 and also of the cases covered under Rule-8 of the Seniority Rules, 1991. However, none of these two Rules are applicable in the instant case.

23. Learned counsel for the respondent next submitted that the judgment of **Bhey Ram Shar (supra)** has no application in the instant case in hand because the said judgment about seniority was passed where selectees of two separate selections were concerned and therefore, provisions of the second proviso to Rule-5 of Seniority Rules, 1991 was applicable, whereas in the instant case, both the petitioners and respondents are selectees of the same selection, therefore they are covered by the main provisions of Rule-5 of the Seniority Rules, 1991.

24. Learned counsel for the respondents next submitted that the seniority of candidates, where appointments are made only by direct recruitment from the result of "only one selection" is determined in accordance with the Rule-5 of the Seniority Rules, 1991, which mandates preparation seniority list only according to the merit list prepared by the Commission or the committee, as the case may be.

25. Learned counsel for the respondents next submitted that the last and final seniority list dated 23.4.2010 of ARO Accounts prepared by the State Government strictly according to the Rule 5 of the U.P. Government Seniority Rules, 1991 read with rule 20 of the Service Rules of 1993 deserves to be upheld, so that the State Government may prepare the fresh final seniority list of the next higher post of Review Officer Accounts on the basis of the same and thereafter, promotions on the vacant post of Section Officer Accounts may be made in the Secretariat Administration Department of U.P. Civil Secretariat.

26. Learned counsel for the respondents next submitted that it is a settled position of law that seniority is only a statutory right, which is conferred to an employee either by way of specific provisions contained in Service Rules, especially prepared for respective services or by way of General Rules prepared under Article 309 of the Constitution of India.

27. Learned counsel for the respondent in support of his submissions, relied upon the following judgments:

(i) Prafulla Kumar Das v. State of Orissa reported in (2003)11 SCC 614

(ii) State of U.P. v. Dinka Sinha reported in (2007) 10 SCC 548

(iii) State of U.P. and others v. U.P. Exercise Subordinate O.M. Association and others reported in (2002) 9 SCC 718

(iv) Pankaj Kumar v. State of U.P. and others passed by this Hon'ble Court in Civil Misc. W.P. No.41701 of 2008 decided on 3.1.2011.

(v) Anil Kumar Sharma v. State of U.P. and others reported in 1997 SCC Online All LJ 2003

(vi) Bhoodev Singh v. Chairman, U.P. State Electricity Board and others.

28. Learned counsel for the respondent nos.4 and 10 and respondent nos.8 and 11 adopted the submissions advanced by Shri Upendra Nath Misra, learned Senior Advocate.

29. I have considered the submissions advanced by learned counsel for the parties and perused the material available on record.

30. Perusal of the material indicates as under:

(i) On 16.04.1996, advertisement for UDA/LDA/ Assistant Accountant Exam-1995 was issued for 423 posts, out of which 271 posts of UDA, 71 posts of LDA and 82 posts of Assistant Accountant in U.P. Civil Secretariat were advertised. In January, 1997, combined written examination was conducted by UPPSC. On 20.9.1997, result was declared by UPPSC for 82 posts of Assistant Accountant.

(ii) On 6.12.1997, Commission gave its first recommendation of 75 candidates against 81 posts. On 23.4.1998, Commission gave its second recommendation of 1 candidate. On 6.8.1998, Commission gave its third recommendation of 4 candidates. On 28.01.1999, Commission gave its fourth recommendation of 3 candidates.

(iii) Despite first recommendation of 75 candidates received from UPPSC in December, 1997, when no appointments were made on the post of Assistant Accountant/ ARO Accounts, selected candidates filed W.P. No.42184/1998 at Allahabad i.e. Ramesh Chandra Deubey v. State. Vide order dated 15.01.1999, the Court directed the respondents to make

appointment on the basis of ARO Accounts on the basis of recommendations of the UPPSC.

(iv) On 26.2.2000, appointments orders were issued to the selected candidates. Against the 81 posts, only 55 persons had joined. Thus, 26 posts were left vacant. Out of this bunch of 55 candidates the group of contesting parties i.e. the petitioners of Ali Safdar v. State.

(v) In the year 2001, when no further action was taken by the State for filling up the vacant 26 posts, W.P. No.7775 of 2001 i.e. Ghanshyam Singh v. State was filed for seeking a direction for filling up of the 26 vacant posts. Vide judgment and order dated 14.5.2001, while referring to the judgment of Yogendra Kumar Pal v. State of U.P. dated 9.4.1998, this Court directed the State Government to send the requisition to the UPPSC for seeking names of wait listed candidates in order of merit and then to fill up the unfilled vacancies within one month.

(vi) On 14.6.2001, the State Government requested the UPPSC to send the names of the wait listed candidates for filling up the unfilled vacancies. On 17.9.2001, UPPSC recommended 15 candidates after verification of records. In the year 2001, State filed Special Appeal No.1060 of 2009 against the judgment and order dated 14.5.2001.

(vii) On 10.08.2001, tentative seniority list of ARO Accounts was issued which included 55 candidates. This was done even while stopping the ongoing procedure of appointment of wait-listed candidates. On 11.09.2001, even without finalizing the tentative seniority list, promotions of 47 ARO Accounts were made on the post of RO Account, only on the basis of tentative seniority list. Pre-requisite for these promotions under the service rules was

minimum 5 years of service as ARO Accounts.

(viii) On 20.09.2001, seniority list of ARO Accounts was issued in which only 55 ARO Accounts (then working) were included. On 27.09.2001, thereafter, appointment orders were issued to 15 candidates from the waiting list. In October, 2001, out of 15 appointments from waiting list, only 10 persons had joined (7 General, 2 OBC, 1 SC). In the year October, 2002, all the ARO Accounts were confirmed.

(ix) In the year 2002, a representation was given by 10 remaining persons for preparation of a combined seniority list. On 17.05.2003, State requested the UPPSC to send the combined merit-list of all 65 AROs appointed in the secretariat.

(x) On 5.6.2003, on a request of the State Government, a combined merit-list was sent by the UPPSC of all 65 AROs, who were appointed by the State on the recommendation of UPPSC and this merit-list was prepared strictly according to the marks obtained by the general category and reserved category candidates and they were placed below the cut off mark of the respective categories.

(xi) On 11.3.2004, first combined seniority list was prepared by the State Government strictly in accordance with 5 of the Seniority Rules, 1991 read with Rule 15(3) and 20 of the Service Rules, 1993 i.e. in accordance with the combined merit list of UPPSC.

(xii) In the year 2004, seniority list dated 11.3.2004 was challenged in Writ Petition No.1517/2014 (Habib Ahmad v. State of U.P.) by the candidates who had joined the services during February to August, 2000. However, the combined merit list dated 5.6.2003 was initially not challenged by the writ petitioners. In Rejoinder affidavit, petitioners claimed the

combined merit list dated 5.6.2003 to be irrelevant for determining seniority. Thus, they refused to challenge it.

(xiii) In the year 2004 also, a writ petition praying for promotion in terms of seniority list dated 11.3.2004 was filed by wait listed candidates i.e. Writ Petition No.7204/ 2004 (Ramashankar Tiwari v. State of U.P.) and 44 promotions earlier made on 11.9.2001 were also challenged.

(ix) On 16.12.2004, meanwhile, a fresh tentative seniority list was issued for ARO Accounts without having any consultation with the Karmic Department. On 29.12.2005, second final seniority list dated 29.12.2005 was directly issued, on the principle of the date of substantive appointment while following the ratio of judgment of **Bhey Ram Sharma's case**, and not in accordance with Rule 5 of the 1991 Seniority Rules. Bhey Ram Sharma's case is inapplicable in these cases because in that case, there were no service rules applicable and then were 2 selections. So it was held that seniority shall be given w.e.f. date of joining, but it had no application in this case.

(x) In the year 2006-07, since the first seniority list dated 11.3.2004 was annulled and then superseded by the second seniority list dated 29.12.2005, therefore 3 writ petitions were filed against 3rd seniority list dated 29.12.2005 i.e. (Writ Petition No.114/2006- Rama Shankar Tiwari v. State; Writ Petition No.8418 of 2006 i.e. Nand Kishore v. State and Writ Petition No.1179/ 2007 (Surendra Kumar Pandey v. State).

(xi) Vide order dated 24.8.2006 passed in Writ Petition No.4531 (SS) of 2006, interim order was passed for consideration of petitioners for promotion. On 27.12.2006, order of Chief Secretary was passed to the effect that seniority list dated 29.12.2005 was erroneously prepared in

violation of Seniority Rules, 1991 that too without referring to Karmik Department. Hence directions were given to correct the error after taking permission from the Court.

(xii) In Contempt Case No.40(C) of 2007 filed by the petitioners for compliance of order dated 24.08.2006, the promotions of the petitioners on the post of RO Accounts were made on 23.2.2007. At that time, promotions were also given to 2 persons who had joined in October, 2001 from waiting list. In the year 2009, in continuation of the directions of the Chief Secretary, the State Government had filed application for recalling the seniority list dated 29.12.2005 prepared in violation of Rule-5 and permission was also sought to make fresh seniority list.

(xiii) On 6.5.2009, this Court allowed the said application and permitted the State to prepare a fresh seniority list. On 15.2.2010, fresh tentative seniority list was prepared as per combined merit list dated 5.6.2003 of UPPSC i.e. in accordance with Rule 5 of the Seniority Rules, 1991.

(xiv) On 23.4.2010, third final seniority list was circulated after disposal of the objections as per Rule 5 and Rule-9 of seniority Rules, 1991 i.e. after deciding all the objections in detail.

(xv) In May, 2010, Writ Petition No.2986(SS) of 2010 (Ali Safdar Ansari v. State) was filed challenging the final seniority list dated 23.04.2010 by the direct appointees of February, 2000 on the ground that the their joining was prior in time, than those who were appointed from waiting list in October, 2001. No explanation was given as to how their claim for seniority from the date of joining can be reconciled with the provisions of Rule-5 of the Seniority Rules, 1991.

(xvi) On 14.5.2010, interim order was passed in Ali Safdar's case (supra), to the

effect that no promotion shall be made as per impugned seniority list. Thereafter, application for recall/ modification was filed by the waitlisted candidates.

(xvii) On 23.5.2012, interim order dated 14.5.2010 was modified. State was permitted to promote the private respondents in accordance with Rules, but private respondents were directed not to claim seniority over the petitioners till the final decision of the case.

(xviii) On 22.07.2013, promotion order in favour of 08 persons was issued which included 07 remaining AROs and one Dinesh Shukla, who has left the job. Thus, all the 1995 batch Assistant Accountant/ ARO Accounts were promoted as Accountants/ RO Accounts.

(xix) In the year 2014, Writ Petition No.1249 (SS) of 2014 i.e. Tanveer Ahmed v. State was filed by the direct appointees from waiting list for seeking a direction to finalize seniority list of RO Accounts and then make promotions on the post of SO Accounts. In the year 2016, Writ Petition No.10278 (S/B0 of 2016 i.e. Bhaskar Singh v. State was filed by the direct appointees of February, 2000 for seeking direction to the respondents to make promotion on the post of Section Officers on the basis of the earlier seniority list dated 06.06.2003 (which was infact Rule 8-A seniority list).

31. To resolve the controversy involved in the present writ petition, Rule 5 of the Seniority Rules, 1991 which is admittedly applicable in the case in hand, reads as under:

"Seniority where appointments by direct recruitment only.--Where according to the service rules appointments are to be made only by the Direct recruitment the seniority inter se of the persons appointed on the result of anyone selection, shall be

the same as it is shown in the merit list prepared by the Commission or the Committee, as the case may be:

Provided that a candidate recruited directly may lose his seniority, if he fails to join without valid reasons when vacancy is offered to him, the decision of the appointing authority as to the validity of reasons, shall be final:

Provided further that the persons appointed on the result of a subsequent selection shall be junior to the persons appointed on the result of previous selection.

Explanation-Where in the same year separate selections for regular and emergency recruitment are made, the selection for regular recruitment shall be deemed to be the previous selection."

32. Learned counsel for the petitioner relied upon the several judgments operative portion of which are hereinbelow:

(i) Sub-Inspector Rooplal (supra):-

24. Before concluding, we are constrained to observe that the role played by the respondents in this litigation is far from satisfactory. In our opinion, after laying down appropriate rules governing the service conditions of its employees, a State should only play the role of an impartial employer in the inter-se dispute between its employees. If any such dispute arises, the State should apply the rules laid down by it fairly. Still if the matter is dragged to a judicial forum, the State should confine its role to that of an *amicus curiae* by assisting the judicial forum to a correct decision. Once a decision is rendered by a judicial forum, thereafter the State should not further involve itself in litigation. The matter thereafter should be left to the parties concerned to agitate further, if they so desire. When a State,

after the judicial forum delivers a judgment, files review petition, appeal etc. it gives an impression that it is espousing the cause of a particular group of employees against another group of its own employees, unless of course there are compelling reasons to resort to such further proceedings. In the instant case, we feel the respondent has taken more than necessary interest which is uncalled for. This act of the State has only resulted in waste of time and money of all concerned.

25. In the light of the view taken by us, the civil appeals and W.P. (C) No. 191/99 are allowed to the extent mentioned above. W.P.(C) No. 4128/98 pending on the file of Delhi High Court which has been registered here as TC (C) No. 56/99 is withdrawn to the file of this Court and the same is dismissed. The respondent (Delhi Administration) shall pay costs in all the above matters.

(ii) D.P. Sharma (supra):-

6. These considerations apply equally to the present case as well. The general rule is if seniority is to be regulated in a particular manner in a given period, it shall be given effect to, and shall not be varied to disadvantage retrospectively. The view taken by the Division Bench, which is in substance contrary to this principle is not sound and cannot be supported.

(iii) Surendra Jai Narain (supra):-

In the instant case, admittedly, while passing the impugned order dated 6th July, 2001 the authority did not consider at all that the petitioner had been appointed in the reserved category two years prior to the respondent no.5. More so, the petitioner had been appointed from the main list while respondent no.5 was appointed from the wait list. It is quite possible, rather, in fact it must have been that the name of petitioner, being a reserved category candidate, found place in the roster much

prior to the respondent no.5, though the said respondent may have secured more marks. Respondent no.5 could not be given place in the cadre even before his birth. Therefore, if he was given appointment for the first time in 1983, he could not be given seniority over and above the petitioner, who had been appointed two years prior to him in 1981.

(iv) Girdhar Kumar Dadhich (supra):-

16. Furthermore the select list would ordinarily remain valid for one year. We fail to understand on what basis appointments were made in 2003 or subsequently. Whether the validity of the said select list was extended or not is not known. Extension of select list must be done in accordance with law. Apart from a bald statement made in the list of dates that the validity of the said select list had been extended, no document in support thereof has been placed before us.

17. State of Rajasthan & ors. v. Jagdish Chopra, this Court held:

"9. Recruitment for teachers in the State of Rajasthan is admittedly governed by the statutory rules. All recruitments, therefore, are required to be made in terms thereof. Although Rule 9(3) of the Rules does not specifically provide for the period for which the merit list shall remain valid but the intent of the legislature is absolutely clear as vacancies have to be determined only once in a year. Vacancies which arose in the subsequent years could be filled up from the select list prepared in the previous year and not in other manner. Even otherwise, in absence of any rule, ordinary period of validity of select list should be one year. In State of Bihar v. Amrendra Kumar Mishra(2006) 12 SCC 561, this Court opined: (SCC p.564, para 9) "9. In the aforementioned situation, in our

opinion, he did not have any legal right to be appointed. Life of a panel, it is well known, remains valid for a year. Once it lapses, unless an appropriate order is issued by the State, no appointment can be made out of the said panel."

It was further held: (SCC p.565, para 13) "13. The decisions noticed hereinbefore are authorities for the proposition that even the wait list must be acted upon having regard to the terms of the advertisement and in any event cannot remain operative beyond the prescribed period." xxx xxx xxx 11. It is well-settled principle of law that even selected candidates do not have legal right in this behalf. (See Shankarsan Dash v. Union of India(1991) 3 SCC 47, and Asha Kaul v. State of J&K(1993) 2 SCC 573)"

(v) Ghanshyam (supra):-

"Accordingly, the writ petition is finally disposed of with the direction that the State Government shall send requisition to the U.P. Public Service Commission calling for names of wait-listed candidates in order of merit to fill up the unfilled vacancies within one month from the date of production of certified copy of this order. In case, the petitioners come in the merit, they shall be offered appointment within another two months.

(vi) State of U.P. and another v. Ghanshyam & others:-

The judgment dated 9.4.1998 in Yogendra Kumar Pal's case (supra), following which the Ghanshyam case was decided, was set aside in Special Appeal No.99/ 1999 (State of U.P. v. Yogendra Kumar Pal) vide judgment dated 30.10.2007 which was while rejecting a application for recall thereof, affirmed vide judgment dated 2.5.2008; And Civil Appeal No.1845-46/2014: Yogendra Kumar Pal v. State of U.P. against these judgments in Special Appeal were disposed of vide order dated 3.2.2004 whereby the correctness of

the judgments dated 30.10.1997 and 2.5.2008 was not disputed but, on a concession of the State of U.P. and the appellants, the wait-listed appointees were allowed to continue in service on the condition that their seniority would be below the merit-list appointees.

(vii) Yogendra Kumar Pal (supra):-

The State Govt. should send requisition to the commission calling for the names of the wait listed selected candidates as against the vacancies which arose as a result of resignation or otherwise of the selected candidates. The requisition may be sent by the State Government within a period of two months and the State Public Service Commission shall on receipt of the requisition, send the names of the wait-listed candidates in order of merit as against the requisition.

(viii) State of U.P. v. Yogendra Kumar Pal (supra):-

In our view, the controversy involved in this matter is squarely covered by our judgment dated 8.2.2007 in the case of U.P. Public Service Commission, Allahabad and another v. State of U.P. and another, 2007(5) ADJ 280(DB). The right of wait list candidate was considered by this Court and in para-15 of the judgment it was held "A wait list candidate does not have any indefeasible right to get appointment merely for the reason that his name finds place in the wait list." This Court in taking the aforesaid view relied upon the decision in Ved Prakash Tripathi v. State of Punjab and another, (1997) 8 SCC 488 and held that even a select list candidate has no indefeasible right to claim appointment. In para-31 of the judgment in U.P. Public Service Commission, Allahabad and another (supra) this Court has further held as under:

"Moreover, even in the case of a select list candidate, the law is well settled that

such a candidate has no indefeasible right to claim appointment merely for the reason that his name is included in the select list as the State is under no legal duty to fill up all or any of the vacancy and it can always be left vacant or unfilled for a valid reason."

(ix) State of U.P. v. Yogendra Kumar Pal (supra):-

32. Be that as it may, from the facts as we have analysed, it is evident that the petitioner had no claim at all in any manner to get appointment pursuant to the judgment of the Hon'ble Single Judge against the vacancies advertised in the aforesaid selection. Thus, his appointment during the pendency of this appeal in the purported compliance of the judgment of the Hon'ble Single Judge was clearly made wholly illegally and by enlarging the scope of judgment of Hon'ble Single Judge to an extent which was not permissible at all. It, thus, would not confer any right, legal, equitable or otherwise upon him which can be protected as has been prayed by him.

34. 34. Apparently, the directions of the Apex Court are referable to its power under Article 142 of the Constitution. However, this Court while exercising its power under Article 226 of the Constitution is bound to act strictly in accordance with law and even justice and equity must be within the four corners of law. The Apex Court has held that the High Court should not decide the matters on sentiments and sympathy, ignoring rule of law. Where a person has no right to get appointment on the post or vacancy, which has to be filled in as per the statutory rules, equity, sympathy or sentiments cannot be imported to protect an appointment made by the authorities ignoring rule of law. The principle of equity in a case of this nature will have no role to play. In Maruti Udyog Ltd. Vs. Ram Lal 2005 (2) SCC 638, the

Apex Court held that the Court cannot interpret the provisions of an Act ignoring the binding decisions of the Court only by way of sympathy to the workman concerned. In Teri Oat Estates (P) Ltd Vs. U.T. Chandigarh 2004 (2) SCC 130, it was held that ".....Sympathy or sentiment by itself cannot be a ground for passing an order in relation whereto the appellants miserably fail to establish a legal right." The Apex Court also referred to Farewell, L.J. in Latham Vs. Richard Johnson & Nephew Ltd. 1913 1 KB 398 observing "We must be very careful not to allow our sympathy with the infant plaintiff to affect our judgment. Sentiment is a dangerous will o' the wisp to take as a guide in the search for legal principles." In Ramakrishna Kamat Vs. State of Karnataka 2003 (3) SCC 374, the Court observed "While being sympathetic to the persons who come before the Court the Courts cannot at the same time be unsympathetic to the large number of eligible persons waiting for a long time in a long queue seeking employment." In Ashok Kumar Sonkar Vs. Union of India 2007 (4) SCC 54, the Court held that if an appointment is illegal, it is non est. in the eyes of law rendering the appointment to be a nullity and further held "The appointment, therefore, was illegal and in that view of the matter, it would be wholly improper for us to invoke our equity jurisdiction." Recently, in Uttar Haryana Bijli Vitran Nigam Ltd. & others Vs. Surji Devi 2008 (2) SCC 310 the Court held "Sentiments and sympathy alone cannot be a ground for taking a view different from what is permissible in law." The Apex Court in U.B. Gadhe & others Vs. G.M. Gujrat Ambuja Cement Pvt. Ltd. JT 2007 (11) SC 425 strongly commented against the direction issued by the Court bereft of logic and legality and said "The reliefs granted

by the Courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the Courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability." In State of M.P. & others Vs. Sanjay Kumar Pathak & others JT 2007 (12) SC 219, the Court observed "ordinarily the writ court should not in absence of any legal right act on the basis of sympathy alone." Even a Constitution Bench of the Apex Court in Secretary, State of Karnataka Vs. Uma Devi & others 2006 (4) SCC 1 referred to the aforesaid observations made in Teri Oat Estates (supra) and Latham Vs. Richard Johnson (supra) and took the view that even Article 142 would not be exercised by the Court on misplaced sympathy. In view of the aforesaid binding decision and also the law laid down by the Constitution Bench of the Apex Court, we do not find it expedient to accept the contention of the learned counsel for the petitioner that since he has been appointed during the pendency of the appeal and has worked for about 8 years, therefore, even if the judgment of the Hon'ble Single Judge is set aside, his appointment should be protected. Once the judgment of the Hon'ble Single Judge has been set aside, all consequential steps taken pursuant to the

said judgement would also become non est. and cannot be protected as that would be against the rule of law and the well known principle that "act of Court shall prejudice none (auctus curiae neminem gravabit)" (See : South Eastern Coalfields Ltd. Vs. State of M.P. and others 2003 (8) SCC 648) and this Court under Article 226 of the Constitution would not pass an order, which would amount to permitting the authorities to act in the breach of rule of law.

(x) Yogendra Kumar Pal (supra):-

An additional affidavit dated 27th August, 2013, has been filed on behalf of the State of U.P.-Respondent no.1. Paragraphs 7 and 8 of the aforesaid affidavit is being extracted hereunder:

"7. That upon deliberation of the facts, especially in deference to the oral observations of this Hon'ble Court and further keeping in view the humanitarian aspects attached and the dependents of the persons who have continued in service on the basis of the order of the High Court, a view was taken in the said meeting that they may be considered to be allowed to remain in service but keeping in view of the implications with respect to different batches of the employees having joined on different dates in their regular appointments, the seniority of these petitioners including the others who are similarly placed (total 39), shall have to be considered after 16.03.2005, the date on which last 2001 batch of direct recruitment has taken place.

8. That the said view to place them in seniority from 16.03.2005 have been taken in view of the fact that three batches of direct recruitment (i.e. 1995 batch, 1999 batch and 2001 batch) have joined and the last joining took place on 16.03.2005. These 28 petitioners herein (claimants) and other 11 who are not party to these

proceedings, shall have to be placed before the said last appointee in view of the fact that it will become very different to reschedule and manage the seniority list. Even if the said efforts would be made, then that will create multiple causes of action for innumerable litigations by different parties claiming to be affected by the said rescheduling of the existing seniority list."

It was acknowledged by the learned counsel representing the State of Uttar Pradesh, during the course of hearing, that the position expressed in paragraphs 7 and 8 relates to such of the appellants who have been appointed against vacancies which were filled up in the first instance, but thereafter, became available again.

Learned counsel for the appellants states that he has no objection to the disposal of the instant appeals, in respect of the remaining appellants, in terms of the offer made by the State of U.P., as has been recorded in paragraphs 7 and 8 of the additional affidavit.

(v) State of J & K (supra):-

11. In view of the factual position noticed hereinabove, the reason indicated by the appellants in declining the claim of the respondent Sat Pal for appointment out of the waiting list is clearly unjustified. A waiting list would start to operate only after the posts for which the recruitment is conducted, have been completed. A waiting list would commence to operate, when offers of appointment have been issued to those emerging on the top of the merit list. The existence of a waiting list, allows room to the appointing authority to fill up vacancies which arise during the subsistence of the waiting list. A waiting list commences to operate, after the vacancies for which the recruitment process has been conducted have been filled up. In the instant controversy the aforesaid situation for operating the

waiting list had not arisen, because one of the posts of Junior Engineer (Civil) Grade-II for which the recruitment process was conducted was actually never filled up. For the reason that Trilok Nath had not assumed charge, one of the posts for which the process of recruitment was conducted, had remained vacant. That apart, even if it is assumed for arguments sake, that all the posts for which the process of selection was conducted were duly filled up, it cannot be disputed that Trilok Nath who had participated in the same selection process as the respondent herein, was offered appointment against the post of Junior Engineer (Civil) Grade-II on 22.4.2008. The aforesaid offer was made, consequent upon his selection in the said process of recruitment. The validity of the waiting list, in the facts of this case, has to be determined with reference to 22.4.2008, because the vacancy was offered to Trilok Nath on 22.4.2008. It is the said vacancy, for which the respondent had approached the High Court. As against the aforesaid, it is the acknowledged position recorded by the appellants in the impugned order dated 23.8.2011 (extracted above), that the waiting list was valid till May, 2008. If Trilok Nath was found eligible for appointment against the vacancy in question out of the same waiting list, the respondent herein would be equally eligible for appointment against the said vacancy. This would be the unquestionable legal position, in so far as the present controversy is concerned.

(vi) Pt. MSM Sharma (supra):-

Seeing that the present proceedings have been initiated on a petition under Art. 32 of the Constitution and as the petitioner may not be entitled, for reasons stated above, to avail himself of Art. 19(1)(a) to support this application, learned advocate for the petitioner falls back upon Art. 21 and

contends that the proceedings before the Committee of Privileges threaten to deprive him of personal liberty otherwise than in accordance with procedure established by law. The Legislative Assembly claims that under Art. 194(3) it has all the powers, privileges and immunities enjoyed by the British House of Commons at the commencement of our Constitution. If it has those powers, privileges and immunities, then it can certainly enforce the same, as the House of Commons can do. Article 194(3) confers on the Legislative Assembly those powers, privileges and immunities and Art. 208 confers power on it to frame rules. The Bihar Legislative Assembly has framed rules in exercise of its powers under that Article. It follows, therefore, that Art. 194(3) read with the rules so framed has laid down the procedure for enforcing its powers, privileges and immunities. If, therefore, the Legislative Assembly has the powers, privileges and immunities of the House of Commons and if the petitioner is eventually deprived of his personal liberty as a result of the proceedings before the Committee of Privileges, such deprivation will be in accordance with procedure established by law and the petitioner cannot complain of the breach, actual or threatened, of his fundamental right under Art. 21.

(vii) Bhey Ram Sharma (supra):-

4. It may be mentioned that another advertisement dated July 14, 1968 had been published by the Board for filling up the posts of Assistant Engineers Class II and pursuant to that advertisement, Respondents 2 to 29 (hereinafter referred to as "the respondents") made applications and they were selected and appointed between October and December 1968 as Assistant Engineers Class II. As the respondents aforesaid had been appointed between October and December 1968 and

the appellants had been appointed w.e.f. January 1, 1969 in the seniority list which was published, the respondents were shown above the appellants. There is no dispute that so far the appellants are concerned, they were appointed as Assistant Engineers Class II by an order dated April 18, 1969, w.e.f. January 1, 1969 after completion of their apprenticeship, whereas the respondents were appointed as Assistant Engineers Class II before January 1, 1969. There was some confusion in respect of Respondents 6, 16, 17 and 28 as to whether they had also been appointed prior to January 1, 1969, but during hearing of the appeals, an affidavit was filed on behalf of the Board giving the dates of their appointments as October 23, 1968, November 21, 1968, November 21, 1968 and December 6, 1968 respectively. Photo copies of their appointment letters have been annexed along with the affidavit. They, however, joined later. It is well known that while determining the seniority of an officer, the date of his appointment is a more important factor than the date of his joining. In many compelling circumstances like accident, the distance at which a particular candidate resides and the time taken by him to join, cannot be ignored. So far the present case is concerned, Respondents 6, 16, 17 and 28 were not only appointed before the appellants but they joined also before April 18, 1969 the date of the appointment of the appellants. The notional seniority given to the appellants with effect from January 1, 1969 shall not affect the seniority of Respondents 6, 16, 17 and 28. 6. Once it is established that the appellants were appointed Assistant Engineers Class II on April 18, 1969 w.e.f. January 1, 1969, whereas the respondents had been appointed between October and December 1968 as Assistant Engineers Class II, then the respondents shall rank

senior to the appellants, as they entered in the cadre of Assistant Engineers Class II of the Board before the appellants. The High Court has rightly pointed out that in fact the appellants were appointed as Assistant Engineers Class II on April 18, 1969, but notional seniority was given to them with effect from January 1, 1969. In this process they cannot affect the seniority of even Respondents 6, 16, 17 and 28.

(viii) R.N. Gosain (supra):-

10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See: *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd.*, (1921) 2 R.B. 608, at p.612, Scrutton, L.JJ. According to Halsbury's Laws of England, 4th Edn., Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside". (para 1508).

11. In *Thacker Hariram Motiram v. Balkrishan Chatbrabhu Thacker & Ors.* (supra), this Court was dealing with a similar situation. The High Court, while deciding the second appeal in an eviction matter gave the appellant (tenant) one year's time subject to his giving an undertaking within a period of three weeks stating that vacant possession would be handed over within the aforesaid time. The appellant gave an undertaking in accordance with the said terms wherein he undertook that he would vacate and give vacant possession of the suit premises by

December 31, 1985, i.e., to say after one year if "by that time no stay order from the Supreme Court is received as I intend to file an appeal in the Supreme Court". It was held that in view of the said undertaking the petitioner could not invoke the jurisdiction of this Court under Article 136 of the Constitution and he should abide by the terms of the undertaking, and it was observed "This undertaking filed by the appellant in our opinion is in clear variation with the oral undertaking given to the learned Judge which induced him to give one year's time. We do not wish to encourage this kind of practice for obtaining time from the court on one plea of filing the undertaking and taking the different stand, in applications under Article 136 of the Constitution.

(ix) State of Karnataka (supra):-

56. According to Mr. Venugopal, Article 300A of the Constitution, as well as the KIAD Act, would be violated if the KIAD Board were to directly acquire or acquiesce in the acquisition of land in excess of what is required for the Project. In our view, this is nothing but a repetition of the arguments made by the State of Karnataka. As we have elaborately discussed, that the land was not in excess has been held by the Division Bench of the High Court on two occasions and we agree with it. Thus, there was no question of the land being acquired for a purpose other than a public purpose or there being any contravention of Article 300A. In fact, we are somewhat surprised that this type of argument must come from the KIAD Board, which was intimately involved, from the very beginning, with the process of acquiring land. Further, the State and its instrumentalities (including the KIAD Board) were enjoined by Clause 5.1.1.1 of the FWA, to make "best efforts" to acquire the land required for the Project. Indeed,

till the State itself changed its stand with regard to the Project, nothing was heard from the KIAD Board about lands being acquired in excess of the public purpose. Further, as an instrumentality of the State, the KIAD Board cannot have a case to plead different from that of the State of Karnataka. Thus, we are unable to countenance the arguments of Mr. Venugopal on behalf of the KIAD Board.

(x) U.P. Power Corpn. Ltd. (supra):-

87. In the ultimate analysis, we conclude and hold that Section (7) of the 1994 Act and Rule 8-A of the 2007 Rules are ultra vires as they run counter to the dictum in *M. Nagaraj*. Any promotion that has been given on the dictum of *Indra Sawhney* and without the aid or assistance of Section 3(7) and Rule 8-A shall remain undisturbed.

(xi) Kamraj Nadar (supra):-

28. If, however, a poll has to be taken under section 53(1) in spite of the retirement of a contesting candidate or candidates from contest as aforesaid the process of election continues in spite of such retirement and the question may arise as to what would happen if any of the contesting candidates who has thus retired dies before the commencement of the poll. If there was nothing more section 52 would apply and the returning officer upon being satisfied of the fact of the death of the candidate would have to countermand the poll and report the fact to the Election Commission and also to the appropriate authority. Provision is therefore made in section 55A(5) that any person who has given a notice of retirement under section 55A(2) is deemed not to be a contesting candidate for the purposes of section 52. This is a deeming provision and creates a legal fiction. The effect of such a legal fiction however is that a position which otherwise would not obtain is deemed to obtain under those

circumstances. Unless a contesting candidate who had thus retired from the contest continued to be a contesting candidate for the purposes of election and the effect of the death of such contesting candidate was as contemplated in section 52, it would not have been found necessary to enact section 55A(5). It is because such a contesting candidate who retires from the contest under section 55A(2) continues to be a contesting candidate for the purposes of election that it has been considered necessary to provide for the consequence of his death and to exclude such a candidate from the category of contesting candidates within the meaning of the term as used in section 38 of the Act, that is to say, candidates who were included in the list of validly nominated candidates and who had not withdrawn their candidature within the period prescribed and who had been included in the list of candidates prepared and published by the returning officer in the manner prescribed. This provision, therefore, warrants the conclusion that a contesting candidate whose name was included in the list under section 38 but who retires from the contest under section 55A(2) continues to be a contesting candidate for the purposes of the Act though by reason of such retirement it would be unnecessary for the constituency to cast its votes in his favour at the poll. Such a candidate continues to be a contesting candidate for the purposes of the Act, notwithstanding his retirement from the contest under section 55A(2).

(xii) Dr. Baliram Waman Hiray (supra):-

About a decade later in *Jagannath Prasad v. State of Uttar Pradesh*, *supra*, case, this Court following its earlier decision in *Smt. Ujjam Bai v. State of Uttar Pradesh*, [1961] 1 SCR 778 held that no doubt a Sales Tax Officer appointed under

the U.P. Sales Tax Act, 1948 is an instrumentality of the State employed for the purposes of assessment and collection of taxes and merely because he has, in the discharge of his duties, to perform certain quasi-judicial functions i.e. has certain powers which are similar to the powers exercised by Courts, still is not a Court as understood in s. 195 of the Code. The Court relied upon the decision of the House of Lords in *Shell Co. of Australia* for the view that a Sales Tax Office was not a Court in the strict sense of that term. It referred with approval to the following observations of Lord Sankey, L.C. where he enumerated some negative propositions to distinguish a tribunal from a Court:

"In that connection it may be useful to enumerate some negative propositions on this subject: 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision 2. Nor because it hears witnesses on oath 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body. See *Rex v. Electricity Commissioners*, [1924] 1 K.L.B. 171 PG NO 974 There had been prior to the enactment of sub-s. (3) of s. 195 of the present Code, a sharp conflict of opinion between the High Courts as to what are the Courts and what are not for the purposes of s. 195(1)(b) of the old Code. The question whether a Commission of Inquiry constituted under the Commissions of Inquiry Act was a Court within the meaning of the Contempt of Courts Act, 1952 and whether the proceedings before the Commission of Inquiry were judicial proceedings directly arose before a Division Bench of the Nagpur High Court

in M. V. Rajwade v. Dr. S.M. Hassan, supra. Bhutt, J. speaking for himself and B.P. Sinha, CJ held that a Commission of Inquiry constituted under the Commissions of Inquiry Act, 1952 was not a Court within the meaning of the Contempt of Courts Act. The learned Judge rightly observed that the legal fiction created by the first part of sub-s. (4) is for the limited purpose specified in the second and that the purpose for which the fiction is created is therefore to be gathered from what follows after the words which create the fiction. In dealing with the fiction, Bhutt, J. observed:

"Applying this test in the instant case, it would appear that the purpose for which the fiction is created in sub-section (4) of Section 5 of the Commissions of Inquiry Act, 1952, is to be inferred from the words that follow the expression the Commission shall be deemed to be a Civil Court". It would not be correct to contend that the above expression is full and complete in itself and what follows it only denotes the limitation on the full-fledged status and powers of a civil Court that the Commission would otherwise have possessed. If that was the intention of the Legislature, the sentence would have been completed after the words "civil court" and what follows it would have been the subject of a separate sub-section or sentence. It is, therefore, clear that under the Commissions of Inquiry Act, 1952, the Commission is fictionally a civil court only for the purpose of the contempt punishable under ss. 175, 178, 179, 180 and 228 of the Indian Penal Code, 1860, subject to the condition that it has not the right itself to punish the contemnors, a right which other Courts possess under Section 480 of the Code of Criminal Procedure 1898. Similarly it follows that the fiction relating to the proceedings before the Commission is confined to offenses that are punishable

under Sections 193 and 228 of the Indian Penal Code, 1860, referred to in sub-section (5) of the Act, and does not extend beyond this limit."

PG NO 975 The learned Judge then dealt with a Commission of Inquiry constituted under the Commissions of Inquiry Act and held that the Commission has not the attributes of a Court. In repelling the contention that the function of the Commission being of a advisory nature which was akin to the Judicial Committee to the Privy Council which only advised His Majesty and did not deliver any judgment themselves, as well as distinguishing the decision of the Lahore High Court in M.M. Khan v. Emperor, ILR (1931) 12 Lah. 391 holding that the Special Commissioners appointed under the Public Servants (Inquiries) Act, 1850 constituted a Court within the meaning of s. 195, the learned Judge observed:

"An enquiry under the Commissions of Inquiry Act, 1952, on the other hand, is of wholly different character. There is no accuser, no accused and no specific charges for trial; nor is the Government under the law, required to pronounce. one way or the other, on the findings of the Commission "

The learned Judge relied upon the following observations of the Judicial committee of the Privy Council In re. Maharaja Madhava Singh, LR (1905) 31 IA 239 where the Judicial Committee in dealing with the Commissioners appointed by the Viceroy and the Governor General-in-Council for the purpose of enquiring into the truth of a certain imputation against the Maharajah, observed:

"It is sufficient to say that the Commission in question was one appointed by the Viceroy himself for the information of his own mind, in order that he should not act in his political and sovereign character

otherwise than in accordance with the dictates of justice and equity, and was not in any sense a Court, or, if a Court, was not a Court from which an appeal lies to His Majesty in Council." The learned Judge rightly observed that the ratio decidendi in that case was that the Commissioner were not a Court and held that the observations made About a decade later in *Jagannath Prasad v.State of Uttar Pradesh*, *supra*, case, this Court following its earlier decision in *Smt. Ujjam Bai v. State of Uttar Pradesh*, [1961] 1 SCR 778 held that no doubt a Sales The Officer appointed under the U.P. Sales Tax Act, 1948 is an instrumentality of the State employed for the purposes of assessment and collection of taxes and merely because he has. in the discharge of his duties, to perform certain quasi-judicial functions i.e. has certain powers which are similar to the powers exercised by Courts, still is not a Court as understood in s. 195 of the Code. The Court relied upon the decision of the House of Lords in *.Shell Co. of Australia* for the view that a Sales Tax Office was not a Court in the strict sense of that term. It referred with approval to the following observations of Lord Sankey, L.C. where he enumerated some negative propositions to contra-distinguish a tribunal from a Court:

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"It is sufficient to say that the Commission in question was one appointed by the Viceroy himself for the information of his own mind, in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, and was not in any sense a Court, or, if a Court, was not a Court from which an appeal lies to His Majesty in Council." The learned Judge rightly observed that the ratio decidendi in that case was that the Commissioner were not a Court and held that the observations made by the Judicial Committee apply *mutatis mutandis* to a Commission of Inquiry constituted under the Commissions of Inquiry Act, and observed: "The Commission in question was obviously appointed by the State Government" for the information of its own mind", in order that it should not act, in exercise of it power, "otherwise than in accordance with the dictates of justice PG NO 976 and equity" in ordering a departmental enquiry against its officers. It was, therefore, a fact finding body meant only to instruct the mind of the Government without producing any document of a judicial nature. The two cases are parallel, and the decision must be, as in-- In re *Maharaja Madhava Singh*, (D)', that the Commission was not a Court. The term 'Court' has not been defined in the Contempt of Courts Act, 1952. Its definition in the Indian Evidence Act, 1872, is not exhaustive and is intended only for

purposes of the Act. The Contempt of Courts Act, 1952, however, does contemplate a 'Court of Justice' which as defined in S. 20, Penal Code, 1860 denotes 'a Judge who is empowered by law to act judicially'. The word 'Judge' is defined in Section 19 as denoting every person--

"Who is empowered by law to give in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive .. ' The minimum test of a 'Court of Justice, in the above definition, is, therefore, the legal power to give a judgment which, if confirmed by some other authority, would be definitive. Such is the case with the Commission appointed under the Public Servants (Inquiries) Act, 1850, whose recommendations constitute a definitive judgment when confirmed by the Government. This, however, is not the case with a Commission appointed under the Commissions of Inquiry Act, 1952, whose findings are not contemplated by law as liable at any stage to confirmation by any authority so as to assume the character of a final decision. ' We are in agreement with these observations by the Judicial Committee apply mutatis mutandis to a Commission of Inquiry constituted under the Commissions of Inquiry Act, and observed:

"The Commission in question was obviously appointed by the State Government" for the information of its own mind", in order that it should not act, in exercise of its power, "otherwise than in accordance with the dictates of justice PG NO 976 and equity" in ordering a departmental enquiry against its officers. It was, therefore, a fact finding body meant only to instruct the mind of the Government without producing any document of a

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33. Learned counsel for the respondents also placed reliance upon the several judgments operative portion of the judgments are extracted hereinbelow:

(i) Prafulla Kumar Das (supra):-

44. Seniority is not the fundamental right but is merely a civil right. The right of the seniority in this case was also not a vested or accrued right.

45. In this case, the petitioners seek benefit to which they are not otherwise entitled. The legislature, in our opinion, has the requisite jurisdiction to pass an appropriate legislation which would do justice to its employees. Even otherwise a presumption to that effect has to be drawn. If a balance is sought to be struck by reason of the impugned legislation, it would not be permissible for this Court to declare it ultra vires only because it may cause some hardship to the petitioners. A mere hardship cannot be a ground for striking down a valid legislation unless it is held to be suffering from the vice of discrimination or unreasonableness. A valid piece of legislation, thus, can be struck down only if it is found to be ultra vires Article 14 of the Constitution of India and not otherwise. We do not think that in this case, Article 14 of the Constitution is attracted.

(ii) State of U.P. v. Dinkar Sinha (supra):-

25. Seniority may not be a fundamental right, but is a civil right. (See *Indu Shekhar Singh v. State of U.P.*, *Bimlesh Tanwar v. State of Haryana* and *Prafulla Kumar Das v. State of Orissa*). Infringement of the said right would be permissible only if there exists any rules validly framed under a statute and/or the proviso appended to Article 309 of the Constitution of India. It cannot act in a vacuum. Any rule taking away such rights would deserve strict construction.

(iii) State of U.P. and others v. U.P. Exercise Subordinate O.M. Association and others (supra):-

2. Prior to the Recruitment Rules, though the selection to the post of Clerks in the Excise Department was being held on the basis of a combined test, and on the basis of merit obtained in the said test, but the appointments were made either to the head office or to the subordinate offices according to the decision of the employer. Under the Recruitment Rules of 1980, "service" was defined to mean the Uttar Pradesh Excise Department Ministerial Service and "member of the service" under Rule 3(f) would mean a person appointed in a substantive capacity under the provisions of these Rules or rules and orders in force prior to the commencement of these Rules to a post in the service. Rule 4 of the Recruitment Rules defines the cadre of service to mean the strength of the service and each category of posts therein shall be such as may be determined by the Governor from time to time. Sub-rule (2) of Rule 4 provides that until orders varying the same have been passed the cadre strength shall be as specified in the Appendix. In the Appendix, the cadre of Senior Clerks is Item 5 and the total strength is 42. Thus, the Recruitment Rules wipe off the distinction between the Clerks of the head office and Clerks of the subordinate offices and the Clerks of the subordinate offices and head office become one cadre. Rule 21 of the Recruitment Rules provides for determination of seniority. It stipulates that the seniority of persons substantively appointed in any category of posts shall be determined in accordance with the Uttar Pradesh Government Services Seniority Rules, 1991. Under the said Seniority Rules of 1991, Rule 5 provides that where according

to the service rules appointments are to be made only by direct recruitment, the seniority inter se of the persons appointed on the result of any one selection shall be the same as it is shown in the merit list prepared by the Commission or the committee, as the case may be. The appointments to the post of Senior Clerks have been made on the basis of direct recruitment, and therefore the inter se seniority of those personnel has to be determined in accordance with Rule 5 of the Seniority Rules read with Rule 21 of the Recruitment Rules. The High Court has considered the appropriate provisions, and has issued appropriate direction quashing the seniority list drawn up by the authority on the erroneous assumption; we see no infirmity with the said conclusion of the High Court requiring our interference. The Appeal fails and is accordingly dismissed.

(iv) Pankaj Kumar (supra):-

24. It is also admitted that validity of rule laying down the principle of determining seniority is not under challenge. Food Inspectors Service Rules, 1992 provides the manner in which seniority is to be determined vide Rule 20, which reads as under:

"20. Seniority:-The seniority of persons substantively appointed in any category of posts shall be determined in accordance with the Uttar Pradesh Government Servants Seniority Rules, 1991, as amended from time to time."

25. This Rule 20 takes us to Seniority Rules, 1991. Rule 5 of Seniority Rules, 1991 which is admittedly applicable in the case in hand, reads as under:

"5. Seniority where appointments by direct recruitment only.--Where according to the service rules appointments are to be made only by the Direct recruitment the seniority inter se of the persons appointed

on the result of anyone selection, shall be the same as it is shown in the merit list prepared by the Commission or the Committee, as the case may be:

Provided that a candidate recruited directly may lose his seniority, if he fails to join without valid reasons when vacancy is offered to him, the decision of the appointing authority as to the validity of reasons, shall be final:

Provided further that the persons appointed on the result of a subsequent selection shall be junior to the persons appointed on the result of a previous selection.

Explanation--Where in the same year separate selections for regular and emergency recruitment are made, the selection for regular recruitment shall be deemed to be the previous selection."

28. It is not the case of petitioner that seniority list of Food Inspectors has not been prepared according to the order of merit prepared by the Commission. On this aspect the petitioner has no grievance at all.

29. His sheet anchor is the decision of this Court in K.N. Singh (supra) which provides seniority from the "date of joining" in respect to direct recruits. In this regard learned counsel for the petitioner placed reliance on para 10 of the judgment, relevant extract whereof is as under:

". . . and the Supreme Court further held that for determining the seniority of the direct recruits the only date for consideration was the date of joining the service."

30. I am constrained to observe that reference and reliance on the aforesaid judgment is thoroughly misconceived. Learned counsel for the petitioner without looking into the relevant service rules and the matter which was considered by the Court, in a blindfold manner has placed

reliance on certain observations which are nothing but reiteration of the relevant service rules applicable in that case. This writ petition appears to have been filed only on the basis thereof and this itself is a sufficient reason for dismissal of the present writ petition. K.N. Singh (supra) was a decision relating to the dispute of seniority in U.P. Higher Judicial Service. It is admitted that U.P. Higher Judicial Service is governed by separate set of rules namely, U.P. Higher Judicial Service Rules, 1975. Rule 26 thereof lays down the principle of seniority in U.P. Higher Judicial Service, and that which came up for consideration before this Court in K.N. Singh (supra), reads as under:

"26. Seniority--(1) Except as provided in sub-rule (2), seniority of members of the service shall be determined as follows:

(a) Seniority of the officers promoted from the Nyayik Sewa vis-a-vis the officers recruited from the Bar shall be determined from the date of continuous officiation in the service in the case of promoted officers and from the date of their joining the service in the case of direct recruits. Where the date of continuous officiation in the case of an officers promoted from the Nyayik Sewa and the date of joining the service in the case of a direct recruit is the same, the promoted officer shall be treated as senior;

Provided that in the case of promoted officer the maximum period of continuous officiation in the service shall not, for the purpose of determining seniority exceed three years immediately preceding the date of confirmation."

31. Since Rule 26 itself provides different reckoning point of seniority for promotees and direct recruits in U.P. Higher Judicial Services, the Apex Court considered the aforesaid provision in O.P. Garg and others Vs. State of U.P. and

others, AIR 1991 SC 1202 and held that seniority of promotees shall be determined from the date of continuous officiation against the vacancy in their quota while seniority of direct recruits would be determined from the date of their joining service and none else. This was only a reiteration of what was provided in Rule 26(2) as it stood at that time which was up for consideration before Apex Court in O.P. Garg (supra). Same was followed by this Court in K.N. Singh (supra).

32. A judgment in the matter of seniority based on a precise and specific service rule applicable to the particular service cannot be relied on or made a foundation for advancing arguments in respect to a different service governed by different set of service rules having different principles for determination of seniority. Rule 26 of U.P. Higher Judicial Service Rules 1975 was totally differently worded than Rule 5 of Seniority Rules, 1991 which is applicable in the present case. Therefore decision in K.N. Singh (supra) involving a different set of service rule and different service, relied on by learned counsel for the petitioner is wholly inapplicable. That would not carry his case further to support him at all.

33. Various decisions in matter of seniority, relating to different services and different service rules, cannot be relied on interchangeably unless it is shown that the rules are pari materia in all respects, bereft of relevant facts. The five Judges Bench of this Court in K.N. Singh (supra) has also led stress on this aspect, in para 9 of the judgement, which reads as under:

"The learned counsel no doubt made reference to various case-laws on the question of inter se seniority between promotee officers and directly recruited officers in different service. All these cases dealt with the particular rules applicable to

the service in question in those cases and the Courts had given interpretations of those Rules. . . . "

35. Learned counsel for the petitioner however submits that some candidates were allowed to join after several years and to allow them to retain seniority also is not only extremely harsh and unjust but travels in the realm of arbitrariness.

(v) Anil Kumar Sharma (supra):-

4. The second publication through which different date must have been fixed for submission of applications cannot be said to be continuation of the earlier publication, but it is an incomplete advertisement published. It is the case of the petitioner that he has submitted his application on 21st December, 1992 pursuant to the advertisement published in Newspaper 'Aaj' on 5.12.1992. Moreover, there having been two advertisements, the selection process can be said to have been started only when last advertisement is published. Since two advertisements are required and two advertisements have been sought to be complied with. Only after the advertisement is complete, the invitation for application is initiated and the selection process starts from the last date of such publication, therefore, the selection process has started after 5th Dec. 1992 which is the period subsequent to 10th July, 1992, when the Management did not have any authority by reason of the amending Act. From the fact it is apparent and can be safely presumed that the selection process was not initiated though advertisement was issued on 31st August, 1991 and no steps were taken till second advertisement was published on 5th Dec. 1992. The fact that the second advertisement was issued and the selection process was started thereafter clearly indicates that the selection started only after second advertisement. The facts in the present case are wholly

distinguishable with that the decision rendered in the case of A.A. Calton (1983 All LJ 516) (supra). On which reliance has been placed, thus the ratio decided in the said case cannot be attracted in the facts and circumstances of the present case, particularly when selection process had started after 14th July 1992. In that view of the matter, I do not find any infirmity in the order impugned.

(vi) Bhoodev Singh (supra):-

44. The eligibility has to be determined on the last date of submission of the applications, In *Y.V. Rangaiah and others v. J. Sreenivasa Rao and Ors.* MANU/SC/0354/1983; (1983) IILL23SC; *A.A. Calton v. The Director of Education and Anr.* MANU/SC/0047/1983; (1983) ILLJ502SC; *P. Ganeshwar Rao and Ors. v. State of Andhra Pradesh and Ors.* MANU/SC/0357/1988; AIR1988SC2068; *P. Mahendran and Ors. v. State of Karnataka and Ors.* MANU/SC/0417/1990; AIR1990SC405; and *Ramesh Chandra Chaudha and Ors. v. State of M.P. and others.* MANU/SC/1723/1996; (1996) 11SCC242, the Hon'ble Supreme Court has taken the view that candidates have to be assessed for selection as per the eligibility criteria existing on the date of advertisement of vacancies for the reason that selection process starts with advertisement and all those persons who apply in response to the same, would be eligible to be considered.

34. Perusal of Rule 5 clearly provides that where according to service rules appointment are to be made only by direct recruitment, the seniority inter se of the persons appointed on the result of any one selection shall be the same as it is shown in the merit list prepared by the Commission or the Committee, as the case may be.

35. Perusal of the above-extracted judgments relied upon by learned counsel for the petitioners shows that once the seniority list is issued by the State Government, the role of the State Government in litigation arising therefrom does not extend to defending the list so as to effectively favour one set of employees against the other, which the State Government is ignoring in the present case by appearing in the case as a contesting party favouring the wait-listed appointees and opposing the merit list appointees. The general rule is if the seniority is regulated in a particular manner in a given period, it shall be given effect to and shall not be varied to disadvantage retrospectively.

36. It further shows that the person could not be given place in the cadre even before his birth. A wait-list candidate does not have any indefeasible right to get appointment merely for the reason that his name finds place in the wait list. It further shows that the High Court while exercising its power under Article 226 of the Constitution of India is bound to act strictly in accordance with law and even justice and equity must be within the four corners of law. A waiting list commences to operate after the vacancies for which the recruitment process has been conducted have been filled up.

37. It is further shows that it is almost settled that while determining the inter-se seniority amongst officers recruited from different sources or between officers appointed by the same process at different times, the date of entering in the service is relevant. A person who enters in the service first shall rank senior unless there is some rule providing otherwise which can be held to be consistent with Articles 14 and 16 of the Constitution.

38. It further shows that law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that “a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. The instrumentality of State cannot plead differently from State.

39. It further shows that Section 3(7) of the 1984 Act and Rule 8-A of the 2007 Rules are ultra vires as they run counter to the dictum. Any promotion that has been given on the dictum of Indira Sawhney and without the aid or assistance of Section 3(7) and Rule 8-A shall remain undisturbed. It further shows that this is a deeming provision and creates a legal fiction. The effect of such a legal fiction however is that a position which otherwise would not obtain is deemed to obtain under those circumstances.

40. Perusal of the above extracted judgments relied upon by learned counsel for the respondents shows that seniority is not the fundamental right but is merely a civil right. If a balance is sought to be struck by reason of the impugned legislation, it would not be permissible for this Court to declare it ultra vires only because it may cause some hardship. A mere hardship cannot be a ground for striking down a valid legislation unless it is held to be suffering from the vice of discrimination or unreasonableness. A valid piece of legislation, thus, can be struck down only if it is found to be ultra vires Article 14 of the Constitution of India and not otherwise. Infringement of the said

right would be permissible only if there exists any rules validly framed under a statute and/ or the proviso appended to Article 309 of the Constitution of India. It cannot act in a vacuum. Any rule taking away such rights would deserve strict construction.

41. It further shows that the seniority of persons substantively appointed in any category of posts shall be determined in accordance with the Uttar Pradesh Government Services Seniority Rules, 1991.

42. It further shows that a judgment in the matter of seniority based on a precise and specific service rule applicable to the particular service cannot be relied on or made a foundation for advancing arguments in respect to a different service governed by different set of service rules having different principles for determination of seniority. Various decisions in matter of seniority, relating to different services and different service rules, cannot be relied on interchangeably unless it is shown that the rules are *pari materia* in all respects, bereft of relevant facts.

43. It also shows that the candidates have to be assessed for selection as per the eligibility criteria existing on the date of advertisement of vacancies for the reason that selection process starts with advertisement and all those persons who apply in response to the same, would be eligible to be considered.

44. I have examined the material on record in the light of the judgments relied upon by learned counsel for the parties.

45. It is an undisputed fact that both the petitioners and private respondents of the case of Ali Safdar (*supra*) are appointed on the basis of only one selection which was advertised on 16.4.1996, written examination of which was held in January, 1997. Therefore, the seniority of the aforesaid AROs (Accounts) of 1996 batch who were appointed in 2000-2001 under the orders of this Court on the basis of same advertisement, same examination, same question paper and same selection i.e. one selection only, has to be determined only according to the provisions of Rule-5 of the Seniority Rules, 1991 i.e. on the basis of their initial merit obtained by them in the same selection.

46. Out of the three combined final seniority lists, the seniority lists dated 11.03.2004 and 23.04.2010 were prepared in accordance with Rule-5 i.e. on the basis of inter-se merit list prepared by the Commission, whereas seniority list dated 29.12.2005 was prepared on the basis of the date of appointment/ joining while applying the ratio of **Bhey Ram Sharma case (*supra*)** and not according to Rule-5 of Seniority Rules, 1991, though in a matter of appointment only by direct selection, seniority cannot be given from the date of appointment/ joining, unless specifically prescribed by the Service Rules, rather it is to be determined only on the basis of combined merit list as per rule 5 of the seniority rules and rule 20 of the Service Rules of 1993.

47. Though the combined merit list dated 5.6.2003 prepared and sent by UPPSC was consciously not challenged by the direct recruits initially while filing their writ petition no.1517 of 2004 (*Habib Ahmad v. State*) and it was subsequently sought to be challenged by an amendment

was orally not pressed by the petitioners, as the said writ petition filed against seniority list dated 11.03.2004 had become infructuous and irrelevant after preparation of seniority list dated 29.12.2005. Therefore, in absence of any challenge made to the combined merit list dated 5.6.2003 prepared by the UPPSC, the petitioners cannot make any claim of any better seniority which nullifies the merit list prepared by the UPPSC. Since the operation of the combined merit list dated 5.6.2003 was not stayed by this Court in any proceeding till date, therefore it is binding on all parties and the same was rightly relied upon by the State while preparing the seniority list dated 11.03.2004 and 23.04.2010 in accordance with Rule-5 of the Seniority Rules, 1991.

48. In regard to issue that right of seniority is not a fundamental/ constitutional right but only a statutory right, conferred by Special Service Rules made under some Act or General Rules prepared under Article 309, it is a settled position of law that seniority is only a statutory right, which is conferred to an employee either by way of specific provisions contained in Service Rules, especially prepared for respective services or by way of General Rules prepared under Article 309 of the Constitution of India.

49. In the instant case, Rule 20 of Service Rules i.e. U.P. Secretariat Accounts Service Rules, 1993 provides that the seniority of persons, substantively appointed in any category of posts covered by the said Rules shall be determined according to the provisions of U.P. Government Servants Seniority

Rules, 1991 as amended from time to time.

50. Rule-5 of the Seniority Rules, 1991 also provides that where according to the Service Rules, appointments are to be made only by way of direct recruitment, seniority inter-se of the persons appointed on the result of any one selection shall be the same, as it is shown in the merit list prepared by the Commission or the Committee, as the case may be.

51. There has been no deviation in preparation of seniority lists dated 11.03.2004 and 23.04.2010 by the State Government, as both these seniority lists have been prepared on the basis of the merit list prepared by the UPPSC and thus, they are in conformity with the previous of Rule-5 of the Seniority Rules, 1991.

52. The only aberration/ deviation in preparation of Seniority list was present in the seniority list dated 29.12.2005 which was prepared without any reference to Karmik Department and while relying on the ratio of the judgment of the Hon'ble Apex Court passed in the case of **Bhey Ram Sharma (supra)**.

53. The judgment of **Bhey Ram Sharma (supra)** has no application in the case in hand because the said judgment about seniority was passed where selectees of two separate selections were concerned and therefore, provisions of the second proviso to Rule-5 of the Seniority Rules, 1991 was applicable, whereas in the instant case, both the petitioners and respondents are selectees of the same selection, therefore, they are covered by the main provisions of Rule-5 of the Seniority Rules, 1991..

54. The seniority of candidates, where appointments are made only by direct recruitment from the result of “only one selection” is determined in accordance with Rule-5 of the Seniority Rules, 1991, which mandates preparation of seniority list only according to the merit list prepared by the Commission or the Committee, as the case may be.

55. In regard to parity with the judgment passed in the case of **Yogendra Pal (supra)**, I have examined the judgment and found that in the case of Yogendra Pal and others v. State of U.P. and others decided by the Hon’ble Single Judge on 09.04.1998, the State’s contention was that the posts, “once occupied” by the appointees of a selection after joining, if vacated/ abandoned the said post, after becoming vacant, cannot be filled up by waitlisted candidates of the same selection, as they are new vacancies, which can be filled up only by way of fresh selection and after making fresh advertisement for the same. The Hon’ble Single Judge proceeded to direct the State to fill up the vacancies, both unfilled as well as those created after resignation of the selected candidates.

The Special Appeal of the State i.e. State of U.P. v. Yogendra Pal was therefore allowed by this Hon’ble Court vide judgment dated 30.10.2007 and thereby the appointments made on the said fresh vacancies, from amongst the candidates of the waiting list of the previous selection were declared irregular and unlawful. A review/ recall application no.265023 of 2007 filed by Yogendra Pal and others was also dismissed vide judgment dated 2.5.2008.

The SLP filed against the aforesaid two judgments of this Court was finally disposed off by the Hon’ble Apex Court

vide judgment and order dated 3.2.2014. In the said case, the Hon’ble Apex Court even after finding that the appointments made from the wait listed candidates on abandoned vacancies were unlawful, orally asked the State to reconsider the continuance of the appellants’ employment sympathetically.

An affidavit was therefore filed by the State Government on 27.8.2013 and an observation was made that only on humanitarian considerations, the wait listed candidates so appointed on abandoned vacancies can be allowed to remain in service but they shall be placed at the bottom of seniority list. The Hon’ble Apex Court while relying on the State’s affidavit disposed off the aforesaid SLP vide judgment dated 3.2.2014 in terms of paras 7 and 8 of the State’s affidavit.

56. In the instant case, both the petitioners and private respondents are selected and appointed from the same selection and appointments from the waiting list were made only on those vacancies which remained vacant in the first round i.e. “on unfilled vacancies”. Since there are no such vacancies, which were initially occupied and subsequently abandoned, which has been filled up from wait listed candidates in the instant case, therefore no parity can be claimed by petitioners with the case of **Yogendra Kumar Pal (supra)**.

57. In **Yogendra Kumar Pal’s case (supra)**, waitlisted candidates were appointed on new vacancies for which they had no right of appointment, hence they were directed to be placed at the bottom of seniority list only on humanitarian consideration of the Hon’ble Apex Court. However, in the instant case, private respondents were appointed only on

unfilled vacancies of the same selection and not on the new vacancies.

58. Since direction for placing those petitioners of Yogendra Kumar Pal (*supra*) at the bottom of seniority list was given by the Hon'ble Supreme Court, only on humanitarian consideration that is after finding their appointment illegal but also considering their long continuance in service and since the appointments of the private respondents were made from the waiting list only on unfilled vacancies, therefore no parity can be claimed by the petitioners with the ratio of judgment passed in the case of **Yogendra Kumar Pal (*supra*)**.

59. The appointments of the waitlisted candidates from the same selection was made according to the merit of the candidates only under the order dated 14.5.2001 passed by this Court in the case of **Ghanshyam Singh v. State of U.P. and others**. Since a reference was made by this Court in the order dated 14.5.2001 to the judgment dated 9.4.1998 of the Hon'ble Single Judge passed in *Yogendra Kumar Pal v. State of U.P.*, therefore a Special Appeal No.1060 of 2009 i.e. *State of U.P. v. Ghanshyam Singh* was initially filed by the State.

60. The candidates of Yogendra Kumar Pal's case were appointed against the "abandoned vacancies" on which prior appointment were made and they fell vacant due to resignation of the appointed candidates, hence they were fresh vacancies whereas in the instant case all the 15 candidates who were subsequently recommended by the UPPSC from the waiting list, out of which 10 candidates had joined, were infact appointees on the leftover/ unfilled vacancies and not fresh

vacancies, therefore, ratio of **Yogendra Kumar Pal's case** had no application in the instant case. For the aforesaid reasons an application for dismissal of State's special appeal as withdrawn was filed on 14.12.2006 which was allowed by this Court vide order dated 5.1.2017.

61. In view of the aforesaid facts, there was no illegality in the withdrawal of the special appeal of the State filed in **Ghanshyam Singh's case (*supra*)**. Moreover, the order dated 5.1.2017 passed by this Court regarding dismissal of the said case as withdrawn has not been challenged by the petitioners in any higher Forum and, therefore, the baseless allegation of malafides, leveled by the petitioners on the State authorities etc. are not tenable in law.

62. Considering in totalities of facts and circumstances of the present case as well as submissions advanced by learned counsel for the parties, it is well established that since the two combined final seniority list dated 11.03.2004 and 23.04.2010 have been consistently prepared in accordance with Rule-5 of the Seniority Rules, 1991 and the seniority list dated 29.12.2005 was only an aberration which was prepared without reference to Karmik Department and while applying the ratio of judgment passed in the case of **Bhey Ram Sharma (*supra*)** which was not at all applicable in the instant case. More specifically, there were two advertisements and two successive selections were under consideration and there were service rules in **Bhey Ram Sharma's case** and, therefore, seniority was prepared under second proviso to Rule 5 i.e. persons appointed on the result of a subsequent selection shall be junior to the persons

appointed on the result of previous selection.

However, in the instant case there was only one advertisement and only one selection was held, therefore seniority cannot be prepared under second proviso to Rule 5 but only under Rule 5 and its first proviso, which collectively provides that seniority of “persons on the result of any one selection, shall be the same as it is shown in the merit list prepared by the commission.

63. It has repeatedly been held that selection process starts with the issuance of advertisement. In the instant case there was only one advertisement dated 16.4.1996 advertising 82 posts of Assistant Accountant, against which in all 65 appointments have been made, therefore in absence of a second advertisement, the seniority cannot be determined as per second proviso to Rule 5(2) i.e. subsequent appointees placed below the initial appointees, rather the collective merit list of UPPSC would determine the seniority of the selected candidates. Therefore, the challenge made by the petitioners to the final seniority list dated 29.12.2005 of ARO Accounts which was not prepared in accordance with Rule-5 of the Seniority Rules, 1991 i.e. according to the combined merit list dated 5.6.2003 prepared by the State Government under the permission granted by this Court.

64. Accordingly, the Writ-A No.2986 of 2010 (Ali Safdar Anhsari and Others v. State of U.P. Through The Principal Secy. Administration Lko.), Writ-A No.2001249 of 2014 (Mohd. Tanveer Haider and 3 Ors. v. State of U.P. Through Prin. Secy. Administration Deptt. Lko.) and Writ-A No.10278 of 2016 (Bhashkar Singh and 6 Ors. v. State of U.P. Thru Prin. Secy. Administration Civil Sectt. And Ors.) are **dismissed** and Writ-A No.1517 of 2004 (Habib Ahmad and 5 Ors. v. State of U.P. Through Prin. Secy. Sectt. Administration Dept) is **disposed of**.

65. It is, however, made it clear that the last and final seniority list dated 23.4.2010 of ARO Accounts prepared by the State Government strictly according to the Rule 5 of the U.P. Government Seniority Rules, 1991 read with rule 20 of the Service Rules of 1993 deserves to be upheld and is hereby upheld, so that the State Government may prepare the fresh final seniority list of the next higher post of Review Officer, Accounts on the basis of the same and thereafter, promotions on the vacant post of Section Officer, Accounts may be made in the Secretariat Administration Department of U.P. Civil Secretariat.

66. It is also made it clear that while making promotion to the next higher post, the respondents shall take into account the long standing period of services of parties and also take into account that long standing seniority cannot be disturbed as per the law laid down by this Court as well as Hon'ble Supreme Court of India in catena of judgments.

(2023) 11 ILRA 550
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 5413 of 2021

Nahar Singh, Constable No. 439 CP
...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Nisheeth Yadav

Counsel for the Respondents:
 C.S.C.

Civil Law - U.P. Subordinate Police Officers (Discipline and Appeal) Rules, 1991 – Rule 4(1), 14(1) – U.P. Police Regulations –

Para 381 – Disciplinary Proceedings – Absence from Duty – Medical Leave – Proportionality of Punishment – Writ Jurisdiction – Article 226 – Reversion to Minimum Pay Scale

The petitioner, a constable, challenged the disciplinary authority's order dated 26.06.2019 reverting him to the minimum pay scale of a constable for five years, affirmed by the appellate authority on 04.05.2020 and the revisional authority on 17.11.2020, for unauthorized absence from duty from 05.06.2002 to 28.05.2003. The petitioner was issued a charge sheet for absence without leave, and after a prior removal order was set aside by the High Court in Writ Petition No. 15753 of 2006 for procedural flaws, fresh proceedings were initiated. The petitioner claimed his absence was due to Hepatitis B and Jaundice, supported by a medical certificate, and argued that his absence should have been condoned as medical leave. He contended the charge sheet lacked specific charges, the inquiry was procedurally flawed, and the punishment was disproportionate. The respondents argued that the petitioner's failure to inform higher authorities about his illness, as required by Para 381 of the U.P. Police Regulations, constituted serious misconduct, and the punishment was proportionate given his one-year absence without intimation while residing in the same district. Held: (1) The writ petition was dismissed, upholding the orders of the disciplinary, appellate, and revisional authorities. (2) The petitioner's unauthorized absence for nearly a year without informing higher authorities, despite being an outpatient and residing in Muzaffarnagar, constituted deliberate misconduct under Para 381 of the U.P. Police Regulations, which mandates written intimation for medical leave. (3) The charge of absence was proved on the preponderance of probabilities, the standard applicable in disciplinary proceedings, as per *St. of Karnataka Vs Umesh*. (4) The punishment of reversion to the minimum pay scale for five years was not disproportionate, as it was less severe than the earlier removal order, and

the court's supervisory jurisdiction under Article 226 does not permit re-appreciation of evidence unless there is a procedural flaw, violation of natural justice, or perversity, as held in *St. of Andhra Pradesh Vs Chitra Venkata Rao and U.O.I. Vs P. Gunasekaran*. (5) The charge sheet dated 28.07.2018, though lacking specific imputation, was supplemented by the inquiry report and show cause notice, and the petitioner's reply was considered but found baseless. (6) The higher authority's decision to impose a higher punishment than recommended was valid, as the petitioner's reply was addressed and found unsatisfactory. (7) In a disciplined force like the civil police, unauthorized absence constitutes serious misconduct, as emphasized in *U.O.I. Vs Diler Singh*. (8) No procedural flaws or violations of natural justice were found, and the medical certificate did not establish hospitalization or inability to communicate, justifying the finding of misconduct.

Case Law Cited:

1. *St. of Andhra Pradesh Vs Chitra Venkata Rao*, (1975) 2 SCC 557
2. *St. of Andhra Pradesh Vs S. Sree Rama Rao*, AIR 1963 SC 1723
3. *Syed Yakoob Vs K.S. Radhakrishnan*, [1964] 5 SCR 64
4. *St. of Karnataka Vs N. Gangaraj*, (2020) 3 SCC 423
5. *St. Bank of Bikaner & Jaipur Vs Nemi Chand Nalwaya*, (2011) 4 SCC 584
6. *B.C. Chaturvedi Vs U.O.I.*, (1995) 6 SCC 749
7. *U.O.I. Vs G. Gunayuthan*, (1997) 7 SCC 463
8. *Bank of India Vs Degala Suryanarayana*, (1999) 5 SCC 762

9. High Court of Judicature at Bombay Vs Shashikant S. Patil, (2000) 1 SCC 416

10. St. of Karn. Vs Umesh, (2022) 6 SCC 563

11. St. of Har. Vs Rattan Singh, (1977) 2 SCC 491

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

1. Heard Sri Nisheeth Yadav, learned counsel for the petitioner and Sri R.S. Umrao, learned Standing Counsel.

2. Petitioner is aggrieved by the order firstly by the disciplinary authority dated 26.06.2019, whereby, petitioner has been reverted back by five years to the minimum of the pay scale of a Constable, the order of the appellate authority dated 04.05.2020 affirming the same and of the revisional authority dated 17.11.2020 rejecting the revision on the ground that there is no procedural flaw in the matter of disciplinary proceedings.

3. The facts in a narrow compass can be drawn like this that the petitioner was issued with a charge sheet for remaining absent from duty w.e.f. 05.06.2002. He was proceeded against by holding a disciplinary proceeding and conducting departmental inquiry as a part thereof and since he was found guilty of the charges, he was issued with show cause notice on 01.04.2003 which was caused to be served upon him through his wife Smt. Sunita Yadav on 23.04.2003, however, when no reply was received from the petitioner, the disciplinary authority proceeded to inflict punishment of removal from service for being absent w.e.f. 05.06.2000 till the date of passing of the order and since he did not discharge his duties from 05.06.2002 till 28.05.2003 his leave was allowed without

pay. This order came to be challenged before this Court in Writ Petition No. 15753 of 2006 and the Court found two directions in the punishment order to be self contradictory and accordingly the order dated 20.05.2003 was set aside.

4. The matter was remitted to the stage of inquiry report with a direction to the disciplinary authority to serve copy of inquiry report upon the petitioner and seek his reply and then decide the matter again. Thus, the disciplinary authority was to initiate the disciplinary proceedings from the stage of submission of reply by the petitioner to the inquiry report. The penultimate paragraph of the order is reproduced hereunder:

"अतः आप इस कारण बताओ नोटिस की प्राप्ति के 15 दिवस के अन्दर अपना लिखित स्पष्टीकरण अधोहस्ताक्षरी के समक्ष प्रस्तुत करें कि क्यों न आपके द्वारा बरती गई लापरवाही, अनुशासनहीनता के दृष्टिगत आपको उ०प्र० अधीनस्थ श्रेणी के पुलिस अधीक्षक की (दण्ड एवं अपील) नियमावली-1991 के नियम 4(1) (क) दीर्घ शास्तियां (तीन) के अन्तर्गत 05 वर्ष के लिए आरक्षी के निम्नतर वेतनमान में अवनत कर दिया जायें।"

Accordingly, you are issued with the show cause notice to submit your reply within 15 days of its receipt as to why you may not be punished by withholding three increments permanently and reverting you to the minimum of the pay scale admissible to the Constables for a period of five years under the U.P. Subordinate Police Officers (Discipline and Appeal) Rules, 1991 for carelessness in discharge of official duty and indiscipline.

(English translation by Court)

5. Petitioner was reinstated in the service with status of suspended employee,

and the direction was issued to the Senior Superintendent of Police, Muzaffarnagar on 18.07.2018 to supply the petitioner copy of inquiry report along with charge sheet seeking his reply within a month. Thereafter, the petitioner was issued with charge sheet dated 28.07.2018 though without imputation of any particular charge, asking the petitioner to submit reply in his defence by 05.08.2018 failing which, it would be taken that petitioner had nothing to say and authority would accordingly proceed to pass orders.

6. Petitioner submitted his reply to the alleged charge sheet and took specific ground that this de novo inquiry was totally uncalled for under Rule 14(1) of 1991 Rules, however, still he explained away that since he was not feeling well and had an acute stomachache while he was on duty as Tehsil Guard, he got himself examined at the Primary Health Centre, Meerapur, Muzaffarnagar where he was diagnosed to be suffering from Hepatitis B and Jaundice and then he explained as to how he suffered from such serious disease and could recover only on 25.05.2003 and so he reported for duty on 28.05.2003, at Reserve Police Lines, Muzaffarnagar. His records and medical certificates were not seen and he was removed from service on 28.05.2003. He claimed to be entitled for medical leave or his absence could have been condoned by adjusting the leave already available in his account under the relevant service rules and that he could have been reinstated without backwages. However, he pleaded that his absence from 05.06.2002 and 17.05.2003 deserved to be allowed restoring him in service by giving benefit of medical leave with pay. He had appended the medical certificate of the doctor concerned Sri Chaitanya Maheshwari dated 22.11.2018.

7. The authority after examining the above reply of the petitioner, held petitioner guilty for not informing the higher authority about his ailment and thus, the charge of remaining absent from duty without leave was found to be proved as per para 381 of Police Regulations and, therefore, the period from 05.06.2002 to 28.05.2003 was directed to be treated as leave without pay. Thus, the earlier order of punishment was changed into this punishment and was forwarded to the higher authority for necessary approval. The higher authority while agreed with the proposed punishment, issued show cause notice to the petitioner as to why he may not be reverted to the position of minimum of basic pay of the post in question by five years.

8. To this show cause notice dated 08.01.2019, petitioner submitted his reply, the same was considered by the authority and was found to be totally baseless and unsatisfactory and thus punishment was awarded to the petitioner reverting him by five years to the minimum of pay of the post in question. This order was unsuccessfully challenged in appeal.

9. Learned Advocate appearing for the petitioner has argued that in the absence of any finding that petitioner's papers were forged or petitioner presented manipulated documents, the authority was not justified in rejecting the same and holding petitioner guilty of charge of absence from duty without notice. It is submitted that whenever some one falls ill, he immediately goes for rest as per the doctors advise and if such a person cannot approach the authority, he cannot be held guilty. He submits that of course after recovery, if the petitioner had not reported it could have been presumed that the

petitioner absented from duty. He has brought all those documents in support of the pleadings raised in the writ petition in assailing the order impugned and submits that these documents were not at all considered by the authority.

10. Yet another argument advanced by learned counsel for the petitioner is that the proposed punishment was to convert the period of absence from duty into leave without pay, and though higher authority could have issued a show cause notice of the punishment of higher degree than the recommended one but when the authority agreed with the recommendation made by the competent authority, the approving authority was not justified in issuing show cause notice for higher degree of punishment, inasmuch as, the authority also did not consider the reply of the petitioner in correct perspective, nor did it discuss the same while imposing the penalty under challenge. It is also argued that in the matter of proposed punishment of higher degree authority has not assigned any special reason as to why it defers from the recommendation made by the competent authority.

11. A further argument advanced by learned counsel for the petitioner that when this Court had directed to serve a copy of the inquiry report to the petitioner and seek his reply and then passed order, there was no question holding inquiry afresh by issuing a charge sheet to the petitioner. It is also argued that the alleged charge sheet issued to the petitioner cannot be termed as charge sheet within the meaning of Rule 14(1) of 1991 Rules as there are no charges leveled in the alleged charge sheet dated 28.07.2018 issued to the petitioner.

12. It is submitted that the petitioner's reply to this aspect of the matter has not been considered at all either by the authority competent in the matter that proposed punishment in the nature of leave without pay nor by the authority that issued a show cause notice for higher punishment and ultimately imposed that punishment of higher degree.

13. Learned counsel for the petitioner next submitted that both the appellate authority as well as authority sitting in revision have manifestly erred in dismissing the appeal and revision. It is submitted that it was not proper either for higher authority that impose punishment or appellate authority and revisional authority to reject the reply/ appeal/ revision of the petitioner in just one line that stand of the petitioner was found to be baseless.

14. Sri Nisheeth Yadav, learned counsel for the petitioner has raised the plea that negligence in terms of absence from duty looking to the facts and circumstances was not such as to place it in nature of such a serious misconduct as to impose major penalty of reversion and the other argument is also that punishment was disproportionate to the charge, if taken to be proved. He has placed reliance upon certain authorities of the Supreme Court on the point of back wages like **Civil Appeal No. 6188 of 2019, Jayantibhai Raojibhai Patel v. Municipal Council, Narkhed & Ors; and Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) & Ors, (2013) 10 SCC 324** upon the scope of interference by this Court in the matter of disciplinary proceedings and the departmental inquiry it has been repeatedly held by this Court as well as by the Supreme Court while exercising preliminary jurisdiction under Article 226

of the Constitution the Court is not clothed with the power of appellate authority.

15. The Court while may consider it to be appropriate case where some procedural lacuna in holding the departmental inquiry of disciplinary proceedings is cited but otherwise not on merits merely for the reason that this Court may come to a different conclusion upon appreciation of facts and evidence than to what has been reached by the inquiry officer/ inquiry committee and the disciplinary authority. In the case of **State of Andhra Pradesh & Ors v. Chitra Venkata Rao, (1975) 2 SCC 557** Supreme Court held that the propositions as were laid down by the Court earlier in the case of **State of Andhra Pradesh v. S. Sree Rama Rao, AIR 1963 SC 1723** should be a guiding factor for scope of interference under Article 226 of the Constitution in the matter of departmental inquiries. The Court observe that "there is no warrant for the view that in considering whether a public officer is guilty of misconduct charge against him the rule followed in criminal trial that an offence is not established unless proved by the evidence beyond reasonable doubt to the satisfaction of the Court must be applied." If this principle is not applied, the Court observed, the High Court would not be competent to declare the order of authorities holding a departmental inquiry to be invalid. The second instance would be only whether there is any violation of statutory rules prescribing a particular mode of inquiry which has not been adopted. Vide para 23 the Court held thus:

"23. The jurisdiction to issue a writ of certiorari under Article 226 is a supervisory jurisdiction. The Court exercises it not as an Appellate Court. The

findings of fact reached by an inferior court or Tribunal as a result of the appreciation of evidence are not reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of facts however grave it may appear to be. In regard to a finding of fact recorded by a Tribunal, a writ can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Again if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal. See Syed Yakoob v. K.S. Radhakrishnan [1964] 5 S.C.R. 64."

16. Again in the case of **State of Karnataka & Anr v. N. Gangaraj, (2020) 3 SCC 423** the Court relied upon its earlier judgment in the case of **State Bank of Bikaner & Jaipur v. Nemi Chand Nalwaya, (2011) 4 SCC 584**, wherein it had observed that the High Court will not act as an appellate court and reassess the evidence led in domestic inquiry. The Court cited para 7 and 10 of the said judgment which runs as under:

"7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the

domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. Courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations. (vide B. C. Chaturvedi vs. Union of India - 1995 (6) SCC 749, Union of India vs. G. Gunayuthan - 1997 (7) SCC 463, and Bank of India vs. Degala Suryanarayana - 1999 (5) SCC 762, High Court of Judicature at Bombay vs. Shashi Kant S Patil - 2001 (1) SCC 416.

10. The fact that the criminal court subsequently acquitted the respondent by giving him the benefit of doubt, will not in any way render a completed disciplinary proceedings invalid nor affect the validity of the finding of guilt or consequential punishment. The standard of proof required in criminal proceedings being different from the standard of proof required in departmental enquiries, the same charges and evidence may lead to different results in the two proceedings, that is, finding of guilt in departmental proceedings and an acquittal by giving benefit of doubt in the criminal proceedings. This is more so when

the departmental proceedings are more proximate to the incident, in point of time, when compared to the criminal proceedings. The findings by the criminal court will have no effect on previously concluded domestic enquiry. An employee who allows the findings in the enquiry and the punishment by the disciplinary authority to attain finality by non-challenge, cannot after several years, challenge the decision on the ground that subsequently, the criminal court has acquitted him."

17. Concluding the principles of law on the point, the Court held that "once the evidence has been accepted by the departmental authority, in exercise of power of judicial review, the Tribunal or the High Court could not interfere with the findings of facts recorded by re-appreciating evidence as if the courts are the appellate authority."

18. This above judgment has been further followed and reiterated by the Supreme Court in **Muzaffar Husain v. State of Uttar Pradesh & Anr, 2022 SCC OnLine SC 567**, the Court in this case also referred to its earlier judgment in the case of High Court of Judicature at **Bombay v. Shashikant S. Patil, (2000) 1 SCC 416**, wherein, the Court had observed thus:

"The Division Bench of the High Court seems to have approached the case as though it was an appeal against the order of the administrative/ disciplinary authority of the High Court. Interference with the decision of departmental authorities can be permitted, while exercising jurisdiction under Article 226 of the Constitution if such authority had held proceedings in violation of the principles of natural justice or in violation of statutory

regulations prescribing the mode of such inquiry or if the decision of the authority is vitiated by considerations extraneous to the evidence and merits of the case, or if the conclusion made by the authority, on the very face of it, is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion, or grounds very similar to the above. But we cannot overlook that the departmental authority (in this case the Disciplinary Committee of the High Court) is the sole judge of the facts, if the inquiry has been properly conducted. The settled legal position is that if there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Article 226 of the Constitution."

19. On the principle of degree of proof in matters of departmental inquiry in a disciplinary proceeding the principles that govern the criminal law where the burden lay upon the prosecution to establish the ingredients of offence beyond the reasonable doubt, is certainly not attracted. This aspect has been deliberated upon and discussed with precision by the Supreme Court in the case of **State of Karnataka & Ors v. Umesh, (2022) 6 SCC 563**, the Supreme Court vide paras 16 & 17 has held thus:

"16. The principles which govern a disciplinary enquiry are distinct from those which apply to a criminal trial. In a prosecution for an offence punishable under the criminal law, the burden lies on the prosecution to establish the ingredients of the offence beyond reasonable doubt. The accused is entitled to a presumption of innocence. The purpose of a disciplinary proceeding by an employer is to enquire

into an allegation of misconduct by an employee which results in a violation of the service rules governing the relationship of employment. Unlike a criminal prosecution where the charge has to be established beyond reasonable doubt, in a disciplinary proceeding, a charge of misconduct has to be established on a preponderance of probabilities. The rules of evidence which apply to a criminal trial are distinct from those which govern a disciplinary enquiry. The acquittal of the accused in a criminal case does not debar the employer from proceeding in the exercise of disciplinary jurisdiction.

17. In a judgment of a three-Judge Bench of this Court in **State of Haryana v. Rattan Singh (1977) 2 SCC 491**, V.R. Krishna Iyer, J. set out the principles vide para 4, that govern disciplinary proceedings as follows:

"4. It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Evidence Act, 1872 may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and Administrative Tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case-law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fairplay is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such

finding, even though of a domestic tribunal, cannot be held good. However, the courts below misdirected themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The "residuum" rule to which counsel for the respondent referred, based upon certain passages from American Jurisprudence does not go to that extent nor does the passage from Halsbury insist on such rigid requirement. The simple point is, was there some evidence or was there no evidence not in the sense of the technical rules governing regular court proceedings but in a fair commonsense way as men of understanding and worldly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a finding is certainly available for the court to look into because it amounts to an error of law apparent on the record. We find, in this case, that the evidence of Chamanlal, Inspector of the Flying Squad, is some evidence which has relevance to the charge levelled against the respondent. Therefore, we are unable to hold that the order is invalid on that ground."

(emphasis in original and supplied)

20. In the matter of disciplinary proceedings the charge of misconduct or doubtful integrity would otherwise be judged on the principle of preponderance of probability as to what the reasonable man would arrive at finally in its conclusion. Applying this test to the fact position of the present case, I find that in the total circumspect of the events right from the date petitioner absented from duty while he was sent to a particular place and then disappeared for about one year while

staying in the same district would lead to conclude that petitioner was certainly negligent and that too so deliberately to make out a case of misconduct to transform such a negligence into a case of misconduct. ON the question of proportionality of the punishment imposed and whether it is commensurate to the charge or not, in my considered view the petitioner having failed to produce any evidence that he was bed ridden or hospitalized during last one year, he being in civil police, was certainly required to report his higher official as a disciplined member of the force. This unauthorized absence of the petitioner from official duty would have led to now other conclusion but that he was not innocently negligent so as not to make out a case of misconduct. Earlier order of removal has been reduced to a punishment of lowering down the petitioner to five years in terms of minimum of basic pay therefore, is not hit in any manner by the doctrine of proportionality and it cannot be said that the punishment imposed is not commensurate to the charge which has been admittedly proved. it has been repeatedly held that the Court will certainly be interfering with the punishment in the event it shoots to its consigns looking to the charge established. this principle has been discussed by the Supreme Court in the case of **Union of India & Ors v. P. Gunasekaran (2015) 2 SCC 610** broad principles have been laid down vide paragraph nos. 12 & 13 of the judgment which are reproduced hereunder:

"12. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, reappreciating even the evidence before the enquiry officer. The finding on Charge I

was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Articles 226/227 of the Constitution of India, shall not venture into reappraisal of the evidence. The High Court can only see whether:

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

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

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

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

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

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

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

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

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

13. Under Articles 226/227 of the Constitution of India, the High Court shall not:

(i) reappraise the evidence;

(ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii) go into the adequacy of the evidence;

(iv) go into the reliability of the evidence;

(v) interfere, if there be some legal evidence on which findings can be based.

(vi) correct the error of fact however grave it may appear to be;

(vii) go into the proportionality of punishment unless it shocks its conscience."

21. On the above principles, if the petitioner's case is tested, I am of the considered view that the petitioner's guilt of remaining absent from duty deliberately and willingly, has rightly been held to be amounting to a misconduct by a member of civil police and therefore, it cannot be said that the punishment imposed upon the petitioner is not commensurate to the charge of misconduct proved.

22. The judgments that have been cited by learned Advocate appearing for the petitioner relating to back wages considering the fact that charge of guilt has been approved and the Court does not find the punishment to be disproportionate to the charge proved by the inquiring authority approved by the disciplinary authority, any issue as to payment for the period petitioner had absented from duty arise. The issue before the Court is as to the correctness of the decision taken by the disciplinary authority which has been affirmed in appeal and revision, no question of any back wages arise.

23. Sri R.S. Umrao, learned Standing Counsel for the respondents has argued that the petitioner was never admitted in any hospital at any point of time and therefore, he was also there in a position to intimate the higher authority/ competent authority about the illness with which he suffered. In support of his argument Sri Umrao has

drawn the attention of the Court to the reply of the petitioner to the charge sheet and also the medical certificate addressed to Senior Superintendent of Police dated 22.11.2018 by Dr. Chaitanya Maheshwari, the Medical Officer under whose treatment petitioner was and submits that there is nothing to demonstrate that petitioner was at any point of time admitted to the hospital. He submits that all that he has shown is that petitioner as a matter of fact was merely under treatment and in such circumstances, if the petitioner was able to visit the doctor for treatment, he could have been visited to the officer concerned to apprise him about his illness or at least he could have sought for medical leave, during this long period from 05.06.2002 to 25.06.2003. He submits that the absence from duty without intimation and notice by a person who is a member of disciplined force, is a serious misconduct and in the absence of any document to show that petitioner ever attempted bonafidely to intimate about his illness, the employer could not have taken the matter sympathetically. It is argued by learned Standing Counsel that this time petitioner has only been awarded with lesser punishment and therefore, this Court may not interfere with the findings of the inquiring authority including the disciplinary authority as to the nature of punishment.

24. If petitioner had ever attempted to intimate the higher authorities about his illness while admittedly he absented from duty for over a long one year by bringing anything on record to demonstrate that he was ever hospitalized, situation would have been different.

25. If one goes through the medical certificates, which is the only document

available with the petitioner to show that he had been under treatment for valid reasons as he suffered from serious disease, one would find that doctor certified only this much that petitioner was under his treatment from 05.06.2002 to 25.06.2003 and it has been very categorically mentioned in the certificate that petitioner was an outdoor patient. This doctor is of Primary Health Centre, Meerapur, Muzaffarnagar. Petitioner, it appears from the documents to have resided at Police Lines, District Muzaffarnagar otherwise, he was a permanent resident of Ghaziabad.

26. In these above circumstances, if he could visit as OPD patient to the doctor, he could have communicated to the higher authorities in the police department also his illness. There is nothing to demonstrate from the entire pleadings raised in reply to the notice dated 28.07.2018 that the petitioner was bedridden during this period. One stand taken is that his wife Smt. Sunita Yadav had intimated on 07.06.2002 to Senior Superintendent of Police but it is very vague and evasive stand. About the fitness claimed by the petitioner, it would relate only to resuming his regular duty and would certainly not absolve him from the liability to intimate about his ailment to the higher authorities.

27. It is true that negligence as such would not amount to a serious misconduct unless it is shown to be of such nature and deliberate one that would render an act or conduct to be unbecoming of an officer or a member of disciplined force but the parameters in organizations like police force, defence and security forces are certainly different. In Civil Police, a Constable has a very responsible role to play in day to day public administration and if a Constable suddenly disappears

from the scene, while he was directed to report at a particular place and then keeps not informing the organization for a pretty long one year, it would certainly amount to such an indiscipline which may warrant a major penalty.

28. The yardsticks to maintain discipline in the case of disciplined force that looks after either the defence of the country or the one involved in civil police for the police administration is to be strictly applied and so the test to check indiscipline would be stricter. Reference to its earlier judgment of Supreme Court in the case of **Union of India v. Dwarka Prasad Tiwari (2006) 10 SCC 388**, Supreme Court in its subsequent judgment in the case of **Union of India & Ors v. Diler Singh (2016) 3 SCC 71** has observed "when a member of the disciplined force deviates to such an extent from the discipline and behaves in an untoward manner which is not conceived of, it is difficult to hold that the punishment of dismissal as has been imposed is disproportionate and shocking to the judicial conscience."

29. In the present case, looking to the facts and circumstances I find that petitioner was under treatment as an OPD patient and he stayed at Muzaffarnagar for one long year and possibly in police lines, so it was all the more his duty to have intimated the higher officer in the department. He could have written letters through registered post also or may be sending a letter through his wife, but nothing was not done. So, I am not able to accept the argument that the conduct of the petitioner was of not such a degree so as to enough to count it as a amount a misconduct.

30. Coming to the other argument that the authority competent in the matter could have disagreed with the recommendations made by the competent authority only by assigning reasons and in the absence of cogent and convincing reason this different stand taken by the competent authority to issue show cause notice for punishment of higher degree / nature was not therefore, sustainable, I find that the contents of reply made by the petitioner were referred to by the authority and have been taking into consideration and were found to be totally baseless and unsatisfactory. These fact finding considerations cannot be further re-appreciated by this Court in its exercise of power under Article 226 of the Constitution.

31. It is pertinent to refer here para 381 of U.P. Police Regulations that reads as under:

"381. Medical leave. -- *It is incumbent on all applicants for medical leave or extension of leave on medical certificates to apprise the Superintendent of Police in writing of their intention to apply for a medical certificate. Any failure to do so may result in a decision that the medical certificate has been obtained by misrepresentation and may thereby entail serious consequences.*"

32. Looking to the above aspect, if one looks to the reply submitted by the petitioner to the show cause notice and then earlier to the charge sheet, one would do not find any cogent and convincing material was ever placed so as to hold him innocent in the matter. Thus, in my considered view the authority having found petitioner guilty of the charges and this time having decided to punish him with lesser degree of punishment than originally

33. In view of the above, petition fails and is accordingly **dismissed**.

Writ-A No. 6662 of 2023

A. Service Law – Constitution of India – Article 309, 310 & 320 – GO dated 02.06.2023 – Clause 12(4) – Transfer – Weightage of 10 marks by considering the spouse (husband) as the government servant claimed by Assistant Teacher – As an employee of University, how far husband come within purview of govt. servant – Appointment of husband was neither made in consultation with the State Public Service Commission nor there is any administrative control vested with the regard to the functioning in His Excellency the Governor – Effect – Held,

(Delivered by Hon'ble Abdul Moin, J.)

1. Supplementary affidavit filed today in Court by Sri Ran Vijay Singh, learned counsel for the respondent no. 3 be kept on record.

2. Heard Sri Rajat Aren, Advocate and Sri Rishi Srivastava, learned counsels for the petitioner, learned Standing counsel appearing on behalf of the respondents no. 1, 2 & 5, Sri Ran Vijay Singh, learned counsel for the respondents no. 3, Sri Kumar Ayush, learned counsel for the respondent no. 4, Sri Abhinav Singh, learned counsel for the respondent no. 6 and Sri Savitra Vardhan Singh, learned counsel for the respondent no. 7.

3. Instant writ petition has been filed praying for the following main reliefs:-

(i) To issue a writ, order or direction in the nature of Certiorari calling for the

records of the case and to quash order dated 27.07.2023 passed by the respondent no. 6, Annexure No. 25 (District Basic Education Officer, Unnao) being violative of G.O dated 29.06.2023 issued by the respondent no. 1 (Not available in Public domain) as well as circular dated 29.06.2023 and circular dated 01.07.2023 issued by Respondent No. 3 and also being violative of the Provisions of Section 13 of the U.P. Basic Education Act, 1972.

(ii) To issue a writ, order or direction in the nature of Mandamus commanding the Respondents (Specially Respondent No. 3 & 6) to allow the petitioner to Re-join in the office of Respondent no. 6 (District Basic Education Officer, Unnao) in pursuance of the Relieving order dated 04.07.2023 passed by Respondent No. 4 (District Basic Education Officer, Bahraich)

(iii) To issue a writ, order or direction in the nature of Mandamus commanding the Respondents (Specially Respondent No. 3, 4 & 6) to regularly pay the salary to the petitioner w.e.f 01.07.2023 without considering any break in service of the petitioner.

(vi) To issue a suitable writ, order or direction in the nature of Certiorari to quash the consequential order no. 28732-35 dated 03.10.2023 passed by the Respondent No. 3 (Annexure No. S.A 4 to the supplementary affidavit) as being arbitrary and contrary to Sub clause (4) of the Clause 12, G.O. dated 29.06.2023 issued by Respondent No. 1 as well as Clause (8) of Circular dated 16.06.2023 & Circular dated 29.06.2023 issued by Respondent No. 3 and also being violative of the Provisions of Section 13 of the Uttar Pradesh Basic Education Act, 1972.

(vii) To issue a writ, order or direction in the nature of Mandamus commanding Respondent No. 3, 4, 5 & 6 to give effect

to/implement Merit List dated 26.06.2023 (in so far as it relates to the petitioner at Ser. No. 3458), consequential joining by the petitioner dated 06.07.2023 and take all necessary Consequential actions for Inter District Transfer of the petitioner From District- Bahraich to District- Unnao."

4. The case set forth by the learned counsel for the petitioner is that the petitioner while working as an Assistant Teacher at Bahraich applied for her inter district transfer from District- Bahraich to District- Unnao. Despite the petitioner having been found eligible for being transferred and despite her joining at Unnao subsequently, through an order dated 27.07.2023, a copy of which is annexure 25 to the writ petition, the transfer of the petitioner has not been found to be in accordance with law and therefore, the petitioner has been required to join at her initial place of posting i.e Bahraich. Later, through an order dated 03.10.2023, a copy of which has been filed as Annexure SA 4 to the supplementary affidavit, the respondent no. 3 after considering the provisions of the Government order dated 02.06.2023 governing the inter district transfer as well as the clarification dated 16.06.2023 has found that the petitioner has erroneously been transferred from District- Bahraich to District- Unnao and consequently, her transfer has been cancelled.

5. The contention of learned counsel for the petitioner is that a Government order dated 02.06.2023, a copy of which is annexure 11 governs the cases for inter district transfer of Assistant Teachers. The petitioner claims that her case is covered by Sub clause (4) of Clause 12 of the aforesaid Government order which provides that those teachers whose spouse are in

Government service i.e a service under the Union of India/ Indian Army/ Indian Air force/ Indian Navy/ Central Para Military Forces and State Government and working under the Uttar Pradesh Basic Shiksha Parishad on a regular basis would be accorded 10 weightage points for transfer. The said Government order has been clarified through the clarification dated 16.06.2023, a copy of which is annexure 13 to the writ petition, which, so far as it relevant to the facts of the instant case, provides that the Government service would be considered to be one where the services of the employee are governed by the rules framed under Article 309 of the Constitution of India.

6. In pursuance of the aforesaid Government order and circular, the petitioner claims to have applied for her transfer from District- Bahraich to District-Unnao which found favour with the respondents and the petitioner was relieved for her joining at Unnao vide order dated 04.07.2023 and also submitted her joining at Unnao on 06.07.2023 and continued working when through the orders impugned, her transfer has not been found to be in accordance with the Government orders dated 02.06.2023 & 16.06.2023 and consequently, her transfer has been cancelled and hence the petition.

7. Learned counsel for the petitioner has argued that the husband of the petitioner is working as a Senior Assistant in the Lucknow University. He had been appointed on compassionate grounds vide order dated 15.10.2003, a copy of which has been filed as annexure 6 to the writ petition. It is contended that the Lucknow University has adopted the Uttar Pradesh Government Servants Dying-in- Harness Rules, 1974 (hereinafter referred to as

"Rules, 1974") for the purpose of making compassionate appointments as would be apparent from a perusal of Minutes of the Executive Council dated 11.12.2021, a copy of which is part of annexure 27 to the writ petition. Reliance has also been placed on the office order dated 15.03.2021 which is also part of annexure 27 to the writ petition (Page 201) to contend that there are no service rules governing the appointment of non teaching staff in the Lucknow University and consequently, the Lucknow University has adopted the rules of the State Government which are applicable for Group C posts.

8. Placing reliance on the aforesaid orders and minutes as well as the appointment of the husband of the petitioner having been made on compassionate grounds under the Rules, 1974 the contention is that when as per the proviso to Article 309 of the Constitution of India, the rules regulating the recruitment and the conditions of service of the petitioner's husband have been issued by His Excellency The Governor consequently, the husband of the petitioner would be covered by the Government order dated 02.06.2023 as clarified vide circular dated 16.06.2023 more particularly keeping in view Clause 8 of the aforesaid circular. It is contended that the petitioner would be entitled for weightage of 10 points upon her husband being an employee of the Lucknow University and thus the respondents have wrongly rejected the claim of the petitioner for her inter district transfer by not granting the weightage of 10 marks and thus the order impugned merits to be set aside.

9. Sri Rajat Aren, learned counsel for the petitioner fairly states that but for the weightage of 10 marks to which the

petitioner is eligible, in case the 10 marks are not awarded to her, she would not be eligible for her transfer from District-Bahraich to District- Unnao.

10. On the other hand, the learned counsels appearing on behalf of the contesting respondents argue that when the petitioner had applied for her inter district transfer from District- Bahraich to District- Unnao she had filled in the form wherein she had indicated her husband as being a Government servant. Considering this, she had been awarded 10 marks for weightage and she had been transferred from District- Bahraich to District- Unnao. The petitioner also submitted her joining at Unnao and also started working. Subsequently, the respondents realized that the husband of the petitioner is simply a Senior Assistant working in the Lucknow University and thus the petitioner would not be entitled for weightage of 10 marks considering the provisions of Government order dated 02.06.2023 read with the clarification dated 16.06.2023. Thus, the respondents passed the order whereby the transfer of the petitioner from District- Bahraich to District- Unnao was rejected followed by the order impugned dated 03.10.2023. It is thus contended there is no illegality and infirmity with the orders impugned.

11. Sri Ran Vijay Singh, learned counsel appearing on behalf of the respondent no. 3 has also argued that Sub clause (4) of Clause 12 of the Government order dated 02.06.2023 would be applicable where the spouse is working under the State Government. This also stands clarified vide clarification dated 16.06.2023. He contends that the proviso to Article 309 of Constitution of India would be applicable where the service rules have been framed by His Excellency the

Governor and the person concerned has been appointed and is working and is governed by the said rules. In so far as the case of the petitioner's husband is concerned who is working as Senior Assistant in Lucknow University it is the Rules of the State Government which have been adopted by the Lucknow University and thus mere "adoption" of the said rules would not take an employee working in an autonomous body like the Lucknow University to be within the ambit of being a Government servant.

12. Heard the learned counsel appearing on behalf of the contesting parties and perused the records.

13. From the arguments as raised by the learned counsels appearing on behalf of the contesting parties and perusal of records it emerges that while the petitioner was working as an Assistant Teacher at Bahraich, she had applied for her inter district transfer to District- Unnao. The application for transfer had been allowed by the respondents and the petitioner joined at Unnao but subsequently through an order dated 27.08.2023, the transfer of the petitioner was not found to be in accordance with law and the relevant Government order and, therefore, the petitioner was required to join back at her initial place of posting i.e Bahraich. Later, through an order dated 03.10.2023, the respondent no. 3 after considering the provisions of the Government order dated 02.06.2023 and the clarification dated 16.06.2023 has found that the petitioner has erroneously been transferred from District- Bahraich to District- Unnao and consequently, her transfer order has been cancelled.

14. The reasons as emerge from a perusal of the order impugned would indicate that the weightage of 10 marks to which the petitioner found herself entitled to in the capacity of her husband being a "Government servant" has not been accepted and admittedly in case the weightage of 10 marks is taken away, the petitioner would not be entitled for her transfer to District- Unnao.

15. Whether the petitioner is entitled for a weightage of 10 marks by considering her husband to be an employee of the State Government as had been indicated by the petitioner in her application for transfer is to be considered.

16. In order to consider as to whether the petitioner was entitled for the weightage of 10 marks, the provisions of the Government order dated 02.06.2023 along with the clarification would have to be seen.

17. For the sake of convenience, the relevant clause of the Government order dated 02.06.2023 more particularly Clause 12 of the said Government order is reproduced below:-

अन्तर्जनपदीय स्थानान्तरण प्रक्रिया में वरीयता हेतु देय भारांक

क्रमांक	मनक	अधिकतम अंक
1	सेवा के प्रत्येक पूर्ण वर्ष के लिए 01 अंक	15
2	दिव्यांग अध्यापक/अध्यापिका (स्वयं/पति या पत्नी/अविवाहित पुत्र/पुत्री)	10

3	असाध्य या गम्भीर रोग से ग्रसित अध्यापक/अध्यापिका (स्वयं/पति या पत्नी/अविवाहित पुत्र/पुत्री)	20
4	शिक्षक/शिक्षिका जिनके पति या पत्नी सरकारी सेवा (भारत सरकार/भारतीय थल सेना/भारतीय वायु सेना/भारतीय नौ सेना/केन्द्रीय अर्ध सैनिक बल एवं उत्तर प्रदेश सरकार व उ०प्र०, बेसिक शिक्षा परिषद के अधीन) में नियमित रूप से कार्यरत हो।	10
5	एकल अभिभावक (पुत्र/पुत्रियों का अकेले पालन करने वाले शिक्षक/शिक्षिका)	10
6	महिला अध्यापिका	10
7	राष्ट्रीय पुरस्कार प्राप्त अध्यापक/अध्यापिका	5
8	राज्य पुरस्कार प्राप्त अध्यापक/अध्यापिका	3

18. This Government order has been followed by clarification dated 16.06.2023 which has also been referred to in the order impugned dated 03.10.2023 while cancelling the transfer of the petitioner. For the sake of convenience, the relevant Clause of the clarification dated 16.06.2023, so far as it pertains to the petitioner, is reproduced below:-

8. सरकारी सेवा का लाभ ऐसे शिक्षक/शिक्षिका जिनके पति या पत्नी भारत सरकार/भारतीय थल सेना/भारतीय वायु सेना/भारतीय नौ सेना/केन्द्रीय अर्ध सैनिक बल एवं उत्तर प्रदेश सरकार व उ०प्र०, बेसिक शिक्षा परिषद के अधीन नियमित कार्यरत सरकारी सेवक होंगे, को ही देय होगा। भारत के संविधान के अनुच्छेद 309 के परन्तु के अधीन जिन कार्मिकों का सेवा विनियमन होता है, वे सरकारी सेवा की श्रेणी में मान जायेंगे। सरकारी सेवा में अद्यतन कार्यरत होने का प्रमाण पत्र जो सक्षम नियुक्ति प्राधिकारी द्वारा निर्गत किया गया हो, ही मान्य होगा।

19. Perusal of Clause 12 of the Government order dated 02.06.2023 would indicate that those teachers whose spouse is working in the Central Government/Indian Army/ Indian Air force/ Indian Navy/ Central Para Military Forces and State Government and working under the Uttar Pradesh Basic Shiksha Parishad would be entitled for 10 marks.

20. In terms of the clarification dated 16.06.2023 those teachers whose spouse is working in the Central Government/Indian Army/ Indian Air force/ Indian Navy/ Central Para Military Forces and State Government and working under the Uttar Pradesh Basic Shiksha Parishad are entitled for the weightage. It has also been provided that those employees whose service is regulated under the proviso to Article 309 of the Constitution of India would also fall within the ambit of Government service meaning thereby that those personnel whose services are regulated under the proviso of Article 309 of the Constitution of India, their service would be considered as Government service.

21. In order to understand this clarification, Article 309 of the Constitution of India would have to be considered, which for the sake of convenience is reproduced below:-

"309. Recruitment and conditions of service of persons serving the Union or a State Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may

direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

22. A perusal of the proviso to Article 309 of the Constitution of India would indicate that the acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State, provided that it is competent for His Excellency the President in the case of service and posts in connection with the affairs of the Union and for the Governor of a State in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment and the conditions of service of persons appointed to such services and posts. Thus, it is the acts of the legislature which are to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State provided that it shall be competent for His Excellency the Governor to make rules regulating the rules and conditions of service of persons appointed to such services and posts.

23. Thus, the services, as are indicated in Article 309 pertain to public

services and posts in connection with the affairs of the Union or of any State.

24. At this stage, it would also be relevant to refer to the provisions of Article 310 of the Constitution of India which reads as under:-

"310. Tenure of office of persons serving the Union or a State

(1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period, that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

25. From a perusal of Article 310 of the Constitution of India it emerges that every person who is a member of a civil

service of the Union or holds any civil post under the State holds office during the pleasure of His Excellency the President or the Governor of the State.

26. Likewise, Article 311 of the Constitution of India so far as it is relevant to the facts of the instant case provides that no person who is a member of a civil service of a State or holds a civil post under the State shall be dismissed or removed by an authority subordinate to that by which he was appointed. The other provisions of Article 311 of the Constitution of India may not detain the Court.

27. Here it would also be relevant to refer to the provisions of Article 320 of the Constitution of India which read as follows:-

"Article-320. Functions of Public Service Commissions.

a. It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

b. It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.

c. The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—

a. on all matters relating to methods of recruitment to civil services and for civil posts;

b. on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and

on the suitability of candidates for such appointments, promotions or transfers;

c. on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

d. on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

e. on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them:

Provided that the President as respects the all- India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for

a Public Service Commission to be consulted.

d. Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions of article 335.

e. All regulations made under the proviso to clause (3) by the President or the Governor of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid."

28. From a perusal of Article 320 of the Constitution of India it emerges that so far as the facts of the instant case are concerned, the functions of the public service commissions have been indicated of which few are for the purpose of assisting the State in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualification are required and that the State Public Service Commission shall be consulted on all matters relating to method of recruitment to civil services and for civil posts; the principles to be followed in making appointments to civil services and posts; on disciplinary matters affecting a person serving under the Government of a State in a civil capacity etc.

29. From a perusal of Articles 309, 310, 311 & 320 of the Constitution of India it emerges that so far as the facts of the

instant case are concerned the phrase "persons serving under the Government of India or the Government of State" appears to have reference to such persons in respect of whom the administrative control is vested in the respective executive Government functioning in the name of President or the Governor. The said person would hold office during the pleasure of the Governor of the State. The rules for his recruitment would be made in consultation with the State Public Service Commission including the rules for making appointment to his post and in making promotion and transfer from one service to the other. However, all these aspects are lacking in the appointment of the husband of the petitioner inasmuch as admittedly, the petitioner's husband is an employee of the Lucknow University an autonomous body, the rules of the State Government have been 'adopted' by the Lucknow University, the appointment of the petitioner's husband has not been made in consultation with the State Public Service Commission nor there are principles framed by the State Public Service Commission for making his appointment and in making his promotion and transfer and neither is any administrative control vested with the regard to the functioning of the petitioner's husband in His Excellency the Governor. Thus, the mere fact that the appointment of the petitioner's husband on compassionate ground has been made by following the Rules, 1974 which have been 'adopted' by the Lucknow University and that the service rules for non teaching staff are those which have been 'adopted' by the Lucknow University pertaining to the State Government which are applicable for Group C post would not render the petitioner's husband as either being a Government servant or being in Government service.

30. In this regard, it would be apt to refer to the Constitution Bench judgment of **Pradyat Kumar Bose Vs Hon'ble the Chief Justice of Calcutta High Court reported in AIR 1956 SC 285** wherein it has been held as under:-

"The phrase 'persons serving under the Government of India or the Government of a State' seems to have reference to such persons in respect of whom the administrative control is vested in the respective executive Governments functioning in the name of the President or of the Governor or of a Rajpramukh."

31. It is not the case and obviously it cannot be the case of the petitioner that the Rules of the Lucknow University have been framed by His Excellency the Governor rather the Lucknow University, instead of framing its own rules, which it has ample power to do, has simply "adopted" the rules of the State Government and thus mere adoption of rules, as already indicated above would not make the petitioner's husband a Government servant or render him as being in Government service. Also, the petitioner's husband cannot be said to be a person serving under the Government of the State of U.P and for whom the administrative control is vested in the State Government. Thus, the arguments of the learned counsel for the petitioner are patently fallacious and merit to be rejected and are accordingly, rejected.

32. The fallacy of the argument of learned counsel for the petitioner can also be understood from a simple example that in case a private company was to adopt the service rules of the Government in all its sphere of working whether the employee of the private company would become a

Government servant or would be considered to be in Government service entitled for the benefit of the Government order dated 02.06.2023 read with the clarification dated 16.06.2023? The answer is obviously No !

33. In this regard, it would also be pertinent to mention that in a matter pertaining to the employees of the autonomous bodies who were claiming as a matter of right the same service benefits at par with the Government employees merely because the autonomous bodies 'adopted' the Government service rules, the Hon'ble Supreme Court in the case of **State of Maharashtra and anr Vs. Bhagwan and Ors reported in (2022) 4 SCC 193** has held as under:-

"26. As per the law laid down by this Court in a catena of decisions, the employees of the autonomous bodies cannot claim, as a matter of right, the same service benefits on par with the Government employees. Merely because such autonomous bodies might have adopted the Government Service Rules and/or in the Governing Council there may be a representative of the Government and/or merely because such institution is funded by the State/Central Government, employees of such autonomous bodies cannot, as a matter of right, claim parity with the State/Central Government employees. This is more particularly, when the employees of such autonomous bodies are governed by their own Service Rules and service conditions. The State Government and the Autonomous Board/Body cannot be put on par."

33. From a perusal of the aforesaid judgment also it emerges that merely because the autonomous bodies have

'adopted' the government service rules, the same would not confer any right of the employees of the autonomous bodies to claim the same benefits as are admissible to government employees inasmuch as they would not fall within the ambit of being government employees or in government service.

33. Accordingly, keeping in view the aforesaid discussion, no merit is found in the writ petition. The writ petition is accordingly dismissed.

34. The Court records the assistance provided by Ms. Megha Sachan, Law Clerk of this Court.

(2023) 11 ILRA 571
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.11.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 6728 of 2023

Vijay Kumar Banswar ...Petitioner
Versus
Awadhesh Kumar Jaisawal ...Respondents

Counsel for the Petitioner:

Aakash Prasad, Amitav Singh, Himanshu Singh,
Yash Joshi

Counsel for the Respondents:

Shishir Chandra, Vishnu Pratap Singh

Civil Law - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 21(1)(a) - Bonafide Need - Eviction - Comparative Hardship - Cross-Examination - Compensation:

Petitioner, a tenant running a machine parts business for 37 years, challenged the Rent Controller's order dated 13.12.2022 allowing eviction under Section 21(1)(a) of the Act for

the landlord's bonafide need to establish a furniture business for his unemployed son, and the District Judge's order dated 24.04.2023 dismissing the appeal. The High Court held that the landlord's need was bonafide, supported by evidence of the son's unemployment and the requirement of a larger space for the proposed business. The petitioner failed to disprove the landlord's need or establish alternative accommodation availability. The plea of comparative hardship was adequately considered by the Rent Controller, finding the petitioner's business relocatable with minimal hardship compared to the landlord's need. The rejection of the petitioner's application for cross-examination was upheld, as cross-examination is discretionary and unnecessary where facts can be proved by documentary evidence. The writ petition was dismissed, but considering the petitioner's long tenancy, the landlord was directed to pay Rs. 25,000/- as compensation under the second proviso of Section 21(1) of the Act.

Held: The landlord's bonafide need for the premises to establish a furniture business for his unemployed son was established. The petitioner's objections regarding alternative accommodation and comparative hardship were unsustainable. The rejection of cross-examination was justified as no necessity was shown. Writ petition dismissed with Rs. 25,000/- compensation to the petitioner for long tenancy.

Writ petition dismissed.

Case Law Discussed:

1. Shiv Sarup Gupta Vs Dr Mahesh Chand Gupta, (1999) 6 SCC 222
2. B.C. Bhutada Vs G.R. Mundada, AIR 2003 SC 2713
3. Harish Kumar (Since Deceased) Through: Lrs. Vs Pankaj Kumar Garg, 2022 LiveLaw (SC) 239
4. R.C. Tamrakar Vs Nidi Lekha, AIR 2001 SC 3806
5. K.C. Kapoor Vs Additional District Judge, Kanpur, 2003(2) ARC 70

6. Mahesh Kumar Vs Swami Dayal Katiyar, Writ A No. 5387 of 2018

7. Radha Kishan Vs IVth Additional District Judge, Jalaun at Orai, 1985 (1) ARC 427

8. Khushi Ram Dedwal Vs Additional Judge, Small Cause Court, Meerut, 1997 (2) ARC 674 (D.B)

9. Sanjay Kumar Katyal Vs Smt. Kamlesh Gupta, 2007 (67) ALR 250

10. Mahesh Chand Vs Additional Civil Judge (S.D.), Bulandshahar, 2005 ARC 558

11. Satnam Singh Vs Rakesh Kumar, 2011 (89) ALR 560

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

1. Heard learned counsel for petitioner as well as learned counsel for respondents.

2. By means of present writ petition, the petitioner has challenged the order dated 13.12.2022 passed by Rent Controller and also the order dated 24.04.2023 passed by District Judge Kheri rejecting the appeal preferred by the petitioner against the order of Rent Controller.

3. The facts in brief are that the petitioner entered into a tenancy in respect of a shop measuring 18 sq. meter situated at Mela Road - Dwarikapuri, Lakhimpur, Pargana & District – Kheri by way of oral agreement with one Chandrachud Singh Rathore. In the tenanted premises, the petitioner has a small machine parts business, selling machine ware, oil, lubricant and auto parts for pump, diesel generator sets vehicles form the shop in question continuously since 1986 i.e. since last 37 years.

4. The respondent had purchased the said property from the original landlord on 02.03.2013 and subsequently the petitioner paid rent to the respondent. On 08.01.2020, the respondent has filed an application under Section 21(1)(a) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 on the ground that the said shop was required for the bonafide need of his son who is unemployed and wanted that shop for starting a business. It was further stated that the other shops owned by the respondent were not available for running of the business as they have been let out on temporary basis.

5. The petitioner had appeared and filed his objections before the Rent controller and resisted the application for eviction. It was stated that there were no bonafide need of the respondent or his son and it has not been stated as to what kind of business would be commenced in the disputed property and it is also stated that respondent had several other vacant shops to start his independent business and consequently prayed for setting aside the application filed by the respondent under Section 21(1)(a) of the Act.

6. The Rent Controller by means of order dated 13.12.2022 allowed the application preferred by the respondent and directed the petitioner to vacate the shop in question within 30 days from the date of order. The Rent Controller came to a finding that the petitioner has admitted the relationship of landlord and tenant between him and the respondent. He also considered the bonafide need of the respondent and also considered the comparative hardship. He considered the fact that the said shop was required by the landlord for the purpose of establishing a business for his son and that he had no other place apart

from the said shop to start the said business. With regard to the claim of the petitioner goodwill of running the said shop from the particular place, the said plea was rejected on the ground that it was always open for the petitioner to establish his business elsewhere and the goodwill would be created at the new place of business and, accordingly allowed the application.

7. In appeal, the District Judge went through the entire evidence at the behest of the petitioner. He considered the fact that six months notice was given to the petitioner by the respondent for vacating the said shop and on expiry of the said period on 03.01.2020 the suit for eviction was filed. He also considered the objection of the petitioner against the application for eviction filed by the respondent.

8. With regard to the objection of the petitioner that the respondent had not given adequate opportunity and the reasons for the bonafide requirement, it was concluded that the respondent in his statement has stated that two shops which are owned by him are not vacant and are occupied by tenant and are accordingly not available for starting the business of his son. He also considered the fact that petitioner had not sought or made any effort to find an alternate accommodation. He considered the fact that from the material on record, it is clear that son of the respondent, namely, Himanshu Banswar is an unemployed youth and the respondent requires the tenanted premises for establishing his business. He has further considered that the next shop, namely, Verma Loha Bhandar is established, will also be got vacated by the petitioner as the said premises is also required along with tenanted premises of the petitioner to establish the business of his son.

9. It has further been considered that a furniture business shop would be established in the premises so vacated by the petitioner and accordingly it cannot be said that the respondent had not given any nature of business sought to be established.

10. It has also been recorded that though the petitioner had stated that the son of the respondent is not unemployed, he has not been able to show any evidence or any material or documents to show as to how the son of the respondent was employed and accordingly he was not able to demonstrate that the son of the respondent is employed. He has also considered the fact that in order to establish and run a furniture shop, a large area is required and the same cannot be run from a small shop. A big showroom is required for which purpose the disputed premises as well as adjacent shops owned by the respondent would be required.

11. After reconsidering the entire evidence on record, it was concluded that a case for eviction is made out and the premises were required for establishment of a business by the son of the respondent and no infirmity was found in the findings recorded by the Rent Controller and consequently the appeal was dismissed.

12. Before this Court, it was again urged that respondent had adequate space and consequently it cannot be said that he requires the disputed property for bonafide need of establishing a business for his son. This Court has also looked into the evidence led by the respondent and his son as P.W. 1 and P.W. 2 from which it is clear that the son of the respondent is unemployed and in order to establish a furniture business a large floor or area is required for which the disputed premises is

required to establish the business. The petitioner could not establish that the son of the respondent is already employed and consequently there was no evidence on record to dispute the claim made by the respondent. Accordingly, no ground is made out for interference with regard to the said issue.

13. In the present case it has been contended by the petitioner that there was no bona fide need of the respondent or his son. Before going into the question whether there was a bona fide need we need to go into the question of what is bona fide. The Supreme Court in the case of **Shiv Sarup Gupta v. Dr Mahesh Chand Gupta, 1 (1999) 6 SCC 222**, held as under :-

“13. ..., the term bona fide or genuinely refers to a state of mind. Requirement is not a mere desire. The degree of intensity contemplated by “requires” is much more higher than in mere desire. The phrase “required bona fide” is suggestive of legislative intent that a mere desire which is the outcome of whim or fancy is not taken note of by the rent control legislation. A requirement in the sense of felt need which is an outcome of a sincere, honest desire, in contradistinction with a mere pretence or pretext to evict a tenant, on the part of the landlord claiming to occupy the premises for himself or for any member of the family would entitle him to seek ejectment of the tenant. Looked at from this angle, any setting of the facts and circumstances protruding the need of the landlord and its bona fides would be capable of successfully withstanding the test of objective determination by the court. The judge of facts should place himself in the armchair of the landlord and then ask the question to himself — whether in the given facts substantiated by the landlord

the need to occupy the premises can be said to be natural, real, sincere, honest. If the answer be in the positive, the need is bona fide. The failure on the part of the landlord to substantiate the pleaded need, or, in a given case, positive material brought on record by the tenant enabling the court drawing an inference that the reality was to the contrary and the landlord was merely attempting at finding out a pretence or pretext for getting rid of the tenant, would be enough to persuade the court certainly to deny its judicial assistance to the landlord. Once the court is satisfied of the bona fides of the need of the landlord for the premises or additional premises by applying objective standards then in the matter of choosing out of more than one accommodation available to the landlord his subjective choice shall be respected by the court. The court would permit the landlord to satisfy the proven need by choosing the accommodation which the landlord feels would be most suited for the purpose; the court would not in such a case thrust its own wisdom upon the choice of the landlord by holding that not one but the other accommodation must be accepted by the landlord to satisfy his such need. In short, the concept of bona fide need or genuine requirement needs a practical approach instructed by the realities of life. An approach either too liberal or too conservative or pedantic must be guarded against."

14. Further in B.C. Bhutada v. G.R. Mundada, 2 AIR 2003 SC 2713 the Apex Court held that,

"Requirement implies an element of necessity. The necessity is a necessity without regard to the degree of which it may be."

15. Thus, it seems that the question of bona fides shall be satisfied if the landlord is able to show that they need the tenant's premises for carrying out their business and the same does not need to be to the extent where no alternative is left to them. In the present case the respondent landowner has been able to show the need accordingly and thus the contention of petitioner of no bona fide ground stands denied.

16. It has also been urged by learned counsel for petitioner that he had moved an application for cross examination which was rejected by the Rent Controller by means of order dated 13.12.2022. It is stated that in his appeal he has raised the issues before the Appellate Court.

17. A perusal of the appellate order, also indicates that though the said ground was raised in the memo of appeal but it was not urged by the petitioner nor considered by the appellate court. Although once the order has not been challenged before the appellate court the same cannot be raised in the writ proceedings, this Court has still gone into the question of cross examination to prove unemployment as raised by the counsel for petitioner.

18. In this regard, a Division Bench of the Supreme Court has observed in the case of **Harish Kumar (Since Deceased) Through: Lrs. Versus Pankaj Kumar Garg, 2022 LiveLaw (SC) 239** as under:-

"Section 21(1)(a) of the Act, under which the application for release was filed, reads as under: "21. Proceedings for release of building under occupation of tenant.- (1) The Prescribed Authority may, on an application of the landlord in that behalf, order the eviction of a tenant from the building under tenancy or any specified

part thereof if it is satisfied that any of the following grounds exists namely- (a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust"

It is quite clear that aforesaid provision seeking release of the premises on the ground of bona fide requirement does not strictly require the landlord to be "unemployed" to maintain an action. All that the provision contemplates is that the requirement so pleaded by the landlord must be bona fide."

19. This makes it clear that even if the son was employed, the same would not have made any difference. The respondent landlord was able to make out a case for eviction the ground that the premises were required for establishing the business of furniture for his unemployed son. It was considered that the business of furniture cannot be run from a small shop but requires more space and consequently even remaining shops which were tenanted by the landlord would be got vacated for the purposes of the establishing the said business. The contention of the petitioner that even if there is a change in circumstances during the pendency of litigation the same can be adequately considered, would not be of much help in facts of the present case. If during the pendency of the litigation certain other adjacent shops had got vacated, or had been temporary let out by the landlord, it does not change the circumstances requiring re-appreciation of evidence in the present case

in as much as it is stated case of the landlord that he required large space for running a furniture shop and the same could not be run from a small shop. It cannot be doubted that the landlord has a right to determine as to how and in what manner he shall live, arranges his business etc. He has to settle his life in his own way. It cannot be guided, controlled or restricted by any 3rd person including the court. A tenant or the court cannot direct the landlord how and in what manner he should live arranges affairs. There is no bar which can restrict a landlord beneficial enjoyment of his own property.

20. In the case of **R.C Tamrakar vs Nidi Lekha AIR 2001 SC 3806** it was held by the Supreme Court that law is well settled that it is for the landlord to decide how in what manner he should live and that he is the best judge of his essential requirement. In deciding the question of bonfide requirement, it is unnecessary to make and endeavour as to how else landlord could have adjusted himself. The petitioner had vehemently urged that the landlord did not specify the business which was to be started by his son. This aspect of the matter was also considered by this court in the case of **K.C Kapoor vs Additional district judge Kanpur 2003(2)ARC 70** and it was held that it is not necessary that the landlord should state the nature of business sought to be commenced by his family. In the aforesaid discussion the said issue is decided in favour of the landlord and against the petitioner.

21. It was also argued by the petitioner that provisions of section 16(2) of act 13 of 1972 were not considered by the prescribed authority. It was submitted that it was mandatory for the prescribed authority to have considered the issue of

comparative hardship, and it should have been considered that the petitioner had been running a business in the tenanted premises for nearly 37 years, and consequently as per the above statutory provision no order of eviction could have been passed.

22. This Court has perused the impugned judgement of the prescribed authority dated 13/12/2022. Issue No. 3 was specially framed to consider the comparative hardship. A finding was returned that the petitioner runs a very small business in the tenanted premises, and the said business can easily be shifted to any other place. On the other hand the respondent was the landlord and his bonafide need for starting a business for his son was greater than the hardship which may be faced by the petitioner. On the aforesaid facts he returned a finding against the petitioner. In view of the above the contention that the prescribed authority had failed to consider the issue of comparative hardship is clearly not made out. This Court is of the considered view that the prescribed authority has duly considered this aspect, and in its correct perspective, and even the finding returned could not be assailed by the petitioner nor any material was placed before this court which may indicate that the finding was perverse. Accordingly, this Court does not find any infirmity with the finding recorded by the prescribed Authority, and the arguments of the petitioner accordingly rejected.

23. Lastly, it was submitted the petitioner was not allowed to cross examine has been considered by this Court in various judgments including ***Mahesh Kumar and Anr. v. Swami Dayal Katiyar*** (Writ A No. 5387 of 2018) decided on 20.2.2018 wherein this Court relying upon

the judgments in ***Radha Kishan v. IVth Additional District Judge, Jalaunat Orai & Ors. 1985 (1) ARC 427, Khushi Ram Dedwal v. Additional Judge, Small Cause Court/ Prescribed Authority, Meerut & Ors. 1997 (2) ARC 674 (D.B), Sanjay Kumar Katyal v. Smt. Kamlesh Gupta & Anr. 2007 (67) ALR 250, Mahesh Chand v. Additional Civil Judge (S.D.), Bulandshahar/ Prescribed Authority (2005)/ ARC 558 and Satnam Singh v. Rakesh Kumar 2011 (89) ALR 560*** held as under:-

" 20. The legal principle for allowing the cross examination in proceedings under Section 21(1) of the Act are absolutely clear. The power under Section 34(1) of the Act is discretionary which should be exercised sparingly by the Prescribed Authority only when he finds that cross-examination is necessary for deciding the release application. The application for cross-examination has to be decided in the context of factual back drop of the case and in the context of nature of the proceedings under the Act. The legislature has not provided for oral evidence to be adduced in support of the case as contemplated under Order XVIII Rule 4 C.P.C. but the facts are to be proved on affidavit. If unnecessary cross examination is permitted, that will only hamper the expeditious disposal of the cases and shall defeat the primary object of the Act, i.e., the expeditious disposal of the cases. When an application for cross examination is filed, the Court has to examine, in each case, as to whether on the facts and circumstance of the case, cross examination is necessary and the application filed for cross examination is bona fide. Cross examination will not be relevant as to the fact which can be proved by documentary evidence and which can be annexed with the affidavit. Under the

scheme of the Act, oral examination may be allowed only as an exception. If a party wants to cross examine, he has to disclose the necessary facts in his application as to why the cross examination is necessary. Unless it is established that the veracity of facts as stated in the affidavit is necessary to be tested by cross examination, the cross examination cannot be allowed in proceedings under Section 21 of the Act. The party moving the application must give reasons as to which particular part of the affidavit is incorrect and under what circumstances and for what reasons such cross examination is necessary in the context of the facts and circumstances of the case."

24. It has been submitted on behalf of the petitioner that only to test the claim of the landlord that the premises are required for bonfide purposes, the petitioner wanted to cross-examine the landlord and his witnesses. In case the petitioner wanted to contest the said facts, or wanted to bring on record some material which may indicate that the requirement of the petitioner was not bonfide or that there was alternate accommodation available, the same could very well have been done by bringing on record the evidence available with the petitioner. No such material was placed by him before the prescribed authority and even if the arguments of the petitioner are to be believed that the adjacent shop was vacant, still the requirement of the landlord was much more than merely the small shop in which the petitioner was a tenant, for him to start a furniture business for which admittedly a large space is required. This court does not find any valid reason for interfering in the order of the prescribed authority rejecting the application for cross examination of the witnesses. The law in this regard as stated above is also clear, and

cross-examination can be allowed only as an exception rather than the rule as the proceedings before the prescribed authority are summary in nature. No satisfactory reason could be disclosed from which it could be gathered that cross-examination was necessary in the facts of the present case and consequently the arguments in this regard are also rejected.

25. In light of the above discussion, this Court does not find merit in the writ petition, accordingly the same is **dismissed**.

26. As regards compensation considering the second proviso of Section 21(1) of the Act of 1972 and also that the tenant has been in tenancy of the premises for over three decades, this Court is of the opinion that ends of justice would be met in case the landlord / respondent is directed to pay Rs.25,000/- as compensation to the petitioner.

(2023) 11 ILRA 578
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2023

BEFORE

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

Writ-A No. 10552 of 2023

Vinod Kumar		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:

Sri Siddharth Khare, Sri Ashok Khare (Sr. Advocate), Sri Kauntey Singh

Counsel for the Respondents:

C.S.C., Sri Abhishek Srivastava, Sri Adarsh Bhushan, Sri Suyash Agarwal, Sri Ujjawal Srivastava

A. Service Law – Disciplinary Proceedings – Jurisdiction of Disciplinary Authority –

Delegation of Powers: The petitioner, an Assistant Engineer, challenged the order dated 22.06.2023 passed by the Managing Director, Purvanchal Vidyut Vitran Nigam Limited, reducing his rank to Junior Engineer as a disciplinary penalty. The petitioner contended that the Managing Director lacked jurisdiction, as the appointing authority (Managing Director, Uttar Pradesh Power Corporation Limited) had not delegated disciplinary powers under the Uttar Pradesh Power Corporation Limited Personnel (Discipline and Appeal) Regulations, 2020. Held, the office memo dated 08.08.2018, delegating disciplinary powers to the Managing Director of the Distribution Corporation, remained valid under Regulation 16(2)(a) of the 2020 Regulations, as it was not cancelled or revoked. The plea of lack of jurisdiction was rejected.

B. Service Law – Disciplinary Proceedings – Conduct of Inquiry – Requirement of

Oral Evidence: The petitioner alleged that the inquiry was flawed as no oral evidence was led by the establishment to prove the charge of negligence in preventing electricity theft. The Inquiry Committee relied solely on the charge-sheet, the petitioner's reply, and a brief hearing without examining witnesses. Held, in disciplinary proceedings involving a major penalty, the establishment must prove charges by leading both documentary and oral evidence, irrespective of the employee's participation. The inquiry report, lacking evidence or reasoned findings, was manifestly illegal. The impugned order and inquiry report were quashed for non-compliance with principles of natural justice and established judicial precedents.

C. Service Law – Disciplinary Proceedings – Consequences of Illegal Inquiry:

The Court quashed the impugned order dated 22.06.2023 and directed the respondents to reinstate the petitioner as an Assistant Engineer with emoluments from the date of judgment. The respondents were granted liberty to proceed afresh from the stage of the charge-sheet, strictly in accordance with law. The petitioner's entitlement to emoluments for the period between the impugned order and the judgment was to be determined based on any fresh proceedings, if initiated.

Case Law Discussed:

1. Roop Singh Negi Vs Punjab National Bank, (2009) 2 SCC 570
2. St. of U.P. Vs Saroj Kumar Sinha, (2010) 2 SCC 772
3. Kaptan Singh Vs St. of U.P., (1994) SCC Online All 300
4. Ranveer Singh Vs U.O.I., unreported
5. Prem Narain Singh Vs St. of U.P., unreported

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

This writ petition is directed against the order dated 22.06.2023 passed by the Managing Director, Purvanchal Vidyut Vitran Nigam Limited, Varanasi, reducing the petitioner in rank to the post of a Junior Engineer from an Assistant Engineer, as a measure of penalty, after holding disciplinary proceedings.

2. The facts giving rise to this petition are that the Uttar Pradesh Power Corporation Limited¹ is a government company under the administrative and financial control of the State Government. The Purvanchal Vidyut Vitran Nigam Limited² is a subsidiary company of the Power Corporation incorporated to discharge the functions of electricity supply and distribution to consumers. The petitioner was appointed as a Junior Engineer (Electrical) vide appointment order dated 05.11.2007 in the employ of the Power Corporation. He has rendered continuous service since then. The petitioner was promoted to the post of an Assistant Engineer vide order dated 16.02.2018. During the period of his service, the petitioner has been posted at different stations and was last posted from 07.12.2021 at the Electricity Distribution

Sub-Division-I, Phulpur, Azamgarh, falling under Electricity Distribution Division-IV, Azamgarh. According to the petitioner, he was posted from March, 2018 to December, 2021 at the Electricity Distribution Sub-Division-I, Atraulia, Azamgarh. While posted there, the petitioner received confidential information on 18.02.2020 and 19.02.2020 on the basis of a reconnaissance done on the premises of a certain M/s. S. Milan Agro Industries, Village Saraiya Nebuadeeh, Post Usraith, Police Station Atraulia, District Azamgarh to the effect that an electricity transformer was found near the rice mill aforesaid, leading to a strong suspicion of electricity theft. On the basis of information aforesaid, that was conveyed to the higher authorities, an enforcement team was constituted by the Chief Engineer, Azamgarh, with the petitioner as a member of the team, to conduct an enforcement raid on the premises of M/s. S. Milan Agro Industries. In the night intervening 19/20.02.2020, the premises of the rice mill was raided, leading to detection of theft of electricity. A checking report No. 139 dated 19/20.02.2020 was drawn up.

3. In consequence of the above raid, two first information reports were lodged at Police Station - Anti Power Theft, Azamgarh, to wit, Crime No. 294 of 2020 under Section 135 of the Electricity Act, 2003 lodged by the petitioner on 20.02.2020 and Crime No. 562 of 2020, under Section 136 of the Act last mentioned, lodged on 21.03.2020.

4. A provisional assessment order was passed by the Executive Engineer, Electricity Distribution Division-VI on 20.02.2020, levying a penalty of ₹2,33,65,028/- against one Sanjay Rai alias Guddu. After issue of the provisional

assessment order, the Executive Engineer, by a letter dated 18.01.2021, made certain inquiries from the petitioner and the Secretary, Krishi Utpadan Mandi Samiti. The petitioner submitted a reply dated 19.01.2021.

5. The provisional assessment order was challenged by the consumer before this Court, where directions were issued, in consequence of which, the District Magistrate, Azamgarh, vide memorandum dated 22.08.2022, returned the recovery certificate unrealized. Subsequently, a fresh recovery certificate was issued against the partners of M/s. S. Milan Agro Industries, to wit, Smt. Madhuri Rai and Smt. Kanchan Rai dated 08.06.2023, directing recovery of a sum of ₹80,21,904/-.

6. On the basis of these facts, disciplinary proceedings were instituted against the petitioner and a charge-sheet dated 27.04.2020 issued against him, carrying a charge to the effect that the petitioner did not make requisite inspection or take timely steps for removing the 400 KVA transformer, on account of which, theft of electricity took place. The petitioner submitted a reply to the charge-sheet dated 03.09.2020.

7. Post submission of the charge-sheet, it is the petitioner's case that no steps were taken in the inquiry. After the lapse of more than a year, a notice dated 13.12.2021 was issued to the petitioner by the Chief Engineer (Distribution)/Convener, Temporary Enquiry Committee-VI, requiring the petitioner to be present in his office on 04.01.2022 for a personal hearing. In compliance, the petitioner appeared before the said Inquiry Committee on 04.01.2022, and reiterated the stand in his reply to the charge-sheet. It is the

petitioner's case that the Inquiry Committee held no inquiry, in the sense that no evidence of any kind was led during the course of proceedings. No testimony or evidence was recorded for proving any of the documents relied upon by the establishment. The further case of the petitioner is that without conducting any inquiry, the Committee proceeded to submit a report dated 27/28.01.2022, holding the petitioner guilty of negligence in discharging his supervisory duties. A copy of the inquiry report was made available to the petitioner along with a show-cause notice dated 22.07.2022 issued by the Director (Personnel Management and Distribution) of the Distribution Corporation. The petitioner was required to file objections to the inquiry report within a period of 15 days. The petitioner submitted his objections before the Director (Personnel Management and Distribution) of the Distribution Corporation in the month of July, 2022. The Managing Director, Distribution Corporation, passed the impugned order dated 22.06.2023, imposing the penalty of reduction in rank.

8. Aggrieved, the petitioner has instituted this writ petition under Article 226 of the Constitution.

9. It is the petitioner's case that he is an employee of the Power Corporation, and the Managing Director of the said Corporation is the appointing authority. The power exercisable by the Managing Director, Power Corporation to inflict a major penalty has not been delegated to the Managing Director of the Distribution Corporation. There is no decision of the Board of Directors of the Power Corporation resolving to delegate the said powers to the Director of the Distribution Corporation or even an order of delegation

passed by the Managing Director of the Power Corporation, delegating that authority. It is also pleaded that under the Rules that make for the service conditions, the appointing authority functions as the disciplinary authority. The petitioner says that he has not been appointed by the Managing Director of the Distribution Corporation, and, consequently, the said officer had no jurisdiction to pass the impugned order. It is also the petitioner's case that departmental proceedings can be initiated on the basis of a departmental charge-sheet issued or approved by the competent authority. Here, the charge-sheet has been issued by the Managing Director of the Distribution Corporation, who is not the petitioner's appointing authority. The proceedings, therefore, taken on the basis of a charge-sheet issued without jurisdiction are all ultra vires.

10. It is next pleaded that no major penalty can be inflicted without holding an oral inquiry, fixing a date, time and place for the purpose. It is averred in paragraph No. 41 that the Inquiry Committee did not record any oral evidence. No evidence was led by the employers to establish the charges against the petitioner. It is specifically urged that the inquiry report does not conform to the requirements of a valid report.

11. In the counter affidavit, in answer to the plea that the Managing Director of the Distribution Corporation is not the petitioner's appointing authority and a fortiori the disciplinary authority, in the absence of delegation of power by the Power Corporation, it is averred in paragraph No. 11 of the counter affidavit that vide an office memo dated 08.08.2018 issued pursuant to the resolution of the Board of Directors of the Power

Corporation, disciplinary and administrative powers vested in the Power Corporation stand delegated to the Managing Director of the Distribution Corporation, except the power to impose the penalty of dismissal. A copy of the memo dated 08.08.2018 issued by order of the Board of Directors of the Power Corporation is annexed as Annexure C.A.-1 to the counter affidavit.

12. In answer to the plea that before the Inquiry Committee, the establishment did not examine any witness or recorded oral testimony fixing a date, time and place for the inquiry, though imperative in the case of imposition of a major penalty, it is pleaded in paragraph No. 13 of the counter affidavit, after entering a plea of denial to the averments in paragraph Nos. 38 and 41 of the writ petition, amongst others, that an opportunity for oral inquiry has been provided vide order dated 30.12.2021 in response where to, the petitioner appeared before the Inquiry Committee on 04.01.2022 and participated in the oral inquiry.

13. In the rejoinder affidavit, it is stated that in view of the Uttar Pradesh Power Corporation Limited Personnel (Discipline and Appeal) Regulations, 2020³ being there to govern the service conditions of the petitioner, the office order dated 08.08.2018, that was issued at a time when the Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999⁴ applied to the Power Corporation, stands nullified. It is also averred that there does not exist any order of delegation in exercise of powers under the Rules of 2020, delegating the disciplinary jurisdiction of the Power Corporation to the Managing Director of the Distribution Corporation. The order dated 08.08.2018 is of no effect

and cannot be relied upon to support the impugned order.

14. Heard Mr. Siddharth Khare, learned Counsel for the petitioner, Mr. Adarsh Bhushan, learned Counsel appearing on behalf of respondent Nos. 3, 4, 5 and 6, Mr. Ujjawal Srivastava, Advocate holding brief of Mr. Abhishek Srivastava, learned Counsel for respondent No. 2 and Mr. Yashwant Singh, learned Standing Counsel appearing on behalf of respondent No. 1.

15. It is submitted by Mr. Siddharth Khare, learned Counsel for the petitioner that the impugned order is without jurisdiction, because the office memo dated 08.08.2018, by which, the disciplinary jurisdiction otherwise vesting in the Managing Director of the Power Corporation was delegated to the Managing Director of the Distribution Corporation, stands nullified, in view of the supervening enforcement of the Rules of 2020. He next submits that the penalty imposed in this case being one of reversion, is a major penalty. The principle is salutary, according to Mr. Khare, that in any disciplinary proceedings, where the charges are such that a major penalty may be imposed, it is imperative for the establishment to examine witnesses in support of the charges. The Inquiry Officer has to conduct formal proceedings, where the establishment have to discharge their burden by leading oral and documentary evidence. It is thereafter that the burden shifts upon the delinquent/employee. In this case, it is emphasized that the Inquiry Committee did not undertake any inquiry. They perused the papers and heard the petitioner; nothing else.

16. Learned Counsel appearing for the respondents have supported the impugned order and say that there is no issue of jurisdiction involved as the Regulations of 2020, on their own terms, would show. About the necessity to hold an oral inquiry, it is said that the petitioner was given an opportunity to appear before the Inquiry Committee and was heard by them, which constitutes compliance with the requirement to hold an oral inquiry. There is no need to examine witnesses in support of the charge.

17. This Court has carefully heard the submissions advanced by learned Counsel for parties and perused the record.

18. So far as the question of jurisdiction is concerned, it is evident, from a perusal of the office memo dated 08.08.2018, that the powers of the Power Corporation to take disciplinary action against their officers employed with a Distribution Corporation, including the imposition of penalties, have been delegated to the Managing Directors of the respective Distribution Corporations, except the power to dismiss from service. It is also true that the order dated 08.08.2018, which, in fact, is a formal order giving effect to the resolution of the Board of Directors of the Power Corporation, was issued at a time before the enforcement of the Regulations of 2020. Regulation 6 provides that the appointing authority shall be the disciplinary authority in case of a person whose service conditions are governed by the Regulations of 2020, and further that it is such authority which can impose any of the penalties envisaged under Regulation 3.

19. The second proviso envisages a delegation by the appointing authority of

powers to impose penalties, other than the power to dismiss from service. Now, certainly, the Regulations of 2020 introduce a new regime governing conditions of service and the Regulations being statutory in character, that is to say, being regulations framed in exercise of powers under the Companies Act, 2013 and Articles 47 and 48 of the Power Corporation's memorandum of association, would, in usual course, efface the office memo dated 08.08.2018 delegating powers by the Power Corporation to take disciplinary action upon the Managing Director of the Distribution Corporation. But, a perusal of the 'Rescission and Savings' clause under the Regulations of 2020 shows that vide Regulation 16(2)(a), it is provided that any order under the Rules of 1999, delegating powers by an authority to impose any of the penalties envisaged under Regulation 3 or to suspend from service, would be deemed to have been issued under the Regulation of 2020, and such order issued under the Rules of 1999 would remain in force, until cancelled or revoked. There is no material placed on record by the petitioner to show that the office memorandum dated 08.08.2018, delegating powers of the Power Corporation to exercise disciplinary authority and impose all punishments upon its employees serving with the Distribution Corporations, upon the Managing Directors of the Distribution Corporations, has been cancelled or revoked by an order subsequent to the enforcement of the Regulations of 2020.

20. In the opinion of this Court, therefore, the office memo dated 08.08.2018 continues to remain in force and invests the Managing Director of the Power Corporation with jurisdiction to pass the impugned order, the introduction of the Regulations of 2020, notwithstanding. The

contention of the learned Counsel for the petitioner, therefore, that the impugned order has been passed without jurisdiction, cannot be accepted.

21. Now, considering the other submission that proceedings before the Inquiry Committee fall foul of the fundamental principle regarding holding of disciplinary proceedings, inasmuch as no witness was examined by the establishment in support of the charge, this Court must remark that the contention appears to be well-founded.

22. We have carefully perused the inquiry report dated 28.01.2022, which can be divided into three parts. In the first part, the background of the charge laid against the petitioner, the charge itself, the manner of submission of the charge-sheet and the fact of a reply to it being submitted, have been enumerated. In the second part, the petitioner's reply has been set out verbatim. In addition, it is recorded by the Inquiry Committee that vide their memorandum dated 30.12.2011, the petitioner was given an oral hearing on 04.01.2022 in the Office of the Chief Engineer/Convener, Temporary Enquiry Committee-VIII. In compliance with the aforesaid opportunity, the petitioner appeared on 04.01.2022 before the Committee, where he disclosed his defence to the Committee. He presented an affidavit to the Committee, saying that he had been given ample opportunity to defend, and apart from his written statement, he did not want to examine/cross-examine witnesses.

23. In the third part, which is the concluding part of inquiry report, there is manifest a sudden arrival at their conclusions by the Inquiry Committee, indeed very cryptically. There is nothing

indicated by the Inquiry Committee to show what evidence they have considered and by what process of reasoning they have arrived at those conclusions. This Court is of opinion that the laconic approach of the Inquiry Committee in arriving at their conclusions can be best understood by quoting the third or the concluding paragraph of the inquiry report, which reads :

अस्थायी जाँच समिति-षष्ठम् का अभिमत

उपरोक्त प्रकरण पर अस्थायी जाँच समिति-षष्ठम् द्वारा परीक्षण एवं व्यक्तिगत सुनवाई के उपरान्त अभिमत निम्नलिखित है :-

1. आरोपी उपखण्ड अधिकारी द्वारा अपने बचाव में यह कहा गया कि उनके पास 05 उपकेंद्र हैं, जिनपर कुल 21 पोषक (लगभग 524 सर्किट किलोमीटर) एवं लगभग 1300 परिवर्तक स्थापित हैं।

2. आरोपी उपखण्ड अधिकारी द्वारा अपने बचाव में यह कहा गया कि वहाँ स्थापित 400 के0वी0ए0 के परिवर्तक (जिसके द्वारा चोरी की जा रही थी) की कोई सूचना न तो किसी अवर अभियन्ता द्वारा और न ही वहाँ नियोजित संविदाकर्मियों द्वारा दी गयी।

3. आरोपी उपखण्ड अधिकारी द्वारा अपने बचाव में यह कहा गया कि वह स्वयं इस रेड टीम में शामिल थे तथा चोरी की इस घटना में दर्ज की गयी प्राथमिकी के वादी हैं।

आरोपी उपखण्ड अधिकारी के उपरोक्त कथन उनके विरुद्ध लगाये गये विभागीय पर्यवेक्षण में लापरवाही, शिथिलता एवं उदासीनता के आरोप से उन्हें मुक्त नहीं करता।

अतः अस्थायी जाँच समिति-षष्ठम् इस प्रकरण पर आरोपित श्री विनोद कुमार, उपखण्ड अधिकारी (2017465) उपखण्ड अधिकारी— अतरौलिया अन्तर्गत विद्युत वितरण खण्ड-षष्ठम्, आजमगढ़ को उनके क्षेत्रान्तर्गत मध्यम क्षमता के वितरण परिवर्तकों का अनुश्रवण समुचित रूप से न करने एवं विभागीय पर्यवेक्षण में लापरवाही, शिथिलता एवं उदासीनता बरतने के दृष्टिगत दोषी पाती है।

उपरोक्त प्रकरण पर अस्थायी जाँच समिति-षष्ठम् द्वारा कृत कार्यवाही की जाँच आख्या सादर प्रेषित ।

24. The findings recorded by the Inquiry Committee, to say the least, are

outrageous. In the conclusion, after noticing the three points of defence raised by the petitioner to the charge of being remiss and negligent in the discharge of his duties, all that the Inquiry Committee say is that the charged Sub-Divisional Officer's aforesaid statement (to be understood as points of defence) cannot serve to exonerate the petitioner of the charge of being negligent and remiss in the discharge of his duties. Thereafter, it is formally held that the Temporary Inquiry Committee-VIII finds the charged officer, Vinod Kumar, Sub-Divisional Officer, Atraulia guilty in not appropriately monitoring the medium capacity transformers in his circle, leading to the charge of being negligent and remiss in the discharge of his duties proved. There is not a word said by way of reason or reference to any evidence recorded by the Inquiry Committee. The Inquiry Committee's findings are, therefore, no more than an ipse dixit of the two members constituting it. Even if the issue of the establishment not examining any witness in support of the charge is kept aside for a moment, an inquiry report of this kind, which is the foundation of order of reversion ultimately made, cannot be sustained as also the order founded upon it.

25. A perusal of the impugned order dated 22.06.2023 passed by the Managing Director of the Corporation betrays the same mechanical approach that the Inquiry Officer's report shows. In the first paragraph, there is a narration of facts leading to the charge being laid against the petitioner, the particulars how the charge-sheet was served, and when and how the reply was submitted.

26. In the next part, there is a detailed reference to the petitioner's reply, setting it out verbatim, which is nothing more than a

reproduction of the contents of the petitioner's reply.

27. The conclusions of the Inquiry Committee have been reproduced in the third part. There is then a reference how the proceedings went beyond receipt of the inquiry report, asking the petitioner to show cause through objection to the Inquiry Report, which, again, have all been reproduced verbatim.

28. In the fourth part, there is a reference to the opinion of the office submitted in the matter, where issues relating to recovery and the legal opinion received by the Corporation from their learned Counsel, have all been reproduced, also *verbatim*.

29. In the concluding part, there is just a reference to the circumstance that theft of electricity was detected, leading to a loss of revenue, but, for what period of time it was committed, is not known. After the said remark, the petitioner was held responsible for negligence in the performance of his duties and the charge of being negligent and remiss in that regard, held proved. Nothing more, in substance, has been said.

30. There is no evidence considered as such that may show that the petitioner was, indeed, negligent. For a fact, there is no consideration of evidence to the effect that there was occasion for the petitioner to have discovered the existence of the transformer, employing which, the theft was committed, which he did not do. *Prima facie*, the petitioner, as soon as he received information, reported the matter to the higher authorities, organized a raid, held the offender and abated the theft. This Court does not mean to say, in the least,

either that the charge against the petitioner is not well-founded, or that it is established. This is so because for one, there is hardly any evidence offered by the establishment to support the charge, and, for a second, there is no consideration of evidence, direct or circumstantial, to establish it.

31. In the considered opinion of the Court, the Inquiry Report as well as the impugned order are manifestly illegal in the sense that these do not proceed to hold the petitioner guilty on any evidence or material worth the name.

32. The other part of the submission, which Mr. Siddharth Khare canvasses, is, in fact that, that has given rise to the infirmity hereinabove noticed. It is, indeed, a salutary principle of law that in the case of charges in a domestic inquiry that are serious enough to merit the imposition of a major penalty, if proved, the establishment/employer must prove by leading evidence in support, both documentary and oral. The inquiry has to be a formal affair, with the Inquiry Officer or the Committee sitting as impartial arbiters, and not as representatives of the department. The establishment or the department must be represented by a Presenting Officer, who ought to present evidence on behalf of the establishment to prove the charges, including oral evidence by examining witnesses. This burden has to be discharged by the establishment/employers irrespective of the fact whether the employee stays ex-parte or he appears and does not elect to lead evidence in his defence, or even, cross-examine witnesses that the establishment would examine. Merely because an employee does not choose to lead evidence in support of his case or cross-examine the establishment's witnesses, does not absolve

the establishment of their burden to prove the charges by leading evidence, again, both documentary and oral.

33. Here, the respondents have thought that since the petitioner has taken a stand that he does not wish to produce evidence in his defence, examine or cross-examine witnesses, the Inquiry Committee and on that basis, the disciplinary authority could proceed to hold the charge proved merely by looking into the charge-sheet and the petitioner's reply, besides a few circumstances, sans any evidence offered by the establishment. This approach, this Court must say, is utterly flawed. The findings of the Inquiry Committee hardly qualify for a valid inquiry report regarding a charge, on the basis of which, a major penalty can be imposed. Reference in this regard may be made to the decision of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others**⁵ where it was held :

14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

34. In **State of U.P. and others v. Saroj Kumar Sinha**⁶ it was, again, held by the Supreme Court :

27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry *ex parte*. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

35. The issue about the necessity for the employer to discharge their burden before the Inquiry Officer by leading documentary as well as oral evidence arose for consideration before a Division Bench of this Court in **Kaptan Singh v. State of U.P.**⁷. In **Kaptan Singh** (*supra*) it was held :

9. We are unable to accept the contention of the learned Additional Chief Standing Counsel. Even if the delinquent employee does not request for personal hearing the burden of proving the charges normally being upon the department, the enquiry officer was under obligation to fix a date for such enquiry, with information to the delinquent and to conduct enquiry wherein he was required to examine documentary as well as oral evidence, if any, in support of the charges. Even if the delinquent employee did not participate in the enquiry, the enquiry officer was duty bound to discharge his obligation as an enquiry officer of ascertaining the truth in respect of the charges levelled against him, on the basis of evidence, as to whether the same are proved against him or not.

10. Even if the delinquent does not demand personal hearing or does not give the names of witnesses with brief synopsis of points on which he wishes to examine or cross-examine the witnesses, the Inquiry Officer is not absolved from fixing a date of enquiry, with intimation to the delinquent and if he does not appear on the date fixed to either adjourn the enquiry to some other date or to proceed *ex parte*, as he deems fit. In either eventuality, he is required to hold inquiry, if delinquent is present, in his presence, if he is absent, *ex parte*. If oral evidence is referred in the charge-sheet, same is required to be recorded/examined, if not, even then the documentary evidence is required to be examined in the light of

the charges for ascertaining the truth in respect thereof. The delinquent is also entitled to be intimated the date for oral enquiry, wherein the Inquiry Officer should confront the delinquent with the charges and the evidence in support thereof, put relevant queries to him, elicit and record his replies/response in respect thereof. Such oral enquiry is necessary as it gives an opportunity, to the delinquent to explain his conduct and to the Inquiry Officer to have a better perspective of the controversy, as, it is not always possible to discern the truth from written replies and documents which may not necessarily convey the complete truth. Even where the delinquent does not dispute the veracity of the documentary evidence, oral enquiry is necessary as he may still have an explanation to offer.

11.

12.

13. The reference to "documentary evidence" in Rule 7(iii) and (v) clearly indicates that the same have to be examined, as aforesaid, on the date to be fixed for enquiry, whether in the presence of the delinquent or in absentia (ex parte). This requirement though not express is implicit in the aforesaid rules, as is the requirement of holding an oral enquiry, as it is a sine qua non for providing reasonable opportunity to defend and is part of the principles of natural justice under Article 311 and 14 of the Constitution. Reference may be made in this regard to the judgments of the Apex Court in *State of Uttar Pradesh and others v. Saroj Kumar Sinha*, (2010) 2 SCC 772, *Roop Singh Negi v. Punjab National Bank*, (2009) 2 SCC 570, *State of U.P. v. T.P. Lal Srivastava*, (1996) 10 SCC 702, and *The Imperial Tobacco Company of India Ltd. v. Its Workmen*, AIR 1962 SC 1348, and the judgments of this Court in *R.K. Singh v. Director/Appointing Authority, Govind*

Ballabh Pant Social Science Institute, Jhansi, Allahabad and another, (2001) 2 UPLBEC 1282 and *Subhash Chandra Sharma v. U.P. Co-operative Spinning Mills and others*, (2001) 2 UPLBEC 1475. The aforesaid requirement of law has not been followed in the instant case.

36. I had occasion to consider the question in ***Ranveer Singh v. Union of India and others***⁸ and ***Prem Narain Singh v. State of U.P. another***⁹ where the same principle was followed to hold that it is imperative for the establishment to lead evidence, particularly oral evidence, to prove the charges before the Inquiry Officer in a case where the charge is likely to lead to the imposition of a major penalty. The employer or the establishment cannot capitalize upon the employee's failure to examine evidence in his defence or presume the charge proved by its own terms, and by reference to a few circumstances here and there.

37. This Court, therefore, is of opinion that the impugned order and the inquiry report are manifestly illegal and deserve to be quashed. Of course, the respondents would have opportunity to proceed afresh in the matter from the stage of charge-sheet, in accordance with law.

38. In the result, this writ petition **succeeds** and shall stand **allowed**. The impugned order dated 22.06.2023 passed by the Managing Director, Purvanchal Vidyut Vitran Nigam Limited, Varanasi is hereby quashed. A mandamus is issued to the respondents to permit the petitioner to continue on his post as an Assistant Engineer and pay him emoluments attached to the said post from the date of this judgment. It shall, however, be open to the respondents to proceed afresh against the

petitioner from the stage of the charge-sheet, strictly in accordance with law and the guidance in this judgment. It shall also be open to the respondents to pass fresh orders, again in accordance with law. The entitlement of the petitioner to receive his emoluments attached to the post of an Assistant Engineer for the period between the date of the impugned order and this judgment shall be decided, subject to event in proceedings, if elected to be taken afresh. In the event, the respondents do not propose to take fresh proceedings, the petitioner would be entitled to all his emoluments attached to the post of Assistant Engineer between the date of the order impugned and this judgment.

40. There shall be no order as to costs.

(2023) 11 ILRA 589
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2023

BEFORE

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

Writ-A No. 10601 of 2023

Dinesh Chand Sharma **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Sujeet Kumar Rai, Sri Anil Kumar Rai

Counsel for the Respondents:
 C.S.C., Sri Brij Raj Verma, Sri Rajesh Kumar Tiwari

Service Law – Disciplinary Proceedings – Natural Justice – Dismissal Order – U.P. Primary Agricultural Cooperative Credit Societies Regulations, 2020 – Requirement of Fair Enquiry – Burden of Proof on Employer – Ex Parte Proceedings

The petitioner, a peon promoted to accountant in Kisan Sewa Sahkari Samiti Ltd., challenged his dismissal from service vide order dated 18.05.2023, issued by the Committee of Management, alleging violation of natural justice and procedural irregularities. The petitioner was dismissed following disciplinary proceedings initiated on charges including unauthorized sale of manure and eucalyptus trees. The dismissal order was preceded by an earlier dismissal (31.12.2022), which was set aside by the Appellate Authority on 13.03.2023 for non-compliance with natural justice, directing fresh proceedings. The petitioner contended that no proper enquiry was conducted, no date, time, or place for enquiry was fixed, no enquiry report was prepared, and no show cause notice was issued before the impugned dismissal. The respondents failed to deny these averments or produce an enquiry report. The Court found that the disciplinary proceedings lacked a fair procedure, as no oral or documentary evidence was formally led to prove the charges, even assuming the petitioner's ex parte absence. Relying on *Roop Singh Negi Vs Punjab National Bank* (2009) 2 SCC 570, *St. of Uttar Pradesh Vs Saroj Kumar Sinha* (2010) 2 SCC 772, and *Smt. Karuna Jaiswal Vs St. of U.P.* 2018 (9) ADJ 107 (DB), the Court held that the employer must prove charges through evidence in a quasi-judicial enquiry, regardless of the delinquent's participation. The dismissal order was quashed for violating principles of natural justice. The petitioner was ordered to be reinstatement with salary from the date of judgment, with liberty to the respondents to proceed afresh from the charge-sheet stage in accordance with law. Back wages were made subject to the outcome of any fresh proceedings or, in their absence, limited to 50% with continuity of service and seniority.

Held: The impugned dismissal order dated 18.05.2023 is quashed for failure to adhere to principles of natural justice and fair procedure in disciplinary proceedings. The respondents are directed to reinSt. the petitioner forthwith and pay his salary from the date of judgment. The respondents may proceed afresh from the charge-sheet stage, strictly in accordance with law. Back wages to be determined based on the outcome of fresh proceedings, if initiated, or limited to 50% with continuity of service and

seniority if no further action is taken. (Paras 23-33)

Case Law Discussed:

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

2. St. of Uttar Pradesh Vs Saroj Kumar Sinha (2010) 2 SCC 772

3. Smt. Karuna Jaiswal Vs St. of U.P. 2018 (9) ADJ 107 (DB)

4. Harish Kumar Sharma Vs St. of U.P. Writ-A No. 13425 of 2022 (Allahabad High Court, decided on 07.09.2022)

5. Yadram Vs St. of U.P. Writ-A No. 20683 of 2022 (Allahabad High Court, decided on 12.12.2022)

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

1. This writ petition is directed against the order dated 18.05.2023, notifying a decision of the Board of Directors/ Committee of Management, Kisan Sewa Sahkari Samiti Ltd., Chaudhera, Block Pahasu, District Bulandshahr, signed by the Chairman and the Secretary of the said society, resolving to dismiss the petitioner from service.

2. The Kisan Sewa Sahkari Samiti Ltd., Chaudhera, Block Pahasu, District Bulandshahr (for short, 'the Society') is a registered Primary Agricultural Cooperative Society, registered under the U.P. Cooperative Societies Act, 1965 (for short, 'the Act of 1965'). The service conditions of employees of Primary Agricultural Cooperative Credit Societies are governed by regulations, known as U.P. Primary Agricultural Cooperative Credit Societies Regulations, 2020, notified on 31.07.2020. These shall hereinafter be called, 'the Regulations of 2020'.

3. The petitioner was a peon in the employ of the Society. According to a resolution of the Board of Directors of the Society, adopted in their meeting dated 22.10.2022, he was promoted to the post of an accountant. The petitioner thinks that he became the victim of a dispute between a Cadre Secretary, Yadram and another Banwari Lal Sharma, who was given additional charge of the Society vide order dated 22.11.2022 passed by the Member Secretary, District Administrative Committee Cooperatives, Bulandshahr.

4. Yadram, the Cadre Secretary instituted Writ-A No. 20683 of 2022, questioning the additional charge of Secretary of the Society being given to Banwari Lal Sharma. The writ petition aforesaid was disposed of, substantially allowed, vide order dated 12.12.2022, in terms of the following orders:

“It has been submitted that Sri Banwari Lal Sharma belongs to the same Block i.e. Development Block Pahasu and this Court in its judgment and order dated 07.09.2022 passed in Writ A No.13425 of 2022 (Harish Kumar Sharma Vs. State of U.P. and 3 others) placing reliance upon the Chapter VII Regulation 36(c) of the Uttar Pradesh Primary Agricultural Cooperative Credit Societies Centralized Service Rules, 1978, had observed that no member shall be posted in the Society of the block where he permanently resides. It has been submitted that the order dated 22.11.2022 has been passed without noticing the aforesaid judgment.

Sri M.N. Mishra, learned counsel, on the basis of the instructions, says that Banwari Lal Sharma has only been given additional charge. He has not been made Cadre Secretary of the Society of the Block of which he is original resident.

This Court is of the opinion that additional charge also cannot be given to Banwari Lal Sharma. The order dated 22.11.2022 is quashed with liberty to the respondent no.3 to pass a fresh order within a period of three weeks from today.

In the meantime, the petitioner has already been suspended by order dated 02.12.2022, he shall not be allowed to function but some other regularly appointed Cadre Secretary shall be given charge of the Society in question.”

5. The petitioner thinks that Banwari Lal Sharma came to believe that Yadram, the Cadre Secretary, who instituted Writ-A No. 20683 of 2022 against the additional charge of the Society that Banwari Lal Sharma held, was set up by the petitioner. The petitioner says that on this account Banwari Lal Sharma, who is till date discharging duties of the Secretary in additional charge of the Society, got disciplinary proceedings instituted against the petitioner mala fide, and had him placed under suspension pending enquiry vide order dated 09.12.2022. A chargesheet dated 12.12.2022 was issued to the petitioner carrying five charges, to which the petitioner filed a reply, which is on record as Annexure No.6 to the writ petition.

6. It is the petitioner's case that after submission of his reply to the chargesheet, no proceedings were taken. It is averred in paragraph No.13 that it is incorrectly mentioned that vide an order dated 21.12.2022, a last opportunity was given to the petitioner to give a reply together with evidence. Rather, it is asserted in paragraph No.13 of the writ petition that after the submission of his reply to the chargesheet, the petitioner was dismissed from service vide order dated 31.12.2022.

7. The petitioner challenged the said order dated 31.12.2022 by taking resort to the remedy of a departmental appeal under Regulation 18 of the Regulations of 2020. The Appellate Authority, vide order dated 13.03.2023, set aside the order of dismissal from service, passed against the petitioner by the Committee of Management of the Society. The Committee of Management were directed to pass fresh orders in accordance with law, after giving opportunity to the petitioner and adhering to the rules of natural justice.

8. It is the petitioner's case that on 16.03.2023, he submitted his joining report, which was acknowledged by the Society. On 20.03.2023, the petitioner moved an application before the Assistant Commissioner/ Assistant Registrar, Cooperatives, Bulandshahr, requesting that the petitioner's salary held up since November, 2022 may be directed to be paid. The Assistant Commissioner/ Assistant Registrar aforesaid by an order dated 24th March, 2023 directed the Committee of Management to ensure payment of the petitioner's salary. The petitioner asserts that despite acknowledging the petitioner's joining report, nothing was done to meaningfully accept the petitioner back in employment pursuant to the appellate order. Therefore, the petitioner instituted Writ-A No. 7033 of 2023, seeking the following material relief:

“i) issue a writ, order or direction in the nature of mandamus, directing respondents no.3 and 4 to reinstate petitioner in service and pay his salary;”

9. Instead of reinstating the petitioner or paying him his emoluments, the petitioner was served with a notice dated 19.04.2023 jointly issued by the Sabhapati

and the Secretary of the Society and another dated 25.04.2023, both requiring the petitioner to appear and produce evidence in his defence. An order of dismissal was passed against the petitioner again on 18.05.2023 by the Committee of Management of the Society, that has been notified by the Sabhapati and the Secretary by the order impugned dated 18.05.2023.

10. The petitioner has averred in paragraph No.23 that a copy of the dismissal order was never served upon him, but during the hearing of Writ-A No. 7033 of 2023, a copy of the said order was produced before this Court. It was then that the petitioner came to know about an order of dismissal being passed against him again. This Court, therefore, dismissed Writ-A No.7033 of 2023 as infructuous, vide order dated 29.05.2023. A copy of the said order was directed to be supplied to the petitioner by this Court.

11. In paragraph Nos. 29, 30 and 31 of the writ petition, it is averred that no date, time and place of enquiry was fixed before proceeding in the matter. It is further averred that neither any enquiry has been conducted nor an enquiry report drawn up and supplied to the petitioner, despite clear directions in that regard by the Appellate Authority, setting aside the dismissal order on the earlier occasion. It is averred in paragraph No. 31 that no show cause notice was issued to the petitioner before the imposition of the major penalty of dismissal.

12. In the counter affidavit dated 23.08.2023 filed on behalf of the respondents, which is an affidavit filed by Banwari Lal Sharma, the In-charge Secretary of the Society, it is averred in paragraph No.22 of the counter affidavit,

while answering paragraph Nos.28, 29 and 30 of the writ petition, thus:

“22. That the contents of paragraphs no.28,29,30 of the writ petition are not admitted and in reply it is stated that all the proceedings initiated against the petitioner in accordance with law after due procedure.”

13. A counter affidavit has been separately filed on behalf of respondent No.3, the Assistant Commissioner/ Assistant Registrar, Cooperatives, Bulandshahr. In paragraph No. 25 of the counter affidavit filed by respondent No.3, the averments in paragraph Nos.29, 30 and 31 of the writ petition have been answered by saying that these need no comments.

14. A personal affidavit of respondent No.3 was also invited because of certain allegations regarding permitting Banwari Lal Sharma to function as the In-charge Secretary of the Society, despite his appointment being quashed by this Court. The said affidavit is confined to the issue aforesaid and allusion would be made to that part of the controversy to the extent necessary.

15. Two rejoinder affidavits have been filed by the petitioner in answer to the counter affidavit on behalf of respondent No.6, Banwari Lal Sharma dated 28.03.2023. Another rejoinder affidavit has been filed in answer to the counter affidavit and personal affidavit filed by respondent No.3.

16. Heard Mr. Anil Kumar Rai, learned Counsel for the petitioner, Mr. Rajesh Kumar Tiwari, learned Counsel appearing on behalf of respondent No. 6 and Ms. Monika Arya, learned Additional

Chief Standing Counsel appearing on behalf of respondent Nos.1, 2 and 3. No one appears on behalf of respondent No.4 and 5.

17. Much has been made on behalf of the petitioner of the issue that respondent No.6, Banwari Lal Sharma, who had been given additional charge of the Society, and upon a challenge about that assignment by the regular Cadre Secretary, Yadram before this Court in Writ-A No.20683 of 2022, was held not entitled to be given additional charge of the Society, but still permitted to continue in that office.

18. The petitioner has raised a grievance about it, because it is the petitioner's case that Banwari Lal Sharma bore a grudge against him, thinking that the petitioner was instrumental in setting up Yadram to question his additional charge of the Society before this Court. The petitioner has urged that a biased Banwari Lal Sharma has sponsored these disciplinary proceedings and even signed the order impugned along with the Sabhapati, acting as the In-charge Secretary of the Society, a position he could not have held after the orders of this Court dated 12.12.2022 passed in Writ-A No.20683 of 2022. The petitioner says that he has been much prejudiced because of Sharma's bias.

19. Banwari Lal Sharma has been impleaded eo nomine and notice was issued to him. He has filed a personal affidavit being a counter affidavit dated 23.08.2023. In paragraph Nos. 9, 10, 11 and 12 of the affidavit filed by Banwari Lal Sharma, it is said that after the orders of this Court, one Ramesh Chandra Sharma was given additional charge of the Society on 02.01.2023. He did not take that additional charge and submitted a memo dated

18.01.2023 to the Assistant Commissioner/ Assistant Registrar, Cooperatives, Bulandshahr, expressing his inability in the matter, on ground that he was a handicapped man, without one of his limbs, and the distance of the Society from his residence was over 30 kilometers. It is then said in the affidavit that on account of Ramesh Chandra Sharma not taking charge of the Society and the Competent Authority not appointing another Secretary, Banwari Lal Sharma continued to work as the In-charge Secretary.

20. The explanation given about permitting Banwari Lal Sharma to continue as the Officiating Secretary of the Society by the Assistant Commissioner/ Assistant Registrar, Cooperatives, Bulandshahr, is more startling than the one offered by Banwari Lal Sharma himself. It is expressed in the following words in paragraph No.5 of his affidavit dated 24.01.2023, which must be quoted for every word of it:

“5. That in compliance of the order dated 12.12.2022 passed by this Hon'ble Court, the District Administrative Committee vide letter dated 02.01.2023 posted Sri Ramesh Chandra Sharma (Cadre Secretary) by giving Additional Charge in place of Sri Banwari Lal Sharma (Cadre Secretary). In pursuance of the order dated 02.01.2023, Sri Ramesh Chandra Sharma joined in the Chaudhera Committee on 14.03.2023.

It is further submitted that by proposal no. 3 of the meeting dated 27.03.2023, the committee of management Chaudhera Committee rejected the contribution of Sri Ramesh Chandra Sharma and by proposal no. 4 of the said meeting again taken a decision to send Sri Banwari Lal Sharma,

Cadre Secretary alongwith the signatory Chairman to the Branch of Bank.

Thereafter, Mr Jagvir Singh, Cadre Secretary, was directed for taking the Addl. Charge in Chaudhera Committee vide office order dated 03.05.2023, but due to the reason that the Committee of Management has not allowed to contribute Sri Jagvir Singh in the Society, by the office letter no. 493 dated 06.06.2023 Sri Raj Mal Singh Cadre Secretary, was directed to have Addl. Charge of the Chaudhera Committee, it is further submitted that Sri Raj Mal Singh Cadre Secretary was also not allowed to contribute by the committee of management of Chaudhera Committee. Thereafter, vide office letter no. 757 dated 28.06.2023 Sri Arvind Kumar, Cadre Secretary was appointed at the original post in the aforesaid society. In pursuance of which Sri Arvind Kumar has given his contribution in the society on 17.07.2023. By the letter dated 28.06.2023 of the Member Secretary, under the forwarding year transfer policy and District Administrative Committee, Sri Banwari Lal Sharma was again transferred and appointed from Home Development Block to another Development Block.

That the deponent called meeting of District Administrative Committee two times for deciding the issue on 17.04.2023 & 09.06.2023 of removal of Banwari Lal Sharma but the decision could not be taken due to the reason that the corum of the committee was not fulfilled.”

21. This Court is opinion that ex facie there was no justification for respondent No.3 to permit Banwari Lal Sharma to function for a single day as the Officiating Secretary after this Court passed order dated 12.12.2022 in Writ-A No.20683 of 2022. The reason, apart from the order

itself, is that this Court acted to prohibit Banwari Lal Sharma holding that additional charge because it was in violation of Regulation 36(c) of the Uttar Pradesh Primary Agricultural Cooperative Credit Societies Centralised Service Rules, 1978, that forbids a member to be posted in a society located in the block, where he permanently resides. Banwari Lal Sharma was held to be a resident of Block Pahasu. It was, therefore, most exceptionable to permit him to continue as the Officiating Secretary of the Society or holding its additional charge in violation of the order of this Court dated 12.12.2022 passed in Writ-A No.20683 of 2022.

22. But, the issue here does not turn much, though it may in the slight, upon Banwari Lal Sharma illegally continuing as the In-charge Secretary of the Society. The reason is that the decision, that was taken in terms of the order impugned to dismiss the petitioner from service, is a decision of the Board of Directors/ Committee of Management of the Society. The Sabhapati and the Secretary of the Society may have participated in some manner in the decision making process, but they have formally notified it. It is not a decision entirely attributable to Banwari Lal Sharma. Rather, it is the decision of a multi-membered body. Therefore, the element of bias, even if present, is minimum and not efficacious enough to influence the result.

23. What this Court, therefore, has to see is if the petitioner was proceeded with in departmental proceedings according to a procedure that is just, fair and reasonable, and further, if it conforms to the fundamentals of the established procedure to hold a valid departmental enquiry.

24. In paragraph Nos.29, 30 and 31 of the writ petition it is averred that no date, time and place of enquiry was fixed and further that no enquiry has been conducted nor an enquiry report drawn up. It is also averred that no show cause notice was issued to the petitioner before the impugned dismissal order was passed. These averments have not been denied in any of the counter affidavits or personal affidavits filed on behalf of respondent No.3 or 6. Rather, these have been admitted. It is also true that in none of the returns filed on behalf of the respondents, is a copy of the enquiry report annexed, on the foot of which the impugned order of dismissal could be based.

25. It is true that notices appear to have been sent to the petitioner to appear before the Committee of Management, which as the Disciplinary Authority could have held the enquiry themselves. If the petitioner did not appear in response to the notice, the enquiry could be held ex parte. During the enquiry to be held either by the Committee of Management of the Society, sitting as the Disciplinary Authority or by a duly appointed Inquiry Officer or Inquiry Committee, the establishment would have to prove the five charges by leading evidence, both documentary and oral. The burden would initially rely upon the establishment to let in some evidence before whoever was inquiring into the charges. It is not that if the petitioner did not appear and submit a reply, the burden to prove the charges that lies on the establishment would stand discharged ipso facto and the charges proved.

26. After all, the law in disciplinary proceedings too is that it is the establishment that has to prove the charges before the Inquiry Officer/ Committee of

Management, or whoever is acting in that capacity through a presenting officer, producing evidence both oral and documentary on behalf of the establishment. After that is done, the delinquent is burdened with a duty to produce evidence in his defence. If the employee/ delinquent is ex parte, still the establishment have to prove the charges by their evidence, may be ex parte.

27. The findings recorded in the impugned order show that the statement of a Chowkidar and an Accountant was considered on the charge if manure was unauthorisedly got taken out by the petitioner and black-marketed. The order does not show at all if this was the statement offered by way of oral evidence before an Inquiry Committee or before the Committee of Management themselves, sitting as an Inquiry Committee. From a tenor of the order, it appears that the Disciplinary Authority relied upon a recorded statement of the Chowkidar and the Accountant, may be during a preliminary enquiry, because there is no reference to oral evidence being recorded, either before the Disciplinary Authority or some other Inquiry Committee or enquiry officer.

28. In regard to the second charge, which is about uauthorised felling of Eucalyptus trees, selling them off and misappropriating the price, all done without sanction of higher Authorities, the statement of a former Secretary, Nahar Singh has been taken into consideration. That statement too says that the petitioner brought pressure upon the Committee of Management to permit the sale after felling the trees, whereas there was no permission by the Committee of Management to sell those trees. It is not at all clear if before a

Committee of Inquiry or the Disciplinary Authority, sitting as a Committee of Inquiry themselves, Nahar Singh was examined as a witness. A reading of the impugned order shows that some statement by Nahar Singh, earlier recorded, was acted upon. Likewise is the position with the other charges.

29. In the absence of a copy of the enquiry report or minutes of the enquiry, if the enquiry was held before the Disciplinary Authority, the Committee of Management themselves, being annexed to the counter affidavit, the inevitable conclusion is that the impugned order of dismissal was passed on the basis of perusal of records without any evidence, documentary and particularly oral, being led on behalf of the establishment. This Court holds so assuming that the petitioner remained *ex parte* and did not appear. Even then, the respondents are not relieved of the burden of holding an enquiry by salutary principles of a fair procedure applicable to domestic inquiries, where a major penalty is imposed. In this connection, reference may be made to the decision of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others**, (2009) 2 SCC 570, where it was held:

“14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to

prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, *inter alia*, was placed by the enquiry officer on the FIR which could not have been treated as evidence.”

30. Likewise is the position of the law enunciated by the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha**, (2010) 2 SCC 772, where it was held:

“27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry *ex parte*. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the un rebutted evidence is sufficient to hold

that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.”

31. A Division Bench of this Court sitting at Lucknow in **Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB) (LB)**, considering the same issue and taking note of the decision of their Lordships in **Saroj Kumar Sinha (supra)**, held:

“14. It is also equally relevant and significant to notice in this case that though the petitioner failed to submit her reply to the charge-sheet, however, the Enquiry Officer did not fix any date, time and place for oral enquiry. It is settled principle that even in a situation where the delinquent officer/employee does not submit reply to the charge-sheet, the Enquiry Officer still needs to prove the charges on the basis of material and evidence available on record and for the said purpose he needs to fix and intimate to the charged officer, the date, time and place for oral enquiry.

15. The law in this regard is very well-settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of *State of Uttar Pradesh and others v. Saroj Kumar Sinha*, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department

and even in the absence of the delinquent officer, has to see as to whether the un rebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of *Saroj Kumar Sinha (supra)* that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable.”

32. In view of what has been said above, this Court finds that the impugned order cannot be sustained.

33. In the result, this writ petition succeeds and is **allowed**. The impugned order is hereby **quashed**. A *mandamus* is issued to the respondents to reinstate the petitioner in service forthwith, and pay him salary from the date of this judgement. It will be open to the respondents to proceed afresh from the stage of the charge-sheet, strictly in accordance with law, and as per guidance in this judgement. If the

Petitions can be transferred by the Chief Justice while sitting at Lucknow to Allahabad, but not vice versa. Matters filed at Allahabad can be heard only at

Allahabad and cannot be summoned to Lucknow. (Para 9)

Petition Dismissed. (E-5)

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

1. Heard learned counsel for parties.

2. Petitioner, a practicing advocate claims himself to be a tenant of House No. 23, Stanley Road, Allahabad (new number being 85) built upon Nazul land bearing Nazul Plot No. 22 AA situated at Civil Station, Allahabad. The said plot was registered under the name of Smt. Chandrakala Devi. On 16.06.2001, approval was granted for conversion of the said Nazul Land into freehold in favour of legal heirs of late Smt. Chandrakala Devi. A sale deed was executed by legal heirs of Late Smt. Chandrakala Devi on 18.08.2001 in favour of respondent Nos. 8 to 10. By the present petition, petitioner is praying for the quashing of a government policy decision dated 26.02.2014 whereby approval was given to revise rates for conversion of Nazul property into freeholds and change in Nazul policy. He is also challenging Clause 10 of Notification dated 04.03.2014. A prayer for quashing of deed dated 07.07.2001 whereby in pursuance of order dated 16.06.2001, a sale deed was executed by the State in favour of legal heirs of Late Smt. Chandrakala Devi. A prayer seeking mandamus commanding the respondents to not interfere in petitioner's possession over House No. 23, Stanley Road, Allahabad (built on Nazul Plot No. 22AA).

3. Sri Gaurav Mehrotra, assisted by Ms. Maria Fatima, learned counsel for respondent Nos. 8 to 10 questions the

maintainability of present petition at Lucknow. He submits that petitioner has previously filed a writ petition bearing number *Civil Misc. Writ Petition No. 17060 of 2002 (R. S Yadav and Anr. v. State of U.P. and Ors.)* at Allahabad praying for mandamus commanding respondents therein to execute sale deed in favour of petitioner for the same Nazul property, which was disposed of by its judgment and order dated 19.02.2009, with observation that State is not duty bound to execute a sale deed in favour of any individual. Another writ petition bearing number *Writ- C No. 15798 of 2010 (Prem Prakash Yadav v. Union of India and Ors.)* is also filed by the present petitioner at Allahabad wherein he has prayed for essentially the same reliefs with regard to same property. This is the third petition filed by the petitioner now at Lucknow with regard to the same property. He submits that filing of third petition at Lucknow, after filing two earlier petitions at Allahabad amounts to forum hunting and is against the settled principle of law that once a forum has been chosen by a party he should stick with the same forum with regard to all future litigation in the said matter. In support of his submissions, learned counsel for the petitioner has placed reliance upon a reported judgment of the Supreme Court in the case of *Kusum Ingots & Alloys Ltd. vs Union of India and Another*; (2004) 6 SCC 254.

4. Counsel for the petitioner insists that cause of action in the present petition has arisen within the territorial jurisdiction of Lucknow as well as Allahabad and thus present petition is maintainable at Lucknow also. Petitioner had earlier filed two petitions bearing numbers Civil Misc. Writ Petition No.15798 of 2010 and Civil Misc. Writ Petition No. 17060 of 2002 at

Allahabad. Learned counsel for petitioner submits that he does not know whether Civil Misc. Writ Petition No.17060 of 2002 is pending or disposed of. Filing of present petition at Lucknow is only an exercise of forum conveniens. He further states that in paragraph-68 and 85 of writ petition, petitioner claims that he has already disclosed filing of earlier writ petitions. Paragraph 68 of the writ petition reads-

"68. That consequently, the petitioner along with another had filed writ petition before this Hon'ble Court on 29.04.2002 challenging the grant of free-hold rights which was made in illegal and fraudulent manner. This was numbered as Civil Misc. Writ Petition No.. 17060 of 2002 where in the following order was passed:-

"Hon'ble M. Katju, J.

& Hon'ble Rakesh Tiwari, J.

Connect with Writ Petition No. 7478 of 2000. Standing Counsel may file counter affidavit within the weeks. In the mean time, status quo as regards possession, shall be maintained till further orders.

Sd./- M. Katju.

Sd./- Rakesh Tiwari"

Paragraph 85 of the writ petition reads-

"85. That thereafter the petitioner had filed a writ petition before this Hon'ble Court challenging the legality & validity of the order dated 5.6.2009 passed by the Principal Secretary, Deptt. of Housing & Urban Planning, Govt. of U.P. This was numbered as Civil Misc. Writ Petition No. 15798 of 2010. This Hon'ble Court was pleased to pass order on 1.4.2010 directing the counsel for Union of India and the State pf U.P. to file the counter affidavits. A look at the order dated 1.4.2010 also reveals that the decision or the order making the

conversion of the land in question into freehold were directed to be not affecting the petitioner's rights which would obviously be the right of tenant & also to seek the conversion of the nazul land into free-hold. Thus the petitioner's rights were not affected or prejudiced in any manner. The photo copy of the order of this Hon'ble Court dated 1.4.2010 is being filed herewith and is marked as Annexure No. 28 to this writ petition."

5. A perusal of the paperbook shows that the petitioner has stated in his first paragraph of the writ petition that this is his first writ petition with regard to the present cause of action. Petitioner failed to disclose whether he has filed any writ petition earlier or not in paragraph-1 of writ petition as is mandatorily required by Chapter 22, Rule 1 of Allahabad High Court Rules, 1952. The said disclosure was mandatorily required to be made in first paragraph of writ petition and not in later paragraphs. He ought to have disclosed in first paragraph itself that earlier petitions were filed at Allahabad.

6. Petitioner insists that the present petition is filed against a cause of action that arises within Lucknow. However, he has admitted in paragraph 68 and 85 that he has earlier filed two petitions at Allahabad with regard to same property. Filing of present petition at Lucknow amounts to forum hunting and not forum conveniens. Supreme Court has settled law with regard to forum conveniens in the case of **Kusum Ingots & Alloys Ltd. (supra)**, the relevant paragraph-30 of the same reads:-

"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]."

7. 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)

8. 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.

9. No doubt petitioner is master of his petitions. In case jurisdiction partially falls at Lucknow in appropriate case a petition can be filed at Lucknow also. But in the present matter earlier repeatedly petitioner chose to file petitions at Allahabad and some of them are pending at Allahabad. The said fact ought to have been disclosed by the petitioner in the very first paragraph of his writ petition. The same was not done. Even otherwise, the unique position with regard to Allahabad High Court is that under Clause-14 of United Provinces High Court (Amalgamation) Order, 1948 the petitions can be transferred by the Chief Justice while sitting at Lucknow to Allahabad but same can neither be transferred by him from Allahabad to Lucknow nor any Court can summon them. The matters at Allahabad can only be heard at Allahabad. Therefore, in the given circumstances, this Court can not summon the records from Allahabad. It creates a unique difficulty. Thus, in this peculiar situation it is necessary that once petitioner chooses between Lucknow or Allahabad for filing his petitions the same is a judicial discipline and ought to be followed in later petitions, if any filed. In absence of the same it becomes difficult for Courts at Allahabad and Lucknow, to have all the matters together and decide the same.

Petitioner in garb of his power to chose forum can not cause inconvenience to Court and keep list pending unnecessary in bifurcated manner.

10. 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.

11. Merely because petitioner has 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 on whims. It is not only his 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 petitioner only.

12. A party has a choice to invoke jurisdiction of this 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 forums would be highly inconvenient to the working of the Court as in the present case. Once petitioner chooses a jurisdiction, out of many available, in normal course, he should stick with the

same, unless he can provide cogent reasons for his hopping around. In the present case the petitioner has not provided any such reasons.

13. In view thereof, the writ petition is **dismissed** with liberty to petitioner to file the same at Allahabad.

14. Interim order, if any, stands vacated.

(2023) 11 ILRA 603
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Writ-C No. 6072 of 2016

Suman Engineering & Chem. Pvt. Ltd.
...Petitioner
Versus
U.P.P.C.L. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Ranjit Saxena, Sri Bidhan Chandra Rai

Counsel for the Respondents:
 C.S.C., Sri Anadi Krishna Narayana, Sri Awadhesh Kumar Saxena, Sri Krishna Agarwal, Sri Narendra Kumar Tiwari, Ms. Vishakha, Sri Shambhu Chopra (Sr. Advocate)

Civil Law - U.P. Electricity Supply Code, 2005 - Clause 4.2, 4.6(b), 4.6(c) & 4.21 - Electricity Act, 2003 - Sections 42, 43, 45, 46 & 50 - Petitioner-company, seeks direction to respondents to refund ₹42,14,181 with interest, including additional interest for six-month delay in refunding security deposit, following cancellation of 3200 KVA power load - Petitioner contended that system-loading charge was refundable, as it is to recover upgrade costs from new or enhanced-load consumers - Since sanction

was cancelled before electricity supply began, petitioner not liable for such charges - Explanation to Note No. 4 of Chapter IV of Cause Data Book was misplaced, it permits licensee to retain higher amount paid as system-loading charges, in case consumer subsequently opts for new load of lower capacity - Such consumer continues to be beneficiary of distribution system, liable to share burden - Only actual expenses, not normative costs, be recovered unless licensee starts availing services - System-loading charges recover costs for strengthening distribution system, apply when prospective consumer begins using electricity - If supply never starts, consumer cannot be charged, once supply begins, licensee may retain amount, under Clause 4.21(a), no refund is made even if load is later reduced - Petitioner, being only prospective, not actual consumer, no liability to share system upgrade costs, entitled to refund of ₹32 lakhs with 8.5% annual interest from date of deposit till refund. (Para 1, 10, 38, 40)

Writ petition allowed. (E-13)

List of Cases cited:

1. Central GST Delhi-III Vs Delhi International Airport Ltd, (2023) 9 SCC 294

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

1. The prayer made in the writ petition is for a direction to the respondents to refund Rs. 42,14,181/- to the petitioner, along with interest on the said amount and further interest for the period of six months for delay caused in refunding the security amount as a result of cancellation of 3200 KVA power load by order dated 22.11.2014.

Background Facts -

2. The petitioner, a private limited company, applied for 2975 KVA load for running an induction furnace. Along with the application, the petitioner deposited

Rs.1,000/-. Shortly thereafter on 10.9.2009, it filed another application for sanction of load of 3200 KVA instead of 2975 KVA. A sum of Rs.4,000/- was further deposited along with the application. The load was sanctioned by Paschimanchal Vidyut Vitaran Nigam Limited (respondent no. 2) vide Office Memorandum dated 18.1.2011, subject to the condition that the petitioner would obtain No-Objection Certificate (NOC) from the U.P. Pollution Control Board. The case of the petitioner is that it applied for NOC from U.P. Pollution Control Board on 22.2.2011. By letter dated 3.10.2012, estimate for releasing the electricity load amounting to Rs.80,54,181/- was sent to the petitioner. The breakup of the said amount is as follows: -

Service Charges	Rs.
5,49,181/-	
Security Deposit	Rs.
38,40,000/-	
System Loading Charges	Rs.
32,00,000/-	
Charges as per letter of	Rs.
4,65,000/-	
Executive Engineer dated 8.8.2012.	

3. The petitioner was required to deposit the said amount within fifteen days, failing which, the sanction order would stand cancelled automatically. Consequently, the petitioner deposited the entire amount on 8.11.2012 and communicated the said fact to the respondents. However, even after lapse of considerable time, the U.P. Pollution Control Board did not issue NOC and consequently the respondents cancelled the sanction vide order dated 22.11.2014.

4. Upon cancellation of the sanction order, the respondents refunded the security

amount of Rs.38,40,000/- vide order dated 4.3.2015. By another order dated 17.3.2015, Rs. 6,38,400/- was paid as interest on the security amount to the petitioner. The respondents however refused to refund other amounts to the petitioner on the ground that the same were non-refundable. The petitioner therefore filed the writ petition for the reliefs noted above.

5. The writ petition was initially allowed by a Co-ordinate Bench on 25.9.2018. It was held that the petitioner was not issued NOC by the U.P. Pollution Control Board despite all efforts. The agreement could not be executed between the parties for want of NOC, for which the petitioner was in no manner responsible. It was also observed that no material was filed by the respondents to prove that they actually incurred any expenses after sanction of the load, nor could place any provision under the Electricity Act or the U.P. Electricity Supply Code, 2005, which would entitle them to appropriate the amount deposited by the petitioner in pursuance of sanction order. Accordingly, the petitioner was held entitled to a refund of the amount deposited by it along with interest @ 8.5% per annum from the date of deposit upto the date of payment.

6. The respondents being aggrieved by the order and judgment of this court, challenged the same before the Supreme Court. The Supreme Court by order dated 29.11.2022 remanded the matter to this court, granting opportunity to the respondents to file additional counter affidavit with supporting documents to prove actual expenses incurred by them. This court was required to “deny refund, to the extent” the respondents are able to prove “the actual expenses incurred”. It

was clarified by the Supreme Court that all contentions which may be available to the respective parties, would remain open for consideration by this court while deciding the writ petition afresh on remand. The relevant portion from the order of the Supreme Court is extracted below: -

“If the appellant would have been called upon to produce such documents and thereafter prove the actual expenses/amount incurred and if it is ultimately found that some amount was actually spent, to that extent, the respondent-original writ petitioner may not be entitled to refund. Therefore, we remand the matter to the High Court by giving one additional opportunity to the appellant to produce the relevant documents/materials/evidences to show actual amount incurred by the appellant while completing the system and other formalities required for getting the connection. For that purpose, it will be open for the appellant to file additional counter with supporting documents, which can be rebutted by the respondent-original writ petitioner and thereafter appropriate order be passed by the High Court denying the refund, to the extent, the appellant is able to prove the actual expenses incurred.

The impugned judgment and order passed by the High Court is set aside and the matter is remanded to the High Court to do the exercise, as observed hereinabove. The aforesaid exercise shall be completed by the respective parties within a period of 3 months from today and thereafter, the High Court to finally decide and dispose of the petition, on remand, within a period of 3 months thereafter.

All contentions which may be available to the respective parties are kept open to be considered by the High Court,

while deciding the writ petition afresh on remand.”

(emphasis supplied by us)

7. After remand, the respondents have filed supplementary counter affidavit and additional supplementary counter affidavit and the petitioner has filed affidavits in rejoinder.

8. We have heard Sri B.C. Rai for the petitioner, learned Standing Counsel for the State respondents, Sri Shambhu Chopra, learned Senior Advocate, assisted by Sri N.K. Tiwari for respondent nos. 2, 3 and 5 and Ms. Vishaka, Advocate, holding brief of Sri Krishna Agarawal for respondent no. 1.

Submissions -

9. Sri Shambhu Chopra, learned counsel appearing on behalf of respondent nos. 2, 3 and 5, submitted that under Clause 4.6(b) of U.P. Electricity Supply Code, 2005 (hereinafter referred to as ‘the Code’), the estimate would include security deposit, charges for laying the service line, distribution mains (if required) & material, and system-loading charges, etc. as determined by the licensee with the approval of the Commission once in two years. Per Clause 4.6(c) of the Code, the respondents had published cost data book and according to which, processing fee is non-refundable and it is also provided therein that in case system-loading charge for the new load is lower than what is already paid by the consumer, no refund shall be made. Therefore, the claim of the petitioner for refund of system-loading charges is not sustainable in law. He also invited our attention towards the balance sheet of respondent no. 2 as on 31.3.2013 to show that the consumer’s contribution

towards service line and other charges constitutes the capital reserve of the Company and thus it is submitted that the amount deposited towards system-loading charges was non-refundable. He also urged that the Corporation was compelled to establish new feeder of 220 KVA to supply electricity in rural areas, because load of 3200 KVA was reserved for the petitioner's industrial unit for two years. He also urged that the Executive Engineer of the concerned Division by letter dated 8.8.2012 requested for sanction of Rs. 4.65 lakhs as the estimated cost for strengthening of one number 33 KV Bay for furnace – IV Feeder at 220 KV Sub Station, Nara to facilitate supply of electricity to the petitioner. He further relied on letter of Chief Engineer dated 21.8.2012 to Executive Engineer (Technical), written in reference to proposed power connection to the petitioner-company. It mentioned that the new power connection is to be supplied from 33 KV Shahpur Bay which till that time was a rural feeder. Since, it was to be utilized for industrial units and therefore the apparatus on the aforesaid Bay were required to be upgraded to ensure uninterrupted power supply to industrial units. The said letter was in continuation of the letter of Executive Engineer dated 8.8.2012 aforementioned. According to the respondents, the work of strengthening of equipments for commissioning of 33 KV Bay at 220 KV Sub Station, Nara was carried out through the contractor M/s Pal Electricals. The contract given in its favour was for Rs. 28,020/-. He also submitted that the respondents had to undertake bifurcation of 33 KV line and construct a new 33 KV line and install four-pole structure near the place of consumer. He places reliance on Clause 4.21 of U.P. Electricity Supply Code, 2005 and the provisions of Chapter IV of Cost Data

Book in support of his contention that Rs. 32,00,000/- realized as system-loading charges was non-refundable. A letter of the Superintending Engineer dated 19.3.2013 has also been filed to show that the respondents were in a position to release power connection as soon as NOC was submitted. A letter of Executive Engineer dated 19.12.2014 addressed to Superintending Engineer mentioning that according to Cost Data Book, system-loading charge was non-refundable, has also been relied upon. Reliance has been placed on the judgment of the Supreme Court in **Central GST Delhi-III vs. Delhi International Airport Ltd.**¹

10. On the other hand, learned counsel for the petitioner submitted that it is the primary duty of the respondents to maintain an efficient distribution system in its area. They were under obligation to upgrade and strengthen the distribution system. The respondents were only authorized to deduct processing fee and line charges, which were actually spent, whereas the amount realized as system-loading charge was refundable, as it is realized from new customers or those seeking enhancement of load to recover the cost of upgradation of the system. Since the sanction order was cancelled even before any electricity was supplied to petitioner-company, therefore it was not liable to bear the system-loading charges. It is also submitted that the reliance placed on Explanation to Note No. 4 of Chapter IV of the Cause Data Book is wholly misplaced, as it only permits the licensee to retain higher amount paid as system-loading charges, in case the consumer subsequently opts for new load of lower capacity. Such a consumer continues to be beneficiary of the distribution system and thus made liable to share the burden. However, the same

analogy cannot be applied to the petitioner. In support of his contention, he has placed reliance on Section 42, 43, 45 and 46 of the Electricity Act, 2003 and has tried to draw a distinction between the expenses realizable as expenditure under Clause 4.6 of the Electricity Supply Code, 2005 as against amounts which are realized as normative cost from the consumers. According to him, it is only the actual cost incurred which can be realized and not the normative cost, unless the licensee starts availing the services. He has placed reliance on various orders passed by the Appellate Tribunal for Electricity in various States and certain orders of the Ombudsman.

ANALYSIS:

Statutory regime -

11. Respondent no. 2 is a distribution licensee, defined under Section 2(17) of the Electricity Act, 2003 (for short referred to as 'the Act'), as follows: -

“distribution licensee” means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply.

12. Under Section 42 of the Act, it is the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act. Section 42(1) runs thus: -

42. Duties of distribution licensees and open access – (1) It shall be the duty

of a distribution licensee to develop and maintain an efficient co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

13. Under Section 43 of the Act, it is the duty of the licensee to supply electricity to the premises owned or occupied by an applicant within one month from the date of receipt of application or where supply requires extension of distribution mains, or commissioning of new supply stations, after such extension or commissioning or within such period as may be specified by the Appropriate Commission. Under sub-section (2), every distribution licensee is obligated to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1), subject to the applicant paying to the licensee such price for the electric plant or electric line as determined by Appropriate Commission, to the licensee. Section 43 is reproduced below for convenience of reference: -

43. Duty to supply on request.- (1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply:

Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission:

Provided further that in case of a village or hamlet or area wherein no

provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.

(2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1):

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.

(3) If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.

14. Section 43 contemplates two kinds of work to be undertaken by the licensee depending on the fact situation. The first one is extension of distribution mains and commissioning of new sub-stations where needed. The second obligation is to provide electric plant or electric line for giving electric supply to the premises in respect of which request is made for supply of electricity. 'Electric line' and 'electric plant' are mutually exclusive terms and have been defined thus :-

“(20) "electric line" means any line which is used for carrying electricity for any purpose and includes -

(a) any support for any such line, that is to say, any structure, tower, pole or other thing in, on, by or from which any such line is, or may be, supported, carried or suspended; and

(b) any apparatus connected to any such line for the purpose of carrying electricity;

.....

(22) "electrical plant" means any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity but does not include -

(a) an electric line; or

(b) a meter used for ascertaining the quantity of electricity supplied to any premises; or

(c) an electrical equipment, apparatus or appliance under the control of a consumer;”

15. Section 45 of the Act empowers the licensee to recover charges for electricity supplied whereas Section 46 empowers it to recover expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of giving that supply. Section 45 and 46 which are pertinent to the controversy involved, are reproduced below: -

45. Power to recover charges. - (1)

Subject to the provisions of this section, the prices to be charged by a distribution licensee for the supply of electricity by him in pursuance of section 43 shall be in accordance with such tariffs fixed from time to time and conditions of his licence.

(2) The charges for electricity supplied by a distribution licensee shall be -

(a) fixed in accordance with the methods and the principles as may be specified by the concerned State Commission;

(b) published in such manner so as to give adequate publicity for such charges and prices.

3) The charges for electricity supplied by a distribution licensee may include -

(a) a fixed charge in addition to the charge for the actual electricity supplied;

(b) a rent or other charges in respect of any electric meter or electrical plant provided by the distribution licensee.

(4) Subject to the provisions of section 62, in fixing charges under this section a distribution licensee shall not show undue preference to any person or class of persons or discrimination against any person or class of persons.

(5) The charges fixed by the distribution licensee shall be in accordance with the provisions of this Act and the regulations made in this behalf by the concerned State Commission.

46. Power to recover expenditure. -

The State Commission may, by regulations, authorise a distribution licensee to charge from a person requiring a supply of electricity in pursuance of section 43 any expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of giving that supply.

16. Section 46 speaks of "expenses reasonably incurred in providing electric line or electrical plant". It does not speak of expenses incurred in extension of distribution mains or commissioning of new sub-station, which a distribution licensee has to undertake where required as part of its statutory obligation under the first proviso to sub-section (1) of Section 43. Under the direction of the Supreme Court also, the refund is to be disallowed only to the extent the respondents are able to prove "the actual expenses incurred." In other words only such expenses which would fall within the ambit of Section 46 could be permitted to be retained by the respondents. In order to determine the same, we would like to refer to few more

statutory provision which have bearing on the issue.

17. Section 47 empowers the licensee to realise reasonable security as may be determined by the Regulations to facilitate supply of electricity. The provision entitles the consumer to interest at bank rate on the security amount and refund of such amount on request.

18. Section 61 empowers the Appropriate Commission to frame regulations and lays down guidelines for determination of the tariff. Section 62 confers power on the Appropriate Commission to determine the tariff and Section 64 lays down the procedure for passing tariff order.

19. Section 50 of the Act empowers the State Commission to frame Electricity Supply Code, providing for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity and payment thereof etc. Section 50 reads thus: -

50. The Electricity Supply Code –

The State Commission shall specify an Electricity Supply Code to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment thereof, restoration of supply of electricity, measures for preventing tampering, distress or damage to electrical plant or electrical line or meter, entry of distribution licensee or any person acting on his behalf for disconnecting supply and removing the meter, entry for replacing, altering or maintaining electric lines or electrical plants or meter and such other matters.

20. The Electricity Supply Code, 2005 framed by the State Commission in exercise of power under Section 50 of the Act, deals with the procedure for grant of electric supply to consumers. Under Chapter IV thereof, Clause 4.1 obligates the licensee to supply electricity to the consumers as per the mandate of Section 42 of the Act. Under Clause 4.2, it is the licensee's obligation to extend the distribution system. It reads as follows:-

4.2 Licencee's Obligation to Extend the Distribution System

(a) The Licencee shall have obligation for ensuring that its distribution system is upgraded, extended and strengthened to meet the demand for electricity in its area of supply. Wherever the existing transformation capacity is loaded upto 80% of its capacity, the licensee shall prepare a scheme report for augmentation of such transformation capacity.

Provided that the responsibility of laying the distribution network for new street lights shall be that of the concerned local body.

Provided also that for prospective connections in un-electrified areas in his area of supply, the Licencee may intimate to the Commission the details of such un-electrified colonies/areas along with approximate no. of prospective consumers. The licensee may also submit detailed plan for electrification of such areas by any licensee / developer / Authority / Private Colonizers / Promoters / local body or any collective body of the consumers. The plans may be updated each year before submission to Commission.

(b) The Licencee shall meet the cost for strengthening/ upgradation of the system to meet the enhanced demand of the existing consumers as well as future growth in demand. Such expenditure shall be

allowed to be recovered from the consumers through tariff subject to financial prudence check by the Commission.

21. Clause 4.6 deals with estimates which includes -

- (i) Security deposit;
- (ii) Charges for laying the service line;
- (iii) Distribution mains, if required and material, and
- (iv) System-loading charges, etc.

It reveals that system-loading charges and the establishment cost are realized as a percentage of the normative estimates, specified in Cost Data Book to be deposited with the licensee before work begins. Although system-loading charge is not defined anywhere, but Clause 4.6(h) reveals that system-loading charge is the cost of extension and upgradation of the system for meeting demand of new consumers/consumers desiring enhancement of load. In areas where distribution mains do not exist, the cost for installation of new distribution mains is normally to be recovered by grant from the State Government, or the local body, or any collective body of the consumers, or a consumer. It is open to the licensee to install new distribution mains from the surplus available with the licensee, after meeting all expenses. However, the cost of extension of service line from the distribution mains to the point of supply, has to be borne by the applicant himself in all cases. Clause 4.6 is extracted below: -

4.6 Estimate

(a) After sanction of load, an estimate shall be prepared, which shall remain valid for three months from the date of sanction letter to the applicant.

(b) The estimate shall include security deposit, charges for laying the service line, distribution mains (if required) & material, and system-loading charges etc, as determined by the Licencee with the approval of the Commission once in two years.

(c) After approval of the Commission, the Licencee shall publish a cost data book, and make it available to any interested person at a reasonable charge and shall also place it on their website.

(d) The above estimate shall be based on Rs/KW (or Rs /KVA) of the sanctioned/contracted load, or on Rs per service installation for specific bands of contractual load applied for OR sanctioned load at each voltage level up to 33 KV voltage on which supply is to be given. Beyond 33 KV voltage level, the charges for laying shall be based on actual estimates of the licencees.

Provided that the estimates for independent feeder shall be in accordance to requirements laid down in clause 3.4 of this code.

Note: Commission had specified a time frame for release of new connection in the Code subject to certain conditions. Commission observes that estimates to be made by licensee for the initial connection has uncertain elements-the uncertainty of time, as well as uncertainty of what consumer has to pay. The commission is therefore constrained to direct the licensee to notify in advance the normative estimated charges as specified above, within 3 months from the date of enforcement of this revised Code, failing which, the licensee shall charge on such provisional normative charges that may be specified by Commission.

(e)(i) LT Loads upto 50 kW shall be developed by the licensee only, for which no supervision charges shall be applicable.

(ii) If the work is to be done by the developer / applicant / development authority, the Licensee shall charge supervision charges (on the estimated labour cost, cost of material handling and storage/inventory, but excluding the system loading charges and the establishment costs), as a percentage of the normative estimates, specified in cost data book, which shall be deposited with the licensee before work begins.

- For LT Loads upto 50 KW, if the supply released on HT on the request of consumers (in such cases, metering will be done on LT and billing as per LT tariff) – 15%.
- For Loads exceeding 50 KW (56 KVA) upto 3600 KW (4000 KVA) – 15%.
- For Loads exceeding 3600 KW upto 9000 KW (10,000 KVA) – 8%.
- For Loads exceeding 9000 KW (10,000 KVA) - 5%.

•

(iii) The Licensee shall commence the work after the applicant has deposited the full amount of the estimates."

(f) Disputes regarding the estimate may be referred to the authority that is one level higher than the sanctioning authority and if the applicant is still aggrieved he may approach the Consumer Grievance Redressal Forum for adjudication.

(g) A final bill shall be prepared after completion of the work by the Licencee.

- If the final bill exceeds the value of the estimate, the difference shall be deposited by the applicant before connection is energized.

- If it were less, the difference shall be adjusted in subsequent electricity bills or refunded by cheque within 60 days.

Provided further that, in case of revision of charges, if the estimates were sanctioned prior to the date of revision, the estimates in excess shall not be charged on completion of works on the basis of revised charge. However, if the work is completed at an estimate less than that prepared in revised charges, the excess amount deposited by the applicant on the basis of unrevised charges, shall be refunded within 60 days.

Provided also that, if the licensee has published updated normative charges in the cost data book, and has included the same in preparing the estimate, the final bill and above proviso, shall not be necessary.

(h) Consumer's Share in the Cost Estimate

(i) The cost of extension and up-gradation of the system for meeting demand of new consumers/consumers desiring enhancement of load shall be deemed to have been recovered from them through system loading charges as approved by the Commission.

(ii) In areas where distribution mains do not exist, the costs for installation of new distribution mains shall normally be covered by grant from State Government or the local body or any collective body of the consumers or a consumer. The licensee may also install new Distribution Mains from the surplus available with the licensee after meeting all expenditure.

(iii) In all cases the applicant shall bear the cost of the extension of service line from the Distribution Mains to the point of supply.

22. Clause 4.21 relates to cost of servicing of new connection,

reduction/enhancement of load and reads thus: -

4.21 Cost of Servicing a New Connection Reduction/Enhancement of Load

(a) The consumer shall pay the cost of service line etc. and system loading charges as a cost of servicing a New Connection/Enhancement of Load to the licensee. These charges shall be either on the basis of the schedule of standard charges specified in the cost data book duly approved by the Commission, or in its absence, the actual cost of works as given in the estimate (clause 4.6) prepared by the Licensee. For reduction of load, system loading charges shall not be refunded, but if the load is enhanced again by the same consumer, only enhanced system loading charges over and above the system loading charges already deposited shall be charged.]

(b) For Conversion from 1 phase to 3 phase LT & vice-versa, and Conversion from LT to HT & vice-versa, the procedure laid down for new connection, and clause 3.3 shall be followed.

23. Clause 4.29 indicates that the service line and other apparatus provided to a consumer to supply electricity vests in him and for a limited period only the licensee is permitted to use the same for providing supply to other consumers. Clause 4.29 is reproduced below: -

4.29 Use of Service line of consumers by Licensee

(a) The Licensee may use the service line and other apparatus to give supply to other consumers provided that the supply to

the consumer who has paid for them is not affected.

(b) Further, even if the supply to the consumer who has paid for the line / apparatus is disconnected for whatever reason, the consumer shall permit the Licencee continued access to the service line and other apparatus if they are required to give supply to other consumers, and no payment shall be due to the consumer for such access/facility, until alternate arrangements are made.

(c) However, it is expressly provided, that the Licencee shall make all possible efforts to make alternate arrangements, as early as may be practicably possible. For this purpose, the Licencee may explore a mutually acceptable arrangement for continuation of the installation at the existing place.

24. 'Service line' is defined under Section 2(61) as follows :-

“Service line means any electric supply-line through which electricity is, or is intended to be, supplied-

(a) to a single consumer either from a distributing main or immediately from the Distribution Licensee's premises; or

(b) from a distributing main to a group of consumers on the same premises or on contiguous premises supplied from the same point of the distributing main;

Processing fees:

25. As per cost data book processing fees was non-refundable. Chapter-II of cost data book deals with processing fees. According to it, for load above 300 KVA the processing fees stipulated at the relevant time was Rs. 5000/-. Although, the load applied was slightly less than 3000 KVA but the petitioner deposited Rs. 5000/-

under the said head. This amount was non-refundable.

Charges for laying service Line

Clause 4.6(h)(iii) of the Code enjoins upon the petitioner to bear the cost of extension of service line from the Distribution Mains to the point of supply. While under sub-section (i) of Section 43, the obligation to extend the distribution system or commission new Sub Station or extend the Distribution Mains to an area where no provision of supply of electricity exist is on the licensee, the duty to provide electric plant and electric line to an applicant is dependent upon his agreeing to pay to the licensee, such price therefor as determined by the appropriate commission. Again under Section 46, the licensee has been empowered to realise expenses reasonably incurred in providing any electric line or electric plant directly from the consumer. As per Clause 4.21, the cost of service line charge shall be either on basis of schedule of standard charges specified in the Cost Data Book, duly approved by the Commission or in its absence the actual cost of work as given in the estimate (clause 4.6) prepared by the licensee.

26. The estimate shows that the respondents have realised Rs.5,49,181/- as service connection charges and another sum of Rs.4,65,000/- as per letter of Executive Engineer dated 08.08.2012. The respondents have not led any evidence to prove expenditure of Rs. 5,49,181/- and 4,64,000/-. The only evidence brought on record is regarding expenditure of a sum of Rs.28,020/- towards strengthening of equipments for commissioning of 33 KVA at 220 KVA sub-station, Nara through the contractor M/s Pal Electricals.

27. As per condition No. (ii) of sanction order dated 18.1.2011, a new 33 KVA line was to be constructed from 220/132 KV sub-station Nara to Furnace Feeder No.1 for which entire expenses was to be borne by the petitioner. Again, no evidence has been brought on record to prove actual expenditure incurred for the said purpose. In para 12 of supplementary counter affidavit it is pleaded that on 8.8.2012, the Executive Engineer addressed a communication to the Zonal Officer. By the said letter, the previous demand of Rs.18.37 lakh for providing new infrastructure for supply of power to the petitioner was cancelled and in its place an estimate of Rs. 4.65 lakh was submitted.

28. The pleading in reference to letter dated 08.08.2012 in para 12 on the supplementary counter affidavit is as follows:-

“That, corporation was compel to establish new feeder of 220 KVA to supply electricity in rural area becal-28use the load of 3200 KVA was reserved for the petitioner industrial unit for two years. The Transmission executive Engineer and Superintending Engineer Distribution Circle Muzzafar Nagar wrote letter dated 08.08.2012 and 21.08.2012 that new infrastructure is required for proper supply to rural area as 3200 KVA load is proposed for industrial supply. Copy of letter dated 08.08.2012 and Superintending Engineer Distribution Circle Muzzafar Nagar filed herewith and 1-28marked as Annexure No. SCA-2 to this affidavit.”

29. In para 13 of supplementary counter affidavit, it is pleaded that the work was got executed through M/s Pal Electricals under a contract. Para 13 is reproduced below:-

“That, the necessary Communication made by the Transmission executive Engineer and Superintending Engineer Distribution Circle Muzzafar Nagar is part of record. The work was performed by the M/s Pal Electricals and Feeder of 220 KVA was established. The copy of agreement with M/s Pal Electrical dated 29.01.2013 and payment to the concern firm are jointly filed herewith and marked as Annexure No. SCA-3 to this affidavit.”

30. In para 19 and 20 of the supplementary counter affidavit dated 3.03.2023, it is pleaded as follows:-

“19. That, the letter dated 08.11.2011, further poignantly stipulate that for providing electricity load of 3200 KVA, the power corporation has to incur expenses for bifurcation of 33 KVA line and also to construct new 33 KVA line with 4 pole structure at the door step (manufacturing unit) of consumer. Petitioner has submitted affidavit accepting such conditions.

20. That, petitioner admitted in his letter dated 16.03.2013 that he is ready to get connection without having NOC from pollution control Board. It proves that power corporation has bifurcated 33 KVA line, laid a separate 33 KV line constructed 4 pole structure. Copy of letter dated 16.03.2016 of petitioner to Executive Engineer is being filed herewith as ANNEXURE NO.SCA-3 to this affidavit.”

31. No evidence has been filed to prove the above expenditure, but in para 21 it is pleaded thus:-

“21. That, the Executive Engineer responded vide letter dated 19.03.2013 and categorically emphasis that 30 days time is given to take NOC. It shows that corporation has already completed its work

to release new electricity connection. Copy of letter dated 16.03.2016 of Executive Engineer to Managing Director of company is being filed herewith as ANNEXURE NO.SCA-4 to this affidavit.

32. We proceed to accept the statement on oath in para 21 read with letter dated 16.03.2016 as evidence of the fact that 4 pole structure and service line was constructed as in that event only, the respondents were in position to write to the petitioner to complete the formalities so that the line is energised. There is also no challenge by learned counsel for the petitioner that the respondents had completed these works. Therefore, sum of Rs.5,49,181/- and Rs.4,65,000/- was rightly retained by the respondents.

Security :

33. Counsel for the petitioner did not dispute that security amount with interest has been refunded. Although the petitioner has claimed certain more amount towards interest on the security amount, but the said claim was not pressed during oral arguments.

34. The real bone of contention between the parties is regarding refundability of system loading charges. The entire arguments by counsel for the parties revolved around it only. We, therefore, proceed to advert to the said issue.

System Loading Charges

35. Clause 4.6 of the Code as noted above stipulates that the estimate shall include (i) security deposit (ii) charges for laying the service line distribution mains (if

required) and material and (iii) system loading charges, etc. as determined by the licensee with the approval of the Commission in two years. It further provides that after approval of the Commission, the licensee shall publish a cost data book specifying the charges realisable from a new applicant or a person seeking variation in supply. System loading charges is not separately defined, either under the Act or under the Code. However, it is evident from Clause 4.6(h) that system loading charge is the normative cost realized by the licensee for extension and upgradation of the system for meeting demand of new consumers/consumers desiring enhancement of load. The same conclusion is deductible from Clause 8 of Chapter I of Cost Data Book. It reads as follows:-

“8. Presently, the licensees are charging a part of the expenditure incurred or to be incurred to upgrade its system of supply from the applicants of new connection/enhancement of load as System Loading Charges, and also recovering a part of it from consumers through tariff. Analysis of this charge is given in Annexure-1.”

36. Clause 4.21 of the Code requires the consumer to pay system loading charge as cost of servicing a new connection/enhancement of load to the licensee. Clause 4.21 which is relevant is reproduced below: -1-28

“4.21 Cost of Servicing a New Connection / Reduction / Enhancement of Load : (a) [The consumer shall pay the cost of service line etc. and system loading charges as a cost of servicing a New Connection / Enhancement of Load to the licensee. These charges shall be either on

the basis of the schedule of standard charges specified in the cost data book duly approved by the Commission, or in its absence, the actual cost of works as given in the estimate (clause 4.6) prepared by the Licensee. For reduction of load, system loading charges shall not be refunded, but if the load is enhanced again by the same consumer, only enhanced system loading charges over and above the system loading charges already deposited shall be charged.]

(b) For Conversion from 1 phase to 3 phase LT & vice-versa, and Conversion from LT to HT & vice-versa, the procedure laid down for new connection, and clause 3.3 shall be followed.”

37. As per cost data book (annexure-1), upgradation of system includes the construction/increasing capacity of distribution sub station, secondary sub station and primary sub station and strengthening/construction of LT, 4KV, 33KV, 132KV and 220KV lines. The respondents have realized Rs. 32 lakhs from the petitioner as system loading charges. It is at the rate of Rs. 1,000/- for load of 3,200KVA in accordance with annexure-1 to the cost data book. The cost data book justifies charging of system loading charges at the aforesaid rate on the footing that it is only a small part of the total expenditure. It also states that though the liability of the licensee in respect of strengthening of system decreases on higher voltage, but for social reasons, the rate of system loading charge are higher at higher voltage to cross subsidise the consumers having lower load, which would be phased out in future. The upgradation of the system as per the scheme of the Act is the primary responsibility of a distribution licensee. The initial expenses as noted

above, is met from the grants received from the State Government or the local body or any collective body of the consumers or a consumer or the surplus available with the licensee after meeting all expenditure. Unlike service line over which the licensee retains right of user for a limited period after supply is disconnected, as stipulated under Clause 4.29 of the Code, the system upgradation carried out by the licensee and in respect of which normative charges as per cost data book is realized as part of estimate from a consumer, continues to be property of the licensee even after the supply is disconnected. The distribution licensee retains full control over its usage.

38. It is thus clear that system loading charges is a permissible mode of recovering expenditure already incurred or likely to be incurred in future by the distribution licensee in strengthening and upgrading the distribution system in its area of operation. It is a compulsory exaction from a person who enjoys the benefit of the distribution system and its upgradation and strengthening by the licensee. Although the said amount is recovered as a component of the 'estimate' from a prospective consumer, but the actual liability accrues once the prospective consumer starts consuming electricity using the distribution system of the licensee. If a prospective consumer does not become actual consumer for any reason whatsoever, and thus does not use the distribution system, he cannot be fastened with the liability towards upgradation of the system i.e. system loading charges. The position would be completely different if once the supply commences. The distribution licensee, would then be within its right to retain the amount. It is for the said reason that even when load is reduced, the Code vide Clause

4.21 (a) stipulates that system loading charges shall not be refunded.

deposit till the date of refund. It is ordered accordingly.

39. In **Delhi International Airport Authority Ltd. (supra)** cited by counsel for the respondents, the issue was whether service tax could be charged on 'user development fee' (UDF). The Supreme Court held that it was in nature of 'tax or cess' collected for recovering the cost of future projects and there was no consideration for services provided by the assessee to the customer and thus could not be subjected to service tax. In that case, the assessees were entrusted with the management and development of the Airport in pursuance of joint venture agreement with Airport Authority of India, created under the Airport Authority of India Act, 1994. The UDF was being charged by the assessees from every departing domestic passengers in terms of Rule 3 of the Rules framed under the Act. There was no dispute in that case that UDF was collected by the assessees from persons actually liable to pay it. As noted above, the Court in that case was only considering the leviability of service tax on UDF. The said judgement is thus of no help to respondents.

Conclusion :

40. Bearing in mind the scheme of the Act and the provisions of the Code, we have no hesitation in holding that the petitioner who only remained a prospective consumer and did not become actual consumer, had not incurred the liability to share the burden of upgradation and strengthening of the distribution system. He is therefore, entitled to refund of the system loading charges, i.e. Rs.32 lakhs alongwith interest @ 8.5% per annum from date of

41. In the result, the writ petition succeeds and is allowed in part. Costs made easy.

(2023) 11 ILRA 617
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.11.2023

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Writ-C No. 9984 of 2023

Mahadev Singh Dal Bahadur Singh
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Pankaj Gupta

Counsel for the Respondents:
C.S.C., Mohan Singh

A. Civil Law - U.P. Revenue Code, 2006 - Section 101 – Pond / Talab – Encroachment – Exchange – Exchange from the land recorded as pond is not permissible, even if it has been converted into abadi; such land is liable to be vacated and restored as pond. Encroachers are not entitled for exchange of their land, and if it is permitted, then persons having muscle power will make encroachment on prominent and valuable land of the Government and others, and on being found as encroachers would seek exchange from their land which may be of lesser value. Therefore, exchange cannot be considered and allowed in such circumstances. (Para 15, 17)

B. Civil Law - U.P. Revenue Code, 2006 - Section 67 – Encroachment over Pond – Land recorded as pond – Admission of encroachment – Petitioner admitted that

the land in dispute is recorded as Talab (pond), on which he has constructed a house in which he is residing. It amounts to admission of illegal encroachment on pond land by the petitioner. Once a fact is admitted, it is not required to be proved. The cardinal principle of law of evidence is that a fact admitted need not be proved. Impugned orders have rightly been passed in accordance with law, which do not call for any interference. If others have also made encroachment on the pond land, the respondents shall get the same vacated in accordance with law and restore the pond. (Para 16, 18)

Dismissed. (E-5)

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

1. Heard Shri Tushar Gupta, Advocate holding brief of Shri Pankaj Gupta, learned counsel for the petitioner, learned Standing Counsel and Shri Ravindra Singh, Advocate holding brief of Shri Mohan Singh, learned counsel for the Gaon Sabha.

2. This petition has been filed challenging the orders dated 21.05.2022 passed in Case No.86 of 2022 under Section 67 of the U.P. Revenue Code- 2006 (here-in-after referred as Code-2006) by the Tehsildar/ Assistant Collector (First Class), Gauriganj, District- Amethi/ respondent no.3 and the order dated 11.09.2023 passed by the Collector, District- Amethi/ respondent no.2 in Appeal No.525 of 2022 under Section 67(5) of Code-2006.

3. Learned counsel for the petitioner submits that the impugned order dated 21.05.2022 has been passed in a haste manner without affording opportunity to the petitioner and following the procedure as prescribed by this Court in Writ-C No.6658 of 2022 (Rishipal Singh VS. State of U.P. & 3 others) reported in 2022 SCC

OnLine All 829 on the ground that the case was registered under Section 67 of the U.P. Revenue Code on 12.01.2022 and the notice was issued to the petitioner on 13.05.2022 and the impugned order was passed on 21.05.2022. He further submits that the land in dispute i.e. Gata No.166 Min/0.025 hec., though recorded as Talab (pond), is not in the shape of Talab (pond) and residential. The name of the petitioner is recorded on Gata No.165, which is adjacent to the said Gata and in case the opportunity would have been afforded, the petitioner could have claimed exchange from his land i.e. Gata No.165, therefore the impugned order is not tenable in the eyes of law. The grounds taken by the petitioner in the appeal have also not been considered and the appeal has been dismissed. Thus, the submission is that the impugned orders are not sustainable in the eyes of law and liable to be quashed.

4. Per contra, learned Standing Counsel submits that the impugned order has rightly been passed after affording opportunity to the petitioner. The petitioner had submitted his reply to the show cause notice, in which he had admitted that the land in dispute is recorded as Talab (pond), though he claimed that his house is built on the said land which is in the shape of Abadi (residential). A contradictory objection has been taken in paragraph-5 of the objection that he has not made any encroachment on the land of pond and is residing in his ancestral house and the report has been submitted without spot inspection. The opportunity of cross-examination with the Lekhpal was also afforded to the petitioner, which was made by the petitioner on 08.05.2022, in which the Lekhpal has specifically stated that he had made the inspection, in which he had found that the petitioner has constructed the house on

Gata No.166/ area 0.025 hec. situated in Village- Jagdishpur. Therefore, the contention of learned counsel for the petitioner that the impugned order dated 21.05.2022 has been passed without affording opportunity to the petitioner is misconceived and not tenable. The appeal has also been dismissed, after considering the grounds raised by the petitioner. Even otherwise, there is admission by the petitioner that he is having house on the recorded pond, which is adjacent to his ancestral land. Thus the impugned orders have rightly been passed in accordance with law after affording opportunity to the petitioner and there is no illegality or error in the impugned order. The petition is misconceived and liable to be dismissed with cost.

5. I have considered the submissions of learned counsel for the parties and perused the records placed on record with this petition.

6. On the basis of a report of Lekhpal, a case under Section 67 of the Code- 2006 for eviction from Gata No.166/0.025 hec. of Village- Jagdishpur, Pargana- Amethi, Tehsil- Gauriganj, District- Amethi and damages was registered. Admittedly a show cause notice was issued to the petitioner and served on him. In response thereof, the petitioner had submitted objections. In the objections, the petitioner has admitted in paragraph-2 that the land in dispute is recorded as Talab (pond) but stated that the said land is in the shape of Abadi since last fifty years and his house is built on the said land and he is residing in the same. He has also stated that others have also made a house on the land in dispute. In paragraph-3 of objection, the petitioner has stated that he is residing on the land in dispute after constructing house since the time of his

ancestors and he has no other place except the said house. In paragraph-5 of the objection, the petitioner has stated that he has not made any encroachment on the land of pond, rather he is residing in his ancestral house and he has no other house. He has further stated that the Halka Lekhpal has submitted the report without making any inspection.

7. After the objections were submitted by the petitioner, the evidence of the concerned Lekhpal was recorded on 18.05.2022, in which the opportunity of cross-examination was also afforded to the petitioner. The concerned Lekhpal has deposed that he had made the inspection, in which it was found that the petitioner has constructed his house on Gata No.166/0.025 hec., which is reserved for Talab. The petitioner could not extract any thing in the cross-examination, which may create even any doubt on the evidence of Lekhpal.

8. In view of above and the admission of the petitioner in the objections in regard to the land in dispute i.e. Gata No.166, it is recorded as Talab and the petitioner has built a house on the said land after making illegal encroachment on it, which as submitted by learned counsel for the petitioner is adjacent to his ancestral land and the ancestral land of the petitioner is Gata No.165 and Gata No.190 in the name of petitioner. Therefore it is apparent that the petitioner has made encroachment on the land of Talab (pond) and the plea that he has no other place is also false and not sustainable.

9. So far as the plea of exchange taken by the petitioner before this Court is concerned, it was not taken before the authority concerned, therefore it is nothing

but an after thought, after passing of the order by the authority concerned and dismissal of appeal and strengthens his admission of encroachment on pond. Therefore, this Court is of the view that the impugned orders have rightly been passed in accordance with law.

10. The power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property has been given in Section 67 of the U.P. Revenue Code-2006, which is extracted here-in-below:-

"(1) Where any property entrusted or deemed to be entrusted under the provisions of this Code to a [Gram Panchayat] or other local authority is damaged or misappropriated, or where any [Gram Panchayat] or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the [Assistant Collector] concerned in the manner prescribed.

[(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.]

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the [Assistant Collector] may allow in this behalf, or if the cause shown is found to be insufficient, the [Assistant Collector] may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or misappropriation of the property or for wrongful occupation as the case may be, be recovered from such person as arrears of land revenue.

(4) If the [Assistant Collector] is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2), he shall discharge the notice.

(5) Any person aggrieved by an order of the [Assistant Collector] under Sub-section (3) or Sub-Section (4), may within thirty days from the date of such order, prefer an appeal to the Collector.

(6) Notwithstanding anything contained in any other provisions of this Code, and subject to the provisions of this section every order of the Sub-Divisional Officer under this section shall, subject to the provisions of sub-section (5) be final.

(7) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation. - For the purposes of this section, the word "land" shall include the trees and building standing thereon."

In view of above, in case of wrongful occupation of the Gram Panchayat property the action can be taken after issuing a show cause notice and considering the reply, if any, submitted by the person concerned.

11. This Court, in the case of **Rishipal Singh Vs. State of U.P. and 3 Others (Supra)**, has issued the guidelines to be adopted as procedure to be applied to proceedings under Section 67, 67A and 26 of the U.P. Revenue Code, which is extracted here-in-below:-

"74. Thus, in my view, following guidelines be adopted as procedure to be applied to proceedings under Sections 67, 67A and 26 of the U.P. Revenue Code. It is all aimed at ensuring transparency in the procedure, judiciousness in approach by the authorities and to thwart every complaint made with ulterior and oblique motive to dislodge a long settled possession and causing of unnecessary harassment to an innocent villager:-

(i) In case of complaint made on RC Form 19, the official making it shall ensure that proper survey is done in the light of observations made in this judgment; the land, occupation of which has stood identified to be unauthorized is in exact measurement and so also shown in the survey map prepared on scale, as per the Land Revenue Survey Regulations, 1978; the exact assessment of damages on the basis of circle rate with details of calculation made on that basis.

(ii) In a case of suo motu action, before issuing RC Form 20, the authority will ensure that proper report upon RC Form 19 is submitted as per para (i) above on parameters of subrule 1 Rule 67.

(iii) RC Form 20 must be accompanied by a copy of report and spot survey submitted alongwith RC Form 19 to the person against whom proceedings have been instituted, or even otherwise submitted in case of suo motu action vide para (ii) above.

(iv) Upon reply being filed to the notice, if authority finds that spot

survey/explanation report is not satisfactory, it may order for a fresh spot report to be prepared in presence of the party aggrieved.

(v) In the event, objection includes a plea of statutory protection/ benefit under Section 67-A, the authority should invite the objection from the Gaon Sabha, and will decide the same alongwith the matter under Section 67, without requiring aggrieved party to move separate application under Section 67-A.

(vi) If the report is admitted on record, may be in case no objection is filed, the authority must ensure presence of the person preparing the report before it, to prove the report by his statement, with a right to aggrieved party to cross question him.

(vii) The authority must endeavour to decide the case within time framed provided under the relevant Act and the Rules and should desist from granting adjournment to the parties in a routine manner.

(viii) In case of appeal under Section 67(5) of the U.P. Revenue Code, 2006, preferred/ filed within the time prescribed alongwith interim relief application, the interim relief application as far as possible should be decided within two weeks' time with prior notice to other side and where plea of settlement under Section 67-A has been taken before Assistant Collector-1st Class, and damages to the tune of 25 % at-least of the total damages are paid and an affidavit of undertaking is filed for not raising any further construction upon the land in question, the authorities including civil administration should avoid taking any coercive measure pursuant to the order appealed against until the disposal of interim relief application. The Appellate authority may also consider granting interim relief on the very first day of filing

of appeal with stay application if above conditions are fulfilled by the appellant.

(ix) The appellate authority should as far as possible decide the appeal within a period of two months of its presentation. "

12. This Court, in the aforesaid guidelines, has provided in paragraph (iv) that upon reply being filed to the notice, if authority finds that spot survey/explanation report is not satisfactory, it may order for a fresh spot report to be prepared in presence of the party aggrieved. Paragraph (v) provides that in the event, objection includes a plea of statutory protection/benefit under Section 67-A, the authority should invite the objection from the Gaon Sabha, and will decide the same alongwith the matter under Section 67. Paragraph (vi) provides for presence of the person, who has prepared the report to prove it and for cross-examination by the aggrieved party.

13. In the present case, the petitioner has admitted that the land in dispute i.e. Gata No.166/0.025 hec. is recorded as Talab (pond), on which the house has been constructed, in which he is residing, therefore there is admission of illegal encroachment on pond by the petitioner. Therefore, the plea that the report has been submitted by the Lekhpal without any inspection in the objection, which has not been pressed subsequently and the inspection proved by the evidence of the Lekhpal, from whom the petitioner had also made the cross-examination but could not extract anything contrary to the same, it could not have been disputed and has not been disputed and has also not been found unsatisfactory. Even otherwise, once a fact is admitted, it is not required to be proved. The cardinal principles of law of evidence is that a fact admitted need not be proved.

14. So far as the plea taken by the petitioner in the objection that the land in dispute is in the shape of Abadi is concerned, it is immaterial, once it has been admitted that the land in dispute is recorded as Talab (pond) because the nature of the land in dispute may have been changed and created by the encroachers which includes the petitioner and it does not give any right to the petitioner on the land of pond. The petitioner has not taken any plea of his statutory protection/ benefit in the objection filed against the show cause notice, therefore such plea is not tenable at this stage. Even otherwise, this plea is not available to the petitioner on the land of pond and he is also having his ancestral property.

15. So far as the plea of the petitioner for exchange of the land in dispute from the land of the petitioner is concerned, the plea is totally misconceived and not tenable because the exchange can be made by any Bhumidhar under Section 101 of the Code-2006 of his land with the land held by another Bhumidhar or entrusted or deemed to be entrusted to any gram panchayat or local authority under Section 59, whereas the petitioner wants to exchange from the recorded pond, which is not permissible, even if it has been created as abadi and it is liable to be get vacated and restored as pond.

16. The Hon'ble Supreme Court, in the case of **Hinch Lal Tiwari Vs. Kamala Devi and Others; (2001) 6 SCC 496** has held that the material resources of the community like forests, tanks, **ponds**, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence

of the guaranteed right under Article 21 of the Constitution and no part of pond could have been allotted to anybody for construction of house building or any allied purposes. A further direction has been issued by the Hon'ble Supreme Court for restoration of the pond, its development and maintenance as a recreational spot, which will undoubtedly be in the best interest of the villagers and it will also help in maintaining ecological balance and protecting the environment in regard to which this Court has repeatedly expressed its concern and such measures must begin at the grass-root level if they were to become the nation's pride. Therefore, if others have also made encroachment on the land of pond as stated by learned counsel for the petitioner, the respondents shall get the same also vacated in accordance with law and restore the pond.

17. Even otherwise the encroachers, who have their own land, can not be said to be entitled for exchange of their land with the same and if it is permitted, then the persons having muscle power will make encroachment on prominent and valuable land of the Government and others and on being found as encroachers would seek exchange from their land, which may be of lesser value, therefore exchange can not be considered and allowed in such circumstances.

18. In view of above and considering the over all facts and circumstances of the case, this Court is of the view that the impugned orders have rightly been passed in accordance with law after affording opportunity to the petitioner by reasoned and speaking orders, which does not call for any interference by this Court and the pleas taken by the petitioner before this Court are not tenable at all in the eyes of

law. This petition is misconceived, lacks merit and liable to be dismissed. No other points or grounds have been raised or argued before this court.

19. This petition is, accordingly, **dismissed**. No order as to costs.

(2023) 11 ILRA 623

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 23.11.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1004529 of 2007

M/S Nicholas Piramal India Ltd. & Ors.

...Petitioners

Versus

Presiding Officer Labour Court Lko. & Ors.

...Respondents

Counsel for the Petitioners:

Dr. R.K. Srivastava, Nishchal Jagdhari

Counsel for the Respondents:

C.S.C., Birendra Pd. Singh, Sanjay Saxena

A. Labour and Industrial Law - U.P. Industrial Disputes Act, 1947 - Sales Promotion Employees (Conditions of Service) Act, 1976 - Sections 2(d) & 6(1) & (2) - *Issue: Whether Medical Representatives are "workmen"* - Petitioner, employer took plea of want of jurisdiction of the Labour Court on the ground that Medical Representatives are not workmen and therefore the dispute cannot be termed as an industrial dispute and the Labour Court was not competent to hear and decide the said case - *Held* : After coming into force of the Sales Promotion Employees (Conditions of Service) Act, 1976 and subsequent amendment by Act No. 48 of 1986 w.e.f. 6.5.1987, Medical Representatives are deemed to be workmen under Section 6(2) of the Act of 1976 and are covered by the Industrial Disputes Act, 1947.

Court held that after 6.5.1987 all Medical Representatives were declared to be workmen without limitation on their wages. (paras 32, 33, 34).

B. Labour and Industrial Law - U.P. Industrial Disputes Act, 1947 - Sales Promotion Employees (Conditions of Service) Act, 1976 - Domestic enquiry, dismissal - Opportunity to adduce additional evidence - *Legal Issue*: Whether the petitioner employer, after reserving right in the written statement, was entitled to an opportunity to lead further evidence before the Labour Court in case the Labour Court was of the opinion that there was any infirmity in the domestic enquiry - *Held* : To avail of the benefit of leading evidence before the Labour Court in support of the charges levelled in domestic enquiry, the first condition is that the *option in that regard should be exercised by the employer at the time of filing of written statement*. Labour Courts/Tribunals have the power to call for any evidence at any stage if facts demand the same to meet ends of justice, and management has to seek leave in the written statement itself to lead additional evidence in the alternative and without prejudice to its rights and contentions, but this does not fetter powers of court/tribunal to direct evidence in interest of justice - Respondent workman dismissed on charge of misconduct for submitting false daily call reports - Domestic enquiry held at New Delhi though alleged misconduct at Lucknow, certificates of doctors not considered - Labour Court held charges not proved after analysing evidence including statement of prosecution witness and doctors' certificates - Argument of petitioner that opportunity to lead further evidence was wrongly denied rejected, as Labour Court had already dealt with entire evidence on record and found charges unproved - Court held that the *petitioner, employer, failed to demonstrate that there was fresh/other material available which could have been placed on record to prove the charges* - No infirmity found in Labour Court's findings - Court held that remanding the matter would be futile and an empty formality - Writ petition dismissed. (paras 15, 17, 20).

Dismissed. (E-5)

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

1. Heard Dr. R.K. Srivastava and Sri Nischal Jagdhari, learned counsel for the petitioner as well as learned Standing Counsel for the respondents.

2. By means of present writ petition the petitioner has assailed legality and validity of award dated 24.01.2007 passed by the Labour Court, Lucknow thereby allowing claim preferred by respondent no. 2 – workman and holding that domestic enquiry held against the workman was illegal and arbitrary and order passed against the workman as a result of domestic enquiry, was set aside holding that the workman was entitled to continue in service with effect from the date of his termination alongwith all consequential benefits.

3. Brief facts giving rise to the present case are that the respondent no. 2 – workman was initially appointed as clerk in M/s Nicholas Piramal India Ltd. with effect from 10.04.1973. Subsequently, by means of order dated 22.09.1982, he was appointed as Trainee Technical Representative and further was appointed on the post of Medical Representative.

4. It is stated that while discharging his duties as Medical Representative the workman-respondent no. 2 was involved in certain acts of misconduct and most specifically submitting false call reports from 05.10.1996 to 18.10.1996 of visiting Doctors and Chemists to whom in fact he has not visited. For his acts of misconduct an explanation was sought by means of a letter dated 07.12.1996 and not being satisfied with his explanation a regular enquiry was instituted. Accordingly charge sheet was issued to the workman-respondent no. 2 on 04.04.1997. Respondent no. 2 was duly heard in the

said proceedings, and he defended himself. The enquiry proceedings were held at New Delhi on 6th and 7th May, 1988 but the respondent no. 2 did not appear and on his request the enquiry was fixed for 10.06.1998, but he again did not appear and the matter was adjourned for 23.06.1998. On 23.06.1998, respondent no. 2 appeared and filed his documents.

5. The enquiry concluded and the enquiry officer submitted his report where he found all the charges levelled against respondent no. 2 – workman to be proved. The workman was given show cause notice alongwith a copy of the enquiry report to which he responded and finally he was dismissed from service by means of order dated 12th March, 1999 and was paid compensation of Rs.1,64,346/- and one month salary. Against his termination, the workman-respondent no. 2 preferred an appeal which was also rejected by the competent authority.

6. The respondent no. 2 raised industrial dispute under Section 4K of the U.P. Industrial Disputes Act and subsequently a reference was made on 08.09.1999 requiring the Labour Court to adjudicate the dispute raised by respondent no. 2 against the petitioner. In the said proceedings the petitioner put in appearance and filed written statement and opposed the claim set forth by the workman-respondent no. 2.

7. After completion of the pleadings Labour Court framed preliminary issue with regard to the facts as to whether domestic enquiry was fair and proper opportunity was given to the workman during the said proceedings. The Labour Court after perusing entire proceedings of the domestic enquiry and the procedure

followed therein, returned a finding that respondent no. 2 – workman was Medical Representative and he had stated that he had visited various Doctors on 05.10.1996 and 18/10/1996 and informed the Doctors and pharmacists about various drugs being sold by the petitioner company. It was noticed by the petitioner that on 05.10.1996 there was meeting of Union in which respondent no. 2 participated and it was not possible to visit Doctors and pharmacists in his capacity as Medical Representative and charged the workman for submitting false call reports.

8. It was noticed that the statements of said Doctors were not recorded, and merely by considering the fact that on that date meeting the workman would not have visited or called on the Doctors and consequently had submitted a false report in this regard. Similar allegations were levelled against him for not visiting Doctors on 18.10.1996. It was further stated that in his defense respondent no. 2 – workman had produced certificates issued by various Doctors, wherein it was stated that he had visited them on the said dates and once such certificates were produced before the enquiry officer then there was no reason for taking a contrary view and disbelieve the said certificates. It was also considered that repeated requests were made for taking statements of Doctors but despite the requests the statements were not recorded.

9. The Labour Court further considered that the workman had worked for a very long time with the petitioner Company and during his tenure he had extremely good track record and through his efforts the petitioner had profited and had sold huge amount of medicines and consequently it was held that from the

material on record that charge no.1 with regard to working dishonestly was not proved. Further, it was found that once the Doctors have given their certificates to the effect that respondent no. 2 – workman had visited them on the dates in question then it cannot be concluded that the workman had not visited them on the said dates, and accordingly the charge on this count was also not proved, contrary to the findings recorded in the order of dismissal. It was observed that certificates issued by the Doctors could not have been disbelieved, without any material to the contrary, and accordingly held that the findings recorded by the domestic enquiry were, illegal and arbitrary and consequently the order of dismissal was set aside.

10. We have considered the arguments of the petitioner as well as perused the record. The respondent workman was alleged to be involved in certain acts of misconduct for submitting false and fabricated daily call reports of 5/10/1996 and 18/10/1996 of having visited Doctors and chemists to whom in fact he had not visited. At the time the respondent was working as a Medical Representative. For the aforesaid misconduct he was required to submit his explanation, and subsequently a chargesheet was issued to him. The enquiry proceedings were held in New Delhi. In the enquiry the charges were found to be proved as per the report of the enquiry officer. The reply of the workman was duly considered, and the disciplinary authority concurred with the findings of the enquiry officer, and a penalty of dismissal was imposed. Compensation of ₹ 1,64,346/- and one month salary was paid to him.

11. There was a meeting of the Workers Union of which the workman

(respondent No. 2) was a member on 05/10/1996 and 18/10/1996 in which he participated. He further submitted a certificate that he had met 5 Doctors and pharmacists on the said dates to promote the medicines sold by the petitioner. The allegations levelled against him was that on the date of the meeting it was not possible for him to meet the Doctors and pharmacists, and therefore the said certificates are false which was a misconduct, and the said basis disciplinary proceedings were initiated against him.

12. The domestic enquiry proceedings were conducted in Delhi, while the alleged misconduct happened in Lucknow where respondent no. 2 had met the doctors concerned. In his defense, the workman had produced certificate of 5 Doctors certifying that he had met them on the said dates. On behalf of the petitioner statement of the supervisor namely Mr P.K Shukla was also recorded. From his statement, it was found that it was possible for the respondent/workman to have met the Doctors either before the meeting or after 3 PM when the meeting got over, as he had three-hour period between the end of the meeting till attending the dinner in the hotel. There were repeated requests made by the workman for having the enquiry be conducted at Lucknow where all the witnesses i.e the doctors were present and could have testified about his presence on the said dates. Neither the enquiry proceedings were conducted at Lucknow, nor were the certificates of the doctors relied upon by the prosecution, and consequently the Labour Court has rightly concluded that the charges have been proved by the petitioner on the basis of conjecture and surmises without there being any material in support of the same. The Tribunal has rightly concluded that

charge number one was not proved as no material was adduced which may indicate that he had worked dishonestly in connection with the employers business. The workman was able to prove that he had worked satisfactorily for last 24 years and due to his efforts the company has profited which was reflected in the sales figures. He was also given a gold medal by the petitioner for his services.

13. To prove the charge of habitual negligence or neglect of work, no evidence was led by the petitioner. Mr P.K Shukla the witness for the petitioner, on the contrary stated that there was no allegation against the petitioner prior to the said act of misconduct and accordingly on the basis of the said statement, and also in absence of any other material, the said charge was also not proved. Regarding the charge of submitting false call reports, the Labour Court held that relying upon the statement of the witness for the petitioner it was clear that on the date of the meeting there was sufficient time to petitioner to have called on the Doctors and pharmacists, and consequently it cannot be said that the call reports filed by the workman were false. This was not contradicted and is also borne out from the evidence adduced on behalf of the petitioners. The certificates of the Doctors were produced during the domestic enquiry and there was no reason for disbelieving them, and for the aforesaid reason the charge against the petitioner was also not proved. This court also does not find any infirmity with the findings recorded by the Labour Court, and no other material or argument was raised by the petitioner which could persuade us to take a contrary view. Accordingly, the argument in this regard submitted by the petitioner is rejected.

14. The petitioner submitted that they should have been given a chance to prove the charges before the Labour Court. It was stated that in the written statement they had reserved the right of adducing evidence, and in case the Labour Court was of the opinion that there was any infirmity in the domestic enquiry then opportunity should have been given to the petitioner to adduce further evidence. In support of their submissions they relied upon the judgement of the Supreme Court in the case of **Karnataka State Road Transport Corporation vs Smt Lakshmiddevamma and another (2001) 5 SCC 433.**

15. To avail of the benefit of leading evidence before the Labour Court in support of the charges levelled in domestic enquiry, the first condition is that the option in this regard should be exercised by the employer at the time of filing of written statement. In the present case undoubtedly, the petitioner had stated that after the decision of primary issues, the circumstances require that the petitioner should be allowed to lead evidence on facts in order to prove its case before the Labour Court.

16. In cases where the termination of a workman is preceded by domestic enquiry, and such termination is challenged, the Supreme Court has held that in case the Labour Court is of the view that the domestic enquiry is initiated on account of violation of principles of natural justice, or that the workman was not afforded proper opportunity, then the employer can be permitted to lead evidence to prove the charges before the Labour Court itself. It is the contention of the petitioner that the order of dismissal has been set aside and despite their seeking

permission to lead evidence, the Labour Court declined to give such opportunity.

17. The Hon'ble Supreme Court in the case of **Karnataka SRTC v. Lakshmiddevamma, (2001) 5 SCC 433** has held as under:-

"45. It is consistently held and accepted that strict rules of evidence are not applicable to the proceedings before the Labour Court/Tribunal but essentially the rules of natural justice are to be observed in such proceedings. Labour Courts/Tribunals have the power to call for any evidence at any stage of the proceedings if the facts and circumstances of the case demand the same to meet the ends of justice in a given situation. We reiterate that in order to avoid unnecessary delay and multiplicity of proceedings, the management has to seek leave of the court/tribunal in the written statement itself to lead additional evidence to support its action in the alternative and without prejudice to its rights and contentions. But this should not be understood as placing fetters on the powers of the court/tribunal requiring or directing parties to lead additional evidence including production of documents at any stage of the proceedings before they are concluded if on facts and circumstances of the case it is deemed just and necessary in the interest of justice."

18. Considering the submissions of counsel for the petitioner, it is noticed that the Labour Court on the request of the petitioner framed a preliminary issue with regard to the fairness of the domestic enquiry. It subsequently dealt with the entire evidence which was led by the prosecution including the statement of Sri PK Shukla who appeared on behalf of the petitioner, as well as the evidence filed by

the workman, and analysed the entire material. After a detailed discussion and analysis, the Labour Court came to the conclusion that the case for dismissal is not made out and none of the charges are proved. This Court has also looked into the aforesaid material and is of the opinion that there is no infirmity with the findings recorded by the Labour Court.

19. The Labour Court has declined to give opportunity to the petitioner to lead evidence on the ground that all the material pertaining to the charges relating to workman attending the meeting with the doctors and pharmacists was already on record, from which the charges are not proved. Despite the specific application having been given by the workman to record the evidence of the Doctors at Lucknow no orders were passed by the enquiry officer and on the other hand certificates given by the Doctor certifying that in fact he visited on the said dates, were available on record from which it was clearly borne out that he had met the Doctors on the two dates. It is in the aforesaid facts that the Court held that the charges are not proved and no other material was placed before the Labour Court in support of the charge.

20. In the present writ petition only vain attempt has been made assailing the order of the Labour Court on the ground that it had not granted them opportunity to lead evidence. It was incumbent upon the petitioner to place material/evidence indicating that fresh/other material was in fact available which could have been placed on record to prove the charges. Matters can be remitted to the Prescribed Authority/Labour Court when it is found, on examination, that there has been violation of principles of natural justice and

the workman was not given proper opportunity to defend himself. In the present case the merits of the charges have been examined by the Labour Court itself, and finding has been returned that the charges are not proved from the material available on record. Therefore, it was necessary for the petitioner to demonstrate that there was other evidence which was available but could not be produced during the domestic enquiry, and that evidence was relevant and necessary to bring home the charges. In the absence of any such material or assertion made before this Court, remanding the matter to the Labour Court would be futile and an empty formality, and is unjustified in the facts of the present case. Accordingly, no ground for interference in this regard is made out, and the argument of the petitioner is rejected.

21. Learned counsel for the petitioner has lastly argued that the award passed by the impugned award dated 24.01.2007 is illegal and arbitrary and without jurisdiction. It was submitted that respondent no. 2 was working on the post of Medical Representative and he is not a "workman" as per Section 2 of the U.P. Industrial Disputes Act and accordingly the Labour Court did not had jurisdiction to decide the said dispute.

22. It was argued on behalf of the respondent no. 2 that the said plea was not taken before the Labour Court and has been raised for the first time in the present writ petition. It has been urged on behalf of the petitioner that Medical Representatives are not 'workman' and therefore, the present dispute cannot be termed as Industrial dispute and the Labour Court is not competent to hear and decide the said case.

23. In the entire writ petition there is no averment has been made as to the nature of work performed by respondent no. 2 nor the wages received by him have been mentioned, but, it has been vehemently submitted that this being question of law it goes to the root of the matter and hence same can be taken for the first time in the writ petition. Considering the above arguments it would be appropriate to consider the said plea in the interest of justice.

24. It has been submitted before this court that Medical Representatives are not 'workmen', as defined in the Industrial Disputes Act. In support of their submissions, they relied upon the case of **May and Baker (India) Ltd. v. Their Workmen, AIR 1967 SC 678** where the Apex Court held that medical representatives shall not be included in the definition of 'workman', since they do not meet the criterion specified in the Act.

25. According to the said case, it was held that for being a workman, certain condition should be satisfied, namely:

1. he should be a person employed in an industry for hire or reward;
2. he should be engaged in skilled or unskilled manual, supervisory, technical or clerical work; and
3. he should not be a person falling under any of the four clauses, i.e. (i) to (iv) mentioned in the definition of 'workman' in section 2(s) of the Act, 1976.

26. The Supreme Court in **May and Baker (India) Ltd. (supra)** accordingly held that:-

"9. The next contention on behalf of the company is with respect to the order of

reinstatement of Mukerjee. The company's case is that Mukerjee was discharged with effect from April 1, 1954. At that time the definition of the word "workman" under Section 2(s) of the Industrial Disputes Act did not include employees like Mukerjee who was a representative. A "workman" was then defined as any, person employed in any industry to do any skilled or unskilled manual or clerical work for hire or reward. Therefore doing manual or clerical work was necessary before a person could be called a workman. This definition came for consideration before Industrial Tribunals and it was consistently held that the designation of the employee was not of great moment and what was of importance was the nature of his duties. If the nature of the duties is manual or clerical then the person must be held to be a workman. On the other hand if manual or clerical work is only a small part of the duties of the person concerned and incidental to his main work which is not manual or clerical, then such a person would not be a workman. It has therefore to be seen in each case from the nature of the duties whether a person employed is a workman or not, under the definition of that word as it existed before the amendment of 1956. The nature of the duties of Mukerjee is not in dispute in this case and the only question therefore is whether looking to the nature of the duties it can be said that Mukerjee was a workman within the meaning of Section 2(s) as it stood at the relevant time. We find from the nature of the duties assigned to Mukerjee that his main work was that of canvassing and any clerical or manual work that he had to do was incidental to his main work of canvassing and could not take more than a small fraction of the time for which he had to work. In the circumstances the tribunal's conclusion

that Mukerjee was a workman is incorrect. The tribunal seems to have been led away by the fact that Mukherjee had no supervisory duties and had to work under the directions of his superior officers. That, however, would not necessarily mean that Mukerjee's duties were mainly manual or clerical. From what the tribunal itself has found it is clear that Mukerjee's duties were mainly neither clerical nor manual. Therefore as Mukerjee was not a workman his case would not be covered by the Industrial Disputes Act and the tribunal would have no jurisdiction to order his reinstatement. We therefore set aside the order of the tribunal directing reinstatement of Mukerjee along with other reliefs."

27. After the judgement of the Supreme Court in the case of **May and Baker (India) Ltd. v. Their Workmen (supra)** the Parliament enacted **Sales Promotion Employees (Conditions Of Service) Act, 1976** (hereinafter referred to as "the Act of 1976"). The said act specifically applied to an establishment engaged in pharmaceutical industry or in any notified industry as per section 2(a) of the Act, 1976, and as per section 2(d) of the Act, 1976 the "sales promotion employee" was defined as any person by whatever name called (including an apprentice) employed or engaged in any establishment for hire or reward, to do any work relating to promotion of sales or business, or both, but does not include any such person—

(i) who, being employed or engaged in a supervisory capacity, draws wages exceeding sixteen hundred rupees per mensem; or

(ii) who is employed or engaged mainly in a managerial or administrative capacity.

28. By the Act of 1976, the Medical Representatives who were defined as sales promotion employees were held to be 'workman' under section 6(1) & (2) of the Act, 1976. Provisions of section 6 of Act of 1976 are as under:-

6. Application of certain Acts to sales promotion employees is detailed herein below :-

(1) The provisions of the Workmen's Compensation Act, 1923 (8 of 1923), as in force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to, or in relation to, workmen within the meaning of that Act.

(2) The provisions of the Industrial Disputes Act, 1947 (14 of 1947), as in force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to, or in relation to, workmen within the meaning of that Act and for the purposes of any proceeding under that Act in relation to an industrial dispute, a sales promotion employee shall be deemed to include a sales promotion employee who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute or whose dismissal, discharge or retrenchment had led to that dispute.

29. The dispute in the present case admittedly pertains to period subsequent to enactment of Sales Promotion Employees (conditions of service) Act, 1976, and consequently the judgement of the Supreme Court in the case of **May and Baker (India) Ltd.v.Their Workmen, AIR 1967 SC 678** would not be good law with regard to the fact that as to whether the medical representatives are 'workman' as per Section 2(d) of the Industrial Disputes Act, 1976.

30. Supreme Court had decided the said issue when the *Sales Promotion*

Employees (conditions of service) Act, 1976, was not in existence. The Act of 1976 had amended the definition of "sales promotion employee" which includes Medical Representatives and held them to be 'workman' as per the Industrial Disputes Act. Bombay High Court in the case of **S.G. Pharmaceuticals Division of Ambala Sarabhai Enterprises Ltd. v. U.D. Pademwar, Letters patent appeal no. 515 of 1984 (decided on 7 August 1989)** has elaborated the issue, in this case, in the following manner :-

"statement of objects and reasons published in the Gazette of India on May 14, 1975, Part II, Section 2, it was clear that as a result of the Supreme Court judgment in the case of May and Baker (India) Limited and Their Workmen (supra) the persons engaged in sales promotion do not come within the purview of the definition of "workman" under the Industrial Disputes Act, 1947 and as such they have no protection regarding security of employment and other benefits under that Act. These persons particularly the medical representatives in the pharmaceutical industry had been demanding from time to time that they should be covered by Industrial Disputes Act. On a petition made by the Federation of Medical Representatives' Associations of India, the Committee on Petitions (Rajya Sabha) in its thirteenth report submitted on March 14, 1972, came to the conclusion that the ends of social justice to this class of people will not be met only by suitably amending the definition of the term "workman" in the Industrial Disputes Act, 1947 in a manner that the medical representatives are also covered by the definition of "workman" in the said Act. Our attention was drawn particularly to sub-section (2) of section 6 of the Sales

Promotion Employees (Conditions of Service) Act, 1976 which provides that the provisions of the Industrial Disputes Act, 1947, as in force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to, or in relation to, workmen within the meaning of the Act and for the purposes of any proceeding under that Act in relation to an industrial dispute. From this deeming provision, it is apparent that the Parliament recognised that the class for the benefit of which the legislation was being undertaken, was not covered by the definition of "workman" under section 2(s) of the Industrial Disputes Act and that was the reason to include that category by the deeming provision which was incorporated. To say, therefore, that a person who did the job of sales promotion did not belong to an identifiable category which would not be correct."

31. We are in agreement with the view taken by the Bombay High Court in the case of **S.G. Pharmaceuticals (supra)** and it is thus clear that as per section 6(2) of Sales Promotion Employees (Conditions of Service) Act, 1976, the medical representatives are "workman" under the Industrial disputes Act, 1947. Further in the case of **H.R. Adyanthaya v. Sandoz (India) Ltd, 1994 SCC (5) 737** it was further made clear that the 1976 Act after its amendment in the year 1986 by the Amending Act No. 48 of 1986 which came into effect w.e.f. 06.05.1987 expanded the definition of sales promotion employee to include all sales promotion employees without any ceiling on their wages, except those employed in supervisory capacity drawing wages exceeding Rs 1600 per mensem and those employed or engaged mainly in managerial or administrative capacity.

32. Thus, after 06.05.1987 all the medical representatives were declared to be workmen without limitation on their wages thereafter and upon the capacity in which they were employed or engaged.

33. In light of the aforesaid discussion this Court is of the considered view that after coming into force of *Sales Promotion Employees (conditions of service) Act, 1976* the medical representatives would be deemed to be workmen as per the provisions of Industrial Disputes act and accordingly the argument of the petitioner is rejected in this regard.

34. In light of the aforesaid discussion this Court does not find any infirmity in the impugned order dated 24.01.2007. The writ petition is accordingly **dismissed**.

(2023) 11 ILRA 632
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.11.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482. No. 4653 of 2023

Parashu Ram Dohre ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
 Dharm Raj Mishra

Counsel for the Opposite Parties:
 G.A., Shambhunath Mishra, Shambhoo
 Nath Misra, Umesh Chandra Tripathi, Quazi
 Vakil Ahmad

A. Criminal Law - Criminal Procedure Code,
 1973-Section 482 - Indian Penal Code, 1860-
 Sections 342, 379, 427, 468, 471 & 120 (B) -

N.D.P.S. Act, 1985 - Section 8/20/29 . As far as the first issue is concerned, it is clear from the fact of this case that after the applicant proceeded against the accused persons and recovered the contraband substance against them, thereby collecting the evidence, the investigating agency, i.e., CBCID without recording any reason that the act of the applicant is not in a good faith, proceeded in the matter and filed the charge-sheet for the other offences than provided in Section 58 of the Act, 1985, which in the opinion of this Court is against the mandate of Section 69 of the Act, 1985. If the provision of Section 58 of the Act, 1985 is given in the act so as to protect the accused from the stringent action, then on the other hand, the officer who acts under Section 42, 43, 44 of the Act, 1985, has also been given protection under Section 69 of the Act, 1985. No doubt that a proceeding under Section 58 of the Act, 1985 can be invoked, but what would be the stage, is the foremost question. While searching out the answer, it is overt from the bare reading of the provision that the Court before whom the criminal proceeding against an accused is running, comes to the conclusion that entry, search, seizure or arrest was either vexatious or unnecessary or a case of unnecessary detention, he shall be prosecuted with the punishment provided under Section 58 of the Act, 1985- In the instant matter, the First Information Report has been lodged under Section 342, 379, 427, 468, 471, 120(B) of IPC and under Sections 8/20/29 of the NDPS Act, against the applicant but the allegation against the applicant is that he has falsely implicated the opposite party no. 3 by showing false seizure of the contraband substance, from his possession. For the aforesaid allegations, the punishment is provided under Section 58 of the Act, 1985 and being an Special Act, the prosecution of such an officer can be done by following the procedure of law but so far as the criminal proceeding initiated against the applicant is concerned, it was done ignoring the provision of Section 69 of the Act, 1985 and therefore, the criminal proceeding arising out of Case Crime No. 67 of 2005 is erroneous.(Para 1 to 31)

The application is allowed. (E-6)

List of Cases cited:

1. UOI thru Narcotic Control Bureau, Lko.Vs M.D. Nawaz Khan(2021) AIR SC 4476;
2. Ravindra B. Dixit Vs St. of M.P. (2000) 10 SCC 92

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Dharm Raj Mishra, learned counsel for the applicant, Sri Rajan Mishra, Advocate holding brief of Sri Quazi Vakil Ahmad, learned counsel for the opposite party no.2, Sri Aniruddh Kumar Singh, learned A.G.A.-I and Sri Sanjay Kumar Yadav, learned AGA for the State.

2. By means of the instant petition, the applicant has sought following:-

(I) issue an order or direction in appropriate nature for setting aside the impugned order dated 26.04.2023 passed by the learned Additional Session Judge, F.T.C. -II, Bahraich contained as annexure No.1 to the petition and further may pleased to set aside the charge sheet No.7 of 2022 contained as annexure No.5 to the petition.

(II) Issue an order or direction in appropriate nature to set-aside the proceeding of case crime No.67/2005 under Section- 342, 379, 427, 468, 471, 120 (B) I.P.C. and under Section 8/20/29 of the N.D.P.S. Act pending before learned Additional Session Judge, F.T.C. -II, Bahraich and direct the opposite party No.1 to investigate the matter in fair and impartial manner.

3. Factual matrix of the case is that the petitioner with other members of the Police team, on an information, raided and arrested Sarfaraz on 18 June 2003 from

Nepal border and 1 KG of Charas, i.e., contraband substance was recovered from his possession and a First Information Report was lodged as Case Crime No. 202 of 2003 under Section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as 'the Act 1985'). Thereafter, Shrinath Yadav was appointed as Investigating Officer who recorded the statement of the witnesses and prepared the site plan and submitted the chargesheet on 6 July 2003 but in the meanwhile, the father of the accused wrote a letter to the Human Rights Commission, that his son is being falsely implicated and thereafter the Special Secretary Home wrote a letter to the Superintendent of Police, Bahraich to conduct an enquiry regarding allegations levelled by the father of the opposite party no. 3 and Circle Officer, Nanpara, Bahraich was appointed to enquire the matter. Thereafter recording the statement of opposite party no. 2 and the witnesses, submitted his report that the allegations made by the opposite party no. 2, are not correct and ignoring the report of the Circle Officer dated 17.11.2003, the Under Secretary, Government of Uttar Pradesh, directed to the Director General of Police to transfer the investigation of Case Crime No. 202 of 2003 to CBCID, with immediate effect. In the meantime, the trial Court took cognizance on the chargesheet dated 28 July 2003 submitted by the Investigating Officer and charges were also framed against the opposite party no. 3 vide order dated 24 January 2004.

4. In compliance of the order of the Under Secretary, Government of UP, Nihal Prasad was appointed as Investigating Officer who submitted the final report before the trial Court. A First Information Report was lodged against the applicant under Section 8/20 of the Act, 1985, which

was registered as Case Crime No. 67 of 2005. Being aggrieved, the applicant filed a writ petition, namely, 1306 (MB) of 2005 before this Court wherein the arrest of the applicant was stayed vide order dated 2 March 2005. Thereafter, Sarfaraz filed a petition under Section 482 No. 1316 of 2006, challenging the chargesheet dated 6 July 2003 filed against him which was dismissed vide order dated 18 September 2012. Further, the final report which was submitted by the Investigating Officer was rejected by the trial Court on 4 January 2006 on the protest application of the applicant and against the aforesaid order, no appeal or revision has been filed and that has attained finality.

5. Father of accused filed Writ Petition No. 25227 of 2020 before this Court for conducting proper and fair investigation in Case Crime No. 67 of 2005, which was finally disposed of vide order dated 9 July 2021, and a recall application of the order dated 9 July 2021 was moved by the applicant which is still pending. Thereafter, the father of the accused, Sarfaraz filed contempt petition bearing No. 1636 (C) of 2021. Later on, the Writ Petition No. 1306 of 2005 filed by the applicant was dismissed and a special leave petition was instituted which too was dismissed.

6. On 19.12.2022, chargesheet was filed in Case Crime No. 67 of 2005 under Sections 342, 379, 427, 467, 468, 471, 120-B of IPC and 8/20/29 of the Act, 1985. On 26 April 2023, the trial Court took cognizance against the applicant and issued summons.

7. So far as, the prosecution sanction was granted in Case Crime No. 67 of 2005,

the same is under challenge before this Hon. Court and is pending consideration.

8. Contention of the learned counsel for the applicant is that, the Act, 1985 is a special Act and the intent of the legislature is clear by expressly providing punishment under Section 58 for vexatious entry and unlawful search, seizure or arrest. He added that the case in hand is that it is malicious prosecution, as the present applicant has not made vexatious entry and unlawfully arrested the opposite party no. 3. He added that the applicant acted in a good faith and there was no intention to falsely implicate opposite party no. 3 and the evidence which was collected by the Investigating Officer do not disclose that how the entry is vexatious and the search, seizure or arrest are unlawful or without any reasonable ground of suspicion.

9. Section 58 of the Act, 1985 is reproduced hereinunder :-

"58. Punishment for vexatious entry, search, seizure or arrest.-(1) Any person empowered under section 42 or section 43 or section 44 who-

(a) without reasonable ground of suspicion enters or searches, or causes to be entered or searched, any building, conveyance or place;

(b) vexatiously and unnecessarily seizes the property of any person on the pretence of seizing or searching for any narcotic drug or psychotropic substance or other article liable to be confiscated under this Act, or of seizing any document or other article liable to be seized under section 42, section 43 or section 44; or

(c) vexatiously and unnecessarily detains, searches or arrests any person,

shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

(2) Any person wilfully and maliciously giving false information and so causing an arrest or a search being made under this Act shall be punishable with imprisonment for a term which may extend to two years or with fine or with both. "

10. Referring the aforesaid he submits that under Section 58 of the Act, 1985, there is a provision for prosecution of an Officer empowered under Section 42, 43 and 44 of the Act, 1985 for false or malicious or vexatious entry, search, seizure or arrest but the fact remains that the opposite party no. 3 who is the accused person and was arrested by the present applicant and the contraband, 1 KG Charas was seized from his possession, the chargesheet was filed against him and his discharge application was rejected and charges has been framed, meaning thereby the trial Court at first hand applied its mind and there was substantial material against the opposite party no. 3 for framing of charges and therefore, this could not be said that arrest of the opposite party no. 3 was unlawful or there is any vexatious entry or unlawful search and seizure.

11. He further argued that under Section 54 of the Act, 1985, there is a provision of presumption regarding the possession of contraband substance recovered and seized by the empowered officer, until proved otherwise. Since, the substance was admittedly recovered and seized from the possession of Sarfaraz and

trial against Sarfaraz is at final stage, therefore, on the basis of presumption that such contraband was in possession of the applicant, is wholly unbelievable and baseless. Further contention of the learned counsel for the applicant is that the impugned order and the chargesheet are against the provision of section 69 of the Act, 1985.

12. Section 69 of the Act, 1985 is reproduced here in under :-

"69. Protection of action taken in good faith.

No suit, prosecution or other legal proceeding shall lie against the Central Government or a State Government or any officer of the Central Government or of the State Government or any other person exercising any powers or discharging any functions or performing any duties under this Act, for anything in good faith done or intended to be done under this Act or any rule or order made thereunder."

13. Referring the aforesaid he submits that looking into the provision of Section 58 and for giving a safeguard to the authority under this Act, it has cautiously been provided by the legislature that no suit, prosecution or other legal proceeding shall lie against any officer of the Central Government or State Government or any person exercising any power or discharging any function under this Act which has been done in a good faith. This provision clearly shows that while promulgating the stringent punishment for offences in the Act, 1985, the legislature was aware of the misuse of the provision, and therefore provided protection, thereby inserting the provision of Section 69.

14. While adding his argument, he submits that the provision of Section 58 of the Act, 1985 provides the procedure with respect to punishment and being the special Act, if an offence is been committed by any person, which is provided in the Act itself, unless otherwise provided under law, such person or authority shall be dealt in accordance with the provision of this Act, not otherwise. He submits that chargesheet has been filed under Section 8/20/29 of the Act, 1985 along with several Sections of Indian Penal Code, which is not permissible under the law.

15. Further initiation of criminal prosecution against the present applicant is of no avail and this could only be done in the exigencies, if the final report is filed and accepted by the trial Court against the accused who has been arrested by such a person, liable to be prosecuted under Section 58 of the Act, 1985 or the criminal proceeding are concluded and such accused person is acquitted. He submits that so far as, the case in hand is concerned, the chargesheet has been filed against the opposite party no. 3 and the discharge application has been rejected and charges have been framed and that has not been challenged at any Court of law and has attained finality. He added that this, prima facie, shows that the entry is not vexatious and there is no maliciousness apparent so far as the allegation of false implication against the applicant is concerned.

16. In support of his contention, he has placed reliance on the following judgements :-

1) (2000) 10 SCC 92; Ravindra B. Dixit Vs. State of M.P. and has referred paragraph 4 and 5 which is quoted hereinunder :-

“4. A bare reading of the aforesaid section would indicate that recourse can be taken to the said provision only when the court comes to the conclusion that the entry, search, seizure or arrest was either vexatious or unnecessary as is apparent from sub-section (1)(b) of Section 58.

5. From the mere fact that there has been an infraction of Sections 42 and 50 of the Act, the Court cannot jump to the conclusion that the arrest or seizure in question was either vexatious or unnecessary. In that view of the matter, the impugned direction of the High Court must be held to be without jurisdiction as the condition precedent for application of Section 58 has been found to be lacking. In these circumstances, we set aside the impugned direction and allow these appeals accordingly.”

2) (2021) AIR SC 4476; Union of India through Narcotic Control Bureau, Lucknow Vs. M.D. Nawaz Khan and has referred paragraph 9 (iv), which is quoted hereinunder :-

“9 (iv) A presumption under Section 54 of the NDPS Act would arise in respect of the possession of a narcotic drug which is found to be in the conscious possession of the accused.”

17. On the other hand, the learned counsel appearing for the private respondent has opposed the contentions aforesaid and submits that the applicant falsely implicated the opposite party no. 2 by registering a First Information Report as Case Crime No. 202 of 2003 at Police Station Nawabganj District Bahraich and that's why the opposite party no. 2 wrote several letters, including letter to the

Human Rights Commission, New Delhi and thereafter, the matter was investigated by the CBCID. The CBCID after thoroughly investigating the matter, found the charges that the opposite party no. 2 has been falsely implicated as it was found that there was some criminal conspiracies committed by the Investigating Officer and by showing false recovery of the contraband substance, the opposite party no. 2 was thrown to face stringent criminal proceedings.

18. During the course of his argument, he has also pointed out that the Human Rights Commission took notice of the complaint dated 02.08.2003 made by the respondent and action taken report was sought from the Superintendent of Police, Bahraich, whereafter a report was submitted, wherein, the clean chit was given to the Investigating Officer as well as other Police officers. He added that the applicant challenged the Government Order dated 24.12.2003 as well as the First Information Report dated 19.02.2005 before this Court vide criminal Writ Petition No.1306 (MB) of 2005, wherein, the order dated 13.09.2019 was passed and the petition was dismissed. He submitted that the applicant had also taken all the plea before the Division Bench of this Court, which are also being placed before this Court vide this petition.

19. He argued that the matter has thoroughly been investigated by the CBCID and thereafter the matter proceeded against the applicant and once the material substance was found against the applicant, the trial Court issued summons. Further contention of the private respondent is that the protection under Section 58 of the NDPS act cannot be granted to the applicant as the Division Bench of this

Court had already expressed its view that the First Information Report has rightly been registered against the applicant and therefore, in the event of material substance against the applicant as well as the order of this Court, no interference is warranted.

20. Per contra, the learned counsel for the State submits that initially the First Information Report was lodged against the respondent and thereafter the matter proceeded and they were found involved in committing offence under the NDPS Act, as the contrabands were recovered from their possession. He submits that being aggrieved, he moved before the Human Rights Commission, New Delhi and after certain developments, the investigation against the applicant, completed and the chargesheet was filed and after taking cognizance, the Magistrate has also summoned the private respondent and in between, the CBCID has also investigated the matter and found that the applicant was involved in committing the offence and therefore the First Information Report was registered and after investigation the chargesheet has been filed.

21. Having heard the counsel for the parties and after perusal of the material placed on record, it transpires that the police team on an information raided the place of occurrence and arrested Sarfaraz, respondent no. 3 at Nepal border with 1 kg of Charas and thereafter completing the formalities of recovery thereafter, the accused persons were arrested and sent to jail. Further, a complaint was made by the accused persons to the Human Rights Commission, New Delhi whereafter an investigation was also started by the CBCID and a First Information Report was lodged against the applicant with a charge of falsely implicating the accused persons

in Case Crime No. 202 of 2003. Though, the applicant filed a writ petition before this Court challenging the FIR, but since the investigation was almost at the completion stage, therefore, the Court did not enter into the matter and dismissed the same.

22. When this Court examines the present matter in the light of the law regarding the false implication in the matters of the NDPS Act, it reveals that Section 58 provides punishment for vexatious entry, search, seizure, or arrest by a person empowered under Section 42 or 43 or 44 of the Act, 1985. Since, the criminal proceedings under the Act, 1985, are stringent, therefore cautiously, the Parliament has inserted provisions for the safeguard of the accused persons. The provision of Section 58 would come into light when without any reasonable ground of suspicion, a person empowered under section 42, 43, 44 of the Act, 1985 enters or searches or causes to be entered or searched any building, convenience or place and vexatiously and unnecessarily seized the property for pretence of searching and seizing any narcotic drug or psychotropic substance or other article or detains, searches or arrest any person, he/she shall be punished. Meaning thereby that if at any point of time pleas are raised by the accused persons, who were searched or arrested or whose properties were seized, they would have right to make complaint and on such complaint and after investigation on it, if it is found that any person has resulting it to cause falsely and maliciously given false information or arrested or searched, must be prosecuted.

23. This court has noticed the fact that the applicant being Investigating Officer in Case Crime No. 202 of 2003, arrested the respondent/accused persons and recovered

the contraband substance, i.e., 1 KG Charas from them and therefore the First Information Report was lodged and thereafter the matter was investigated and chargesheet was filed. The trial Court had also taken cognizance and issued summons and the matter is still pending consideration. But one thing is clear that at the first hand, the respondent accused persons are found involved in committing offence and they were chargesheeted. So far as the chargesheet filed against the applicant is concerned, that does not disclose that whether Section 69 of the Act, 1985 has been taken care of by the investigating agency, who has submitted the chargesheet against the applicant under Section 58 of the Act, 1985 is a protection to the action of an officer, who acted in a 'good faith'.

24. In view of the aforesaid backgrounds, the issues are cropped up; one is that whether, in a case, where the chargesheet has been filed against an accused for offences under the Act, 1985, but without completion of the trial proceeding, the police officer or any authority can be prosecuted for offences prescribed under section 58 of the Act, 1985 and secondly, that whether the protection, which were given to an officer under Section 69 of the Act, 1985 can be ignored by any of the investigating agency, in any eventuality.

25. As far as the first issue is concerned, it is clear from the fact of this case that after the applicant proceeded against the accused persons and recovered the contraband substance against them, thereby collecting the evidence, the investigating agency, i.e., CBCID without recording any reason that the act of the applicant is not in a good faith, proceeded

in the matter and filed the chargesheet for the other offences than provided in Section 58 of the Act, 1985, which in the opinion of this Court is against the mandate of Section 69 of the Act, 1985. If the provision of Section 58 of the Act, 1985 is given in the act so as to protect the accused from the stringent action, then on the other hand, the officer who acts under Section 42, 43, 44 of the Act, 1985, has also been given protection under Section 69 of the Act, 1985. No doubt that a proceeding under Section 58 of the Act, 1985 can be invoked, but what would be the stage, is the foremost question. While searching out the answer, it is overt from the bare reading of the provision that the Court before whom the criminal proceeding against an accused is running, comes to the conclusion that entry, search, seizure or arrest was either vexatious or unnecessary or a case of unnecessary detention, he shall be prosecuted with the punishment provided under Section 58 of the Act, 1985.

26. In the instant matter, the First Information Report has been lodged under Section 342, 379, 427, 468, 471, 120(B) of IPC and under Sections 8/20/29 of the NDPS Act, against the applicant but the allegation against the applicant is that he has falsely implicated the opposite party no. 3 by showing false seizure of the contraband substance, from his possession. For the aforesaid allegations, the punishment is provided under Section 58 of the Act, 1985 and being an Special Act, the prosecution of such an officer can be done by following the procedure of law but so far as the criminal proceeding initiated against the applicant is concerned, it was done ignoring the provision of Section 69 of the Act, 1985 and therefore, the criminal proceeding arising out of Case Crime No. 67 of 2005 is erroneous.

27. This Court has also taken note of the fact that after investigation in Case Crime No. 202 of 2003, the charge-sheet was filed against the opposite party no. 3 and thereafter the charges have also been framed and thus, the story which has been narrated by the opposite party no. 2, prima facie, seems to be incorrect.

28. In view of the aforesaid submissions and discussions, the entire criminal proceedings arising out of Case Crime No. 67 of 2005 under Section- 342, 379, 427, 468, 471, 120(B) of IPC and under Section 8/20/29 of the N.D.P.S. Act pending before learned Additional Session Judge, F.T.C.- II, Bahraich are hereby quashed.

29. It is open to the prosecution to proceed further against the applicant, in accordance with law.

30. The instant application is hereby allowed.

(2023) 11 ILRA 640
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.11.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482. No.8245 of 2023

Vishal Mishra & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
 Angrej Nath Shukla

Counsel for the Opposite Parties:
 G.A.

A. Criminal Law - Criminal Procedure Code, 1973-Section 482 - Indian Penal Code, 1860-

Sections 147, 148, 149, 323, 504, 506 & 307 - Prevention of Damage to Public Property Act, 1984 - Section 2/3 - Explosive Substance Act, 1908 - Section 3 - National Investigation Act, 2008-Sections 2(1)(h), 13 & 22-Quashing of Chargesheet and Cognizance order- In the instant matter, supplementary charge sheet was filed under Section 3 of the Act, 1908 which is admittedly 'the Scheduled Offence' but the Judicial Magistrate-Ist, Gonda ignoring the provisions of the Act 2008 took cognizance and summoned the applicants including the other co-accused persons. He further the Judicial Magistrate-I has taken cognizance of the offence under Section 3 of the Act 2008 along with the other offences of the Indian Penal Code whereas so far as the offence under Section 3 of the Act 1908 is concerned that is to be tried by the Special Courts as are designated under Section 22 and defined under Section 2(1)(h) of the Act, 2008. It is also an admitted fact that the court of Judicial Magistrate-I, Gonda is not a court designated under Section 22 of the Act 2008 and the fact remains that the Special Court for hearing the matter is designated as third most senior Additional Sessions Judge at Lucknow and the same is having jurisdiction over all the State of Uttar Pradesh so far as the cases scheduled, under the Schedule of the Act, 2008. Section 3 of the Act 1908 has been charged after further investigation, by way of filing supplementary charge-sheet and therefore as per the notification dated 24.04.2021, issued by the Government of Uttar Pradesh while exercising its power provided under Section 22 of the Act, 2008 shall be applicable in the instant matter and therefore the matter is triable by the Special Court designated by the State of U.P., i.e., the third senior most Court of Additional District and Sessions Judge, Lucknow.(Para 1 to 20)

B. Section 22 of the Act 2008 empowers the State Government to designate one or more courts of session as a special courts for trial of the offences specified in the 'schedule'. It is, prima facie evident from the Schedule of the Act 2008 that the 'Act 1908' is substituted with effect from 2nd of August 2019, in the Schedule of the Act 2008 and, therefore, the jurisdiction of the Special Courts as provided under Section 13 of the Act 2008, shall come into picture, so far as the present matter is concerned.(Para 14)

The application is allowed. (E-6)

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Angrej Nath Shukla, learned counsel for the applicants, Sri Shiv Nath Tilahari, learned AGA-I and Sri Aniruddh Kumar Singh, learned AGA-I for the State.

2. By means of the instant application, prayer has been made to quash the charge sheet and cognizance order dated 30.1.2023 and supplementary charge sheet and cognizance order dated 15.6.2023 passed by the Judicial Magistrate First Gonda as well as entire proceedings of Criminal Case No.11874 of 2023, arising out of Case Crime No./F.I.R. No.0516 of 2022, under Sections 147, 148, 149, 323, 504, 506, 307 I.P.C. & Section 2/3 Prevention of Damage to Public Property Act and Section 3 of Explosive Substance Act, registered at Police Station Kotwali Dehat, District Gonda.

3. Factual matrix of the case is that the incident is said to have taken place on 1.11.2022 at 7.00 AM and the injury was examined on the same date at 11.50 AM, in the police custody and the F.I.R. of the incident was lodged on 2.11.2022 at 1.05 pm. After the F.I.R. was lodged, the police investigated the matter and submitted the charge sheet on 26.1.2023, under Sections 147, 148, 149, 323, 504, 506, 307 of I.P.C. and 2 & 3 of the Prevention of Damage to Public Property Act, thereafter further investigation was done and supplementary charge sheet was filed on 9.6.2023, whereafter the trial court took cognizance of the offence under Section 3 of the Explosives Substances Act 1908 (hereinafter referred to as 'the Act, 1908')

along with the other sections and has summoned the accused persons including the present applicants.

4. Contention of the learned counsel for the applicants is that the Act 1908 has been substituted in the Schedule of the National Investigation Act, 2008 (hereinafter referred to as 'the Act 2008') with effect from 02.08.2019 and, therefore, the jurisdiction of the Special Courts as defined under Section 2(1)(h) comes into play. He added that 'Scheduled Offence' has been defined under Section 2 (1) (g) of the Act, 2008, which is quoted hereinunder:-

"2(1)(g). "Scheduled Offence" means an offence specified in the Schedule;"

5. He further submits that as per the provisions of Section 22 of the Act 2008, the State Government may designate one or more courts of sessions, as special courts by way of notification in the Official Gazette. Section 22 of the Act 2008 is reproduced hereinunder:-

"22. Power of State Government to [designate Court of Session as] Special Courts.-(1) The State Government may [designate one or more Courts of Session as] Special Courts for the trial of offences under any or all the enactments specified in the Schedule.

(2) The provisions of this Chapter shall apply to the Special Courts [designated] by the State Government under sub-section (1) and shall have effect subject to the following modifications, namely:-

(i) references to "Central Government" in sections 11 and 15 shall be construed as references to State Government;

(ii) reference to "Agency" in sub-section (1) of section 13 shall be construed as a reference to the "investigation agency of the State Government";

(iii) reference to "Attorney-General for India" in sub-section (3) of section 13 shall be construed as reference to "Advocate-General of the State".

(3) The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is '[designated]' by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.

(4) On and from the date when the Special Court is '[designated]' by the State Government the trial of any offence investigated by the State Government under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that Court on the date on which it is constituted.

This clause seeks to empower the State Government to constitute one or more Special Courts for the trial of offences under this Act. It seeks to provide that until the Special Court is constituted by the State Government, the jurisdiction under this Act shall be exercised by the Court of Session within whose jurisdiction the offence has been committed. (Notes on Clauses).

6. Referring to the aforesaid, he submits that the Central Government inserted/substituted, the Act, 1908, in the

Schedule of the Act, 2008, which became effective on 2nd of August 2019.

7. Further, Section 13 of the 'Act 2008' provides the jurisdiction of the Special Courts, which starts from non-obstante clause and provides that every 'Scheduled Offence' investigated by the Agency shall be tried only by the Special Court. Section 13 of the Act 2008 is reproduced hereinunder:-

"13. Jurisdiction of Special Courts
(1) Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed.

(2) If, having regard to the exigencies of the situation prevailing in a State if,-

(a) it is not possible to have a fair, impartial or speedy trial; or

(b) it is not feasible to have the trial without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor or a Judge of the Special Court or any of them; or

(c) it is not otherwise in the interests of justice,

the Supreme Court may transfer any case pending before a Special Court to any other Special Court within that State or in any other State and the High Court may transfer any case pending before a Special Court situated in that State to any other Special Court within the State.

(3) The Supreme Court or the High Court, as the case may be, may act

under this section either on the application of the Central Government or a party interested and any such application shall be made by motion, which shall, except when the applicant is the Attorney-General for India, be supported by an affidavit or affirmation."

8. Act 2008 is the Special Act and, therefore, any matter, which is under the 'Scheduled Offences', shall be tried by the Special Courts only as designated by the Central Government or the State Government.

9. So far as the present case is concerned, supplementary charge sheet was filed under Section 3 of the Act, 1908 which is admittedly 'the Scheduled Offence' but the Judicial Magistrate-Ist, Gonda ignoring the provisions of the Act 2008 took cognizance and summoned the applicants including the other co-accused persons. He further argued that it reveals from the impugned order dated 15.6.2023 that the Judicial Magistrate-I has taken cognizance of the offence under Section 3 of the Act 2008 along with the other offences of the Indian Penal Code whereas so far as the offence under Section 3 of the Act 1908 is concerned that is to be tried by the Special Courts as are designated under Section 22 and defined under Section 2(1)(h) of the Act, 2008. It is also an admitted fact that the court of Judicial Magistrate-I, Gonda is not a court designated under Section 22 of the Act 2008 and the fact remains that the Special Court for hearing the matter is designated as third most senior Additional Sessions Judge at Lucknow and the same is having jurisdiction over all the State of Uttar Pradesh so far as the cases scheduled, under the Schedule of the Act, 2008.

10. Further submission is that since the order dated 15.6.2023 passed by the Judicial Magistrate-Ist is being against the provisions of the Act, 2008 is unlawful and erroneous and, therefore, the submission is that the order dated 15.6.2023 passed by the Judicial Magistrate-Ist may be set aside.

11. On the other hand, learned A.G.A. has submitted that as per the powers derived from the provisions envisaged under Section 22 of the Act 2008, the State Government by way of notification dated 20.4.2021 has designated III Senior most Court of Additional District and Session Judge, Lucknow as Special Court having territorial jurisdiction over whole State of Uttar Pradesh for the trial of all offences as specified in the Schedule appended to the aforesaid Act. He added that the State Government has acted in compliance of the provisions envisaged under Section 22 of the Act, 2008, as such, there is no lacuna in the act of the State Government.

12. Having heard learned counsel for the parties and after perusal of the record, it transpires that initially, an F.I.R. was lodged under Sections 147, 148, 149, 323, 504, 506, 307 of I.P.C. and 2 & 3 of the Prevention of Damage to Public Property Act, thereafter the matter was investigated and the charge sheet was filed on 2.11.2022 and the cognizance was also taken on 30.1.2023. Later on, further investigation was done and Section 3 of the Explosive Substances Act, 1908 has been added and the supplementary charge sheet has been filed on 12.6.2023, thereafter, the Judicial Magistrate-I, Gonda took cognizance and issued summons against the applicants including the other co-accused persons.

13. When this Court examines the matter in the light of the contention made

hereinabove by the counsel for the applicant and the records as well as the law applicable therein, it prima facie transpires that the present applicants have been charged for the offences under Section 3 of the Act, 1908 along with other Sections of the Indian Penal Code and once the charge sheet was filed, the Magistrate without considering the fact that there is a provision under Section 2(1) (h) of the Act, 2008, regarding designated special courts under Section 22 of the Act, 2008, took cognizance in the matter and issued summons.

14. Section 22 of the Act 2008 empowers the State Government to designate one or more courts of session as a special courts for trial of the offences specified in the 'schedule'. It is, prima facie evident from the Schedule of the Act 2008 that the 'Act 1908' is substituted with effect from 2nd of August 2019, in the Schedule of the Act 2008 and, therefore, the jurisdiction of the Special Courts as provided under Section 13 of the Act 2008, shall come into picture, so far as the present matter is concerned.

15. While deriving the powers envisaged under Section 22 of the 'Act 2008', the State Government issued a notification on 20.04.2021 and designated the third senior most Court of Additional District and Sessions Judge, Lucknow as Special Court having territorial jurisdiction of whole of the State of U.P. for the trial of all offences as specified in the schedule which are investigated by anti-terror squad or State Police of Uttar Pradesh meaning thereby that even if the matter is investigated by the State Police, the jurisdiction would lie to the Special Court as provided under Section 13 of the Act 2008.

16. It is also evident from the First Information Report that the same was lodged on 02.11.2022, which is subsequent to the 02.08.2019, i.e., the date when the Act, 1908 has been inserted in the Act 2008 and further the notification was also done prior to the First Information Report was lodged and therefore the case of the applicants covers with the mandate of the Section 22 of the Act 2008 as well as the notification dated 20.04.2021, notified by the State of U.P., thereof.

17. Now, it is conclusive that any investigation which are done by anti-terror squad or the State Police of Uttar Pradesh, so far as the offences specified in the schedule are concerned, shall be tried by the Special Court, designated by virtue of the provisions provided under Section 13 of the Act 2008 read with notification dated 20.4.2021 issued by the State Government.

18. So far as the present matter is concerned, Section 3 of the Act 1908 has been charged after further investigation, by way of filing supplementary charge-sheet and therefore as per the notification dated 24.04.2021, issued by the Government of Uttar Pradesh while exercising its power provided under Section 22 of the Act, 2008 shall be applicable in the instant matter and therefore the matter is triable by the Special Court designated by the State of U.P., i.e., the third senior most Court of Additional District and Sessions Judge, Lucknow.

19. In view of the aforesaid submissions and discussions, the impugned cognizance order dated 30.06.2023 and further the order of cognizance on supplementary charge-sheet dated 15.02.2023 passed by the Judicial Magistrate First, Gonda are hereby set-aside.

20. The application is allowed accordingly.

21. Consequently, the District Judge, Gonda is hereby directed to transmit back the Criminal Case No. 11874 of 2023 arising out of Case Crime No. 0516 of 2022 of the Special Court designated by the State Government as the third senior most Court of Additional District and Sessions Judge, Lucknow, who in fact is having the territorial jurisdiction by virtue of the notification dated 20.04.2021, which was issued in consonance with the provision of Section 22 of the Act, 2008, within a period of three weeks from the date of this order.

(2023) 11 ILRA 645
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.06.2023

BEFORE

THE HON'BLE VINOD DIWAKAR, J.

Application U/S 482. No. 20468 of 2023

M/S Pashupati Alloys, Meerut ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
 Sri Pavan Kishore, Sri Manish Kumar Singh

Counsel for the Opposite Parties:
 G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - The Negotiable Instruments Act, 1881 - Section 138,143 to 147 - dishonour of cheque - expeditious hearing of criminal complaints filed under the Negotiable Instruments Act. - Courts should expedite case resolution to meet legitimate expectations, as delayed relief may diminish the impact and leave litigants feeling exhausted and

disillusioned with the legal system.(Para - 6, 15, 16)

(B) The Negotiable Instruments Act, 1881 - Section 143(3) - Every trial under this section shall be conducted as expeditiously as possible, and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint, Section 143(A) - Court trying an offence under section 138 has the authority to order the drawer of the cheque to pay interim compensation to the complainant.(Para -7)

(C) The Constitution of India, 1950 - Article 142 - law established by the Supreme Court of India is indeed binding upon all subordinate courts in the country - empowers the Supreme Court to deliver judgments and orders that are necessary for complete justice - maintaining consistency, uniformity, and the rule of law within the judicial system - significant aspects of their lives, rights, and property - impact on their well-being, livelihood, and sense of security. (Para -12)

Case has been pending since 13.8.2020 - with no effective hearing conducted - trial court issued bailable warrants five times and non-bailable warrants 11 times - imposing costs of Rs. 300, Rs. 500, and Rs. 1000 on accused - applicant aggrieved by lack of an effective hearing - filed an instant application for early or time-bound disposal of the case.**(Para - 4,5)**

HELD:-Trial court failed to understand the purpose and objective of the Act, 2002. Trial court is ordered to promptly dispose of the pending criminal complaint before the ACJM, in accordance with the Supreme Court's directions and provisions of the Act, with the hope that the trial court understands the implications of non-compliance. **(Para - 17, 18)**

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

List of Cases Cited:-

1. I.B.A. & ors. Vs U.O.I. & ors. , (2014) 5 SCC 590

2. Meters and Instruments (P) Ltd. Vs Kanchan Mehta , (2018) 1 SCC 560

3. Re: Expeditious Trial of Cases under Section 138 of N.I. Act, 1881 , (2021 SCC Online SC 354)

(Delivered by Hon'ble Vinod Diwakar, J.)

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

2. The applicant has preferred the instant application under Section 482 Cr.P.C. seeking direction for expeditious disposal of the Complaint Case No.4863 of 2022 titled M/s Pashupati Alloys Vs. Sunil Garg, filed under Section 138 of the Negotiable Instruments Act, 1881, pending trial before the Court of learned Additional Chief Judicial Magistrate, Vth, Meerut.

3. The facts leading to filing this instant application are succinct as follows:

(i). M/s Pashupati Alloys filed a criminal complaint against Mr. Sunil Garg, owner of M/s Mahaveer Ispat Udyog, regarding dishonour of the cheque dated 30.4.2020 amounting to Rs.10,00,000/-.

(ii). The criminal complaint was filed on 13.8.2020 before the learned Additional Chief Judicial Magistrate-Vth, Meerut.

(iii). Learned Additional Chief Judicial Magistrate-Vth, Meerut summoned the accused- Sunil Garg, vide order dated 16.3.2021 and on presentation of bail bond, granted bail vide order dated 3.12.2021.

(iv). Learned trial court recorded the statement under Section 254 Cr.P.C.

and listed the case for the recording of evidence.

4. Since 13.8.2020, the case has been pending trial before the learned trial court, and despite being listed 33 times, no effective hearing was conducted. Out of these 33 instances, the trial court issued bailable warrants against the accused five times on 26.8.2021, 13.10.2021, 29.10.2021, 10.11.2021, and 26.11.2021. Additionally, non-bailable warrants were issued a total of 11 times on 24.5.2022, 24.6.2022, 1.12.2022, 12.12.2022, 5.1.2023, 17.1.2023, 2.2.2023, 17.2.2023, 2.3.2023, 28.3.2023, and 11.4.2023. During this period, the trial court also imposed costs of Rs. 300, Rs. 500, and Rs. 1000 on the accused on 20.4.2022, 7.7.2022, and 20.9.2022, respectively.

5. The applicant, aggrieved by the fact that the trial court conducted no effective hearing, has preferred the instant application seeking early or time-bound disposal of the case.

6. Before I advert to the relief sought by the applicant, it is prudent to refer to some of the judgments passed by the Hon'ble Supreme Court regarding the expeditious hearing of criminal complaints filed under the Negotiable Instruments Act. Additionally, before seeking the assistance of the judgments passed by the Hon'ble Supreme Court for the expeditious and early disposal of cases related to the dishonour of cheques, it is appropriate to consider sections 143 to 147 and 138 of the Act.

7. The relevant portion of section 143(3) is extracted herein below:

"Every trial under this section shall be conducted as expeditiously as possible, and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint."

8. Section 143(A) states that the Court trying an offence under section 138 has the authority to order the drawer of the cheque to pay interim compensation to the complainant. The interim compensation must be paid within 60 days from the date of the order under sub-section (1) of section 143(A). However, if the Court deems it necessary, it may extend this period by up to 30 days upon a sufficient cause shown by the drawer of the cheque.

9. Upon a closer examination of section 145 of the Act¹, it becomes evident that both sub-sections 1 and 2 are enforceable within the bounds of the legal procedure and empower the Court to record evidence on the affidavit. Similarly, section 146 allows the Court to presume the fact of dishonour of cheques based on the presentation of the bank slip or evidence of an error on the slip. No official remark denoting that the cheque has been dishonoured can be considered valid until and unless such a fact is disproved.

10. The Hon'ble Supreme Court in ***Indian Bank Association and others Vs. Union of India and others***², observed that the Amendment Act, 2002 has to be given effect to it in letter and spirit and hence issued the following directions:-

"23. Many of the directions given by the various High Courts, in our view, are worthy of emulation by the Criminal Courts all over the country dealing with cases under Section 138 of the Negotiable

Instruments Act, for which the following directions are being given:

23.1 The Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

23.2 The MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. The Court, in appropriate cases, may take the assistance of the police or the nearby Court to serve notice on the accused. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow-up action be taken.

23.3 The Court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, the Court may pass appropriate orders at the earliest.

23.4 The Court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examination.

23.5 The Court concerned must ensure that examination-in-chief, cross-

examination and re-examination of the complainant must be conducted within three months of assigning the case. The Court has option of accepting affidavits of the witnesses, instead of examining them in the Court. The witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court."

11. The Supreme Court has also issued various directions in ***Meters and Instruments (P) Ltd. Vs. Kanchan Mehta***³ and the same has been clarified by the Constitution Bench of the Supreme Court in *Re: Expeditious Trial of Cases under Section 138 of N.I. Act, 1881* vide order dated 16.04.2021 and issued fresh direction with respect to the conduct of trials of complaints under section 138 of the Act¹. Uttar Pradesh has also established, on a pilot basis, five Special Courts in the districts with the highest pendency of cases. Thereby five Special Courts were established in Lucknow, Agra, Kanpur, Gautambudh Nagar, and Ghaziabad, one in each district. The guidelines were also issued for covering the pilot study vide order dated 19.05.2022 in ***Re: Expeditious Trial of Cases under Section 138 of N.I. Act, 1881 (supra)***, the case is still seized with the Supreme Court.

12. The law established by the Supreme Court of India is indeed binding upon all subordinate courts in the country. Article 142 of the Constitution of India empowers the Supreme Court to deliver judgments and orders that are necessary for complete justice. It also states that these judgments and orders shall be enforceable throughout the territory of India. As a result, any decision or law propounded by the Supreme Court becomes a binding precedent for all lower or subordinate

courts in the country, and they are required to follow and apply the same while deciding similar cases. This principle of law is crucial for maintaining consistency, uniformity, and the rule of law within the judicial system.

13. Indeed, it is a matter of record that the Supreme Court has consistently issued numerous directions in various cases to ensure the early and speedy disposal of complaints filed under Section 138 of the Act¹. However, the desired impact is often not seen on the ground.

14. Litigants approach the courts with grievances, seeking resolution and redress for their issues. Their cases are not just legal matters; they represent significant aspects of their lives, rights, and property. The outcome of the case can have a profound impact on their well-being, livelihood, and sense of security.

15. Addressing litigants' concerns and understanding the profound impact that legal proceedings have on their lives can foster public confidence in the judiciary and reinforce the belief that the courts are indeed the guardians of justice and protection. It is essential for the courts to embrace measures to expedite the resolution of cases and fulfil the legitimate expectations of those who approach the legal system in search of justice.

16. The relief, though appreciated, may no longer hold the same significance or impact as it would have if provided earlier or more expeditiously. The delay in obtaining justice can diminish the litigant's sense of satisfaction and may leave them feeling exhausted and disillusioned with the legal system.

17. It is indeed regrettable that the learned trial court failed to grasp the objective of the enactment of the Act, 2002, along with its purpose.

18. In terms of the directions issued by the Hon'ble Supreme Court as mentioned above and considering the provisions of the Act, it is hereby ordered, with the hope and expectation, that the trial court comprehends the implications of non-compliance with the directions issued by the Supreme Court, to expeditiously dispose of the pending criminal complaint before the Court of the learned Additional Chief Judicial Magistrate, Vith, Meerut. This petition is thus disposed of accordingly.

(2023) 11 ILRA 649

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 10.07.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application U/S 482. No. 24169 of 2023

Vishwanath Singh Rathaur & Ors.

...Applicants

Versus

The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Mukesh Kumar

Counsel for the Opposite Parties:

G.A.

A. Criminal Law - Criminal Procedure Code, 1973-Section 482 - Indian Penal Code, 1860-Sections 323, 342, 379, 504 & 506-Challenge to entire criminal proceedings- the applicants were complying with the order issued by the court below, for which a complaint came to be filed and was registered as a complaint case under the aforesaid sections;

mandatory provisions of sanction by the competent authority under Section 197 CrPC could not have been ignored by the learned Chief Judicial Magistrate, Varanasi before taking cognizance and summoning the applicants as accused. In the present case, it is not in dispute that the applicants, along with other police personnel were complying the order of the court below, as such, it cannot be said that the police officers were not acting in discharge of their official duty. Even if the police official had exceeded to some extent their authority in discharge of their official/public duty, then also sanction would be required for their prosecution. In absence of sanction, the criminal proceedings against the applicants would be non-est and void and the same are liable to be quashed. (Para 1 to 20)

B. The intention behind protection under Section 197 CrPC is to protect the public servant from being unnecessarily harassed by launching a criminal proceeding against him for an offence allegedly committed while performing official/public duty. If the offence is in respect of an act done or purported to be done in discharge of official/public duty, the public servant has protection under Section 197 CrPC. This protection under Section 197 CrPC has salutary object to prevent harassment of public servants and protect them for mala fide and motivated criminal prosecution. However, if the competent authority finds that the act of commission/omission done by public servant was not in performance of his public duty, he would sanction prosecution of the public servant. (Para 16,17)

The application is allowed. (E-6)

List of Cases cited:

1. D. Devraja Vs Owais Sabeer Hussain (2020) 7 SCC 695
2. Matajog Dobey Vs H.C. Bhari (1955) SC 44 : (1955) 2 SCR 925 : 1956 Cri LJ 140
3. Bhagwan Prasad Srivastava Vs N.P. Misra (1970) 2 SCC 56 : (1971) 1 SCR 317
4. Pukhraj Vs St. of Raj. & anr. (1973) 2 SCC 701

5. Mahendra Pal Singh Lekhpal & anr. Vs St. of UP & anr.. Appl. u/s 482 No.15266 of 2007

6. Ajeet Shukla & ors. Vs St. of U.P. & ors. Appl. u/s 482 No.5776 of 2017

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

1. Heard Sri Mukesh Kumar, learned counsel for the applicants, learned AGA for the State-respondent (O.P. No.1) and perused the material available on record. As legal point is involved in the matter, no notice is required to be issued to the opposite party no.2.

2. By way of this application under Section 482 CrPC, the applicants have prayed for quashing of the order dated 15.03.2023 passed by the learned Additional Civil Judge, Jr. Division/Judicial Magistrate, Court No.1, Varanasi in Complaint Case No.2803 of 2018 (Lalchand Vs. Vishwanath Singh Rathour and others), under Sections 323, 342, 379, 504 and 506 IPC, Police Station-Bhelpur, District-Varanasi as well as summoning order dated 16.01.1998.

3. By means of the impugned order the learned Additional Civil Judge, Jr. Division/Judicial Magistrate, Varanasi Complaint Case No.2803 of 2018 (Lalchand Vs. Vishwanath Singh Rathour and others), under Sections 323, 342, 379, 504 and 506 IPC, Police Station-Bhelpur, District-Varanasi rejected the application of the applicant under Section 197 of Cr.P.C., against which, the present application has been filed. A further prayer has been made for staying the entire proceedings of Complaint Case No.2803 of 2018 (Lalchand Vs. Vishwanath Singh Rathour and others), under Sections 323, 342, 379, 504 and 506 IPC, Police Station-Bhelpur, District-Varanasi.

4. On the date of incident i.e. 24.10.1997 all the applicants were posted in the District Police Varasnsi. Applicant no. 1 was posted as Chowki In-charge at Police Station Bhelpur, District Varanasi. Applicant no.2 was posted as Constable and applicant no.3 was posted as Head Constable at Police Station Bhelpur, District-Varanasi.

5. District Court, Varanasi comes within the jurisdiction of Police Station-Bhelpur, District Varanasi.

6. Brief facts of the case reads as follows:

7. During the posting of applicant No.1 (Vishwanath Singh Rathaur) as a Chawki In-charge, he received a direction issued by the learned court below vide order dated 18.10.1997 in respect of arrest of the opposite party no.2 pursuant to Case Crime No.383 of 1994, under the Motor Vehicles Act, which has been complied with by the applicant no.1 and arrested the opposite no.2 on 24.10.1997. In this regard, a compliance report has also been sent by the applicant no.1 to the learned court below, a copy of which has been annexed as Annexure 2 to the Application. In retaliation to the same, opposite party no.2 became annoyed with the applicants and made a false application to the Higher Authority, but the concerned Higher Authority after investigating the matter, found the complaint to be false and fabricated against the applicants. Thereafter, opposite party no.2 with a mala fide intention filed a complaint before the court of Chief Judicial Magistrate, Varanasi on 07.11.1997 for mentioning therein that complainant was arrested by the applicants by way of summoning order, whereas, no warrant in pursuance of the arrest of the

complainant was issued by the court below, under Sections 323, 342, 379, 504 and 506 IPC, which was later on registered as Complaint Case No.1358 of 1997 against the applicants.

8. Thereafter on the basis of statements of the complainants under Section 200 CrPC and witness under Section 202 CrPC, the learned Chief Judicial Magistrate, Varanasi issued summons against the applicants for the offences under Sections 323, 342, 379, 504 and 506 IPC vide order dated 16.01.1998.

9. On behalf of the applicants, it has been submitted that the applicants were complying with the order issued by the court below, for which a complaint came to be filed and was registered as a complaint case under the aforesaid sections; mandatory provisions of sanction by the competent authority under Section 197 Criminal Procedure Code, 1973 (for short 'CrPC') could not have been ignored by the learned Chief Judicial Magistrate, Varanasi before taking cognizance and summoning the applicants as accused.

10. On behalf of the applicants, it has also been submitted that if the police personnel, including the applicants, would not have complied with the order of the learned court below, the same would attract disobedience of the court's order; the impugned proceedings, in absence of sanction by the competent authority for prosecution of the applicants, are nonest and, are liable to be quashed as the same are without jurisdiction. It is further submitted that In support of his submissions, learned counsel for the applicant has placed reliance upon the judgment of the Apex Court in the case of **D. Devaraja Vs. Owais Sabeer Hussain;**

2020 (0) AIR (SC) as well as the judgments of this Court passed in Application U/S **482 No.15266 of 2007 (Mahendra Pal Singh Lekhpal and another Vs. State of U.P. and another)** dated 10.01.2022 and **Application U/S 482 No.5776 of 2017 (Ajeet Shukla and others Vs. The State of U.P. and others)** dated 10.08.2022 and submits that present criminal proceedings against the applicant is nothing but an abuse of process of law, which is liable to be quashed.

11. On behalf of the respondent, it has been submitted that applicants were involved in committing the aforesaid offences and the offence committed by the applicants cannot be said to be a part of the official duty and, therefore, no sanction was required for prosecuting them for the offences committed by them and the same did not come within the performance of the public/official duty and, therefore, their action was wholly illegal and not in performance of public/official duty. Their acts/crimes are not protected by the provision of Section 197 CrPC. It has been further submitted that the present application has no merit and is liable to be dismissed.

12. I have considered the submissions advanced by the learned counsel for the parties and gone through the record.

13. Section 197 in The Code of Criminal Procedure, 1973 is extracted herein below for convenience:-

"197. Prosecution of Judges and public servants.-(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have

been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government."

Notification No. 1841 (3)/VI-538-71 dated 30th January, 1975 reads as under:

"Grih Vibhag (Police), Anubhag-9, Notification No. 1841 (3)/VI-538-71, dated January 30, 1975:-

In exercise of the powers conferred by sub-section (3) of Section 197 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974), the Governor is pleased to direct that the provisions of sub-section (2) of the aforesaid section shall apply to all members of the following forces of the State, charged with the maintenance of public order wherever they may be serving, namely :

(i) U.P. Police Force

(ii) U.P. Pradeshik Armed Constabulary"

14. The object of sanction for prosecution under Section 197 CrPC is to protect the public servants discharging

official/public functions from harassment by initiation of mala-fide/frivolous/retaliatory criminal proceedings. A Constitution Bench of the Supreme Court in the case of **Matajog Dobey Vs. H.C. Bhari, AIR 1956 SC 44**, delineating importance of sanction for prosecution of public servants held as under:-

"15. The minor contentions may be disposed of at the outset. Even if there was anything sound and substantial in the constitutional point about the vires of Section 5(1) of the Act, we declined to go into it as it was not raised before the High Court or in the grounds of the petition for special leave to appeal. Article 14 does not render Section 197 of the Criminal Procedure Code ultra vires as the discrimination is based upon a rational classification. Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. It was argued that Section 197 of the Criminal Procedure Code vested an absolutely arbitrary power in the Government to grant or withhold sanction at their sweet-will and pleasure, and the legislature did not lay down or even indicate any guiding principles to control the exercise of the discretion. There is no question of any discrimination between one person and another in the matter of taking proceedings against a public servant for an act done or purporting to be done by the public servant in the discharge of his official duties. No one can take such proceedings without such sanction. If the Government gives sanction against one public servant but declines to do so against another, then the government servant against whom sanction is given may possibly complain of discrimination. But

the petitioners who are complainants cannot be heard to say so, for there is no discrimination as against any complainant. It has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the government and not in a minor official. Further, we are not now concerned with any such question. We have merely to see whether the court could take cognisance of the case without previous sanction and for this purpose the court has to find out if the act complained against was committed by the accused while acting or purporting to act in the discharge of official duty. Once this is settled, the case proceeds or is thrown out. Whether sanction is to be accorded or not is a matter for the government to consider. The absolute power to accord or withhold sanction conferred on the government is irrelevant and foreign to the duty cast on the court, which is the ascertainment of the true nature of the act."

15. The intention behind protection under Section 197 CrPC is to protect the public servant from being unnecessarily harassed by launching a criminal proceeding against him for an offence allegedly committed while performing official/public duty. If the offence is in respect of an act done or purported to be done in discharge of official/public duty, the public servant has protection under Section 197 CrPC. This protection under Section 197 CrPC has salutary object to prevent harassment of public servants and protect them for mala fide and motivated criminal prosecution. However, if the competent authority finds that the act of commission/omission done by public servant was not in performance of his

public duty, he would sanction prosecution of the public servant.

16. In **1973 (2) SCC 701 (Pukhraj Vs. State of Rajasthan and another)** the Supreme Court has held that the requirement of sanction cannot be confined to only such an act done or purporting to be done directly in discharge of his public office. This protection would be available in cases where the act complained of is in excess of the duty or under a mistaken belief as to the existence of such duty. Paragraph-2 of **Pukhraj Vs. State of Rajasthan and another case (supra)** is extracted hereinunder:-

"2. The law regarding the circumstances under which sanction under Section 197 of the Code of Criminal Procedure is necessary is by now well settled as a result of the decisions from Hori Ram Singh's case [AIR 1939 FC 43 : 1939 FCR 159 : 40 Cri LJ 468] to the latest decision of this Court in Bhagwan Prasad Srivastava v. N.P. Misra [(1970) 2 SCC 56 : (1971) 1 SCR 317] . While the law is well settled the difficulty really arises in applying the law to the facts of any particular case. The intention behind the section is to prevent public servants from being unnecessarily harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an

*act purports to be done in execution of duty. The test appears to be not that the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the "capacity in which the act is performed", "cloak of office" and "professed exercise of the office" may not always be appropriate to describe or delimit the scope of section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty. In *Hori Ram Singh case* Sulaiman, J. observed:*

"The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction."

In the same case Varadachariar, J. observed: "there must be something in the nature of the act complained of that attaches it to the official character of the

*person doing it". In affirming this view, the Judicial Committee of the Privy Council observed in *Gill [AIR 1948 PC 128 : 1948 LR 75 IA 41 : 49 Cri LJ 503]* case:*

"A public servant can only be said to act or purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty.... The test may well be whether the public servant, if challenged, can reasonably claim that, what he does in virtue of his office."

*In *Matajog Dobey v. H.C. Bhari [AIR 1955 SC 44 : (1955) 2 SCR 925 : 1956 Cri LJ 140]* the Court was of the view that the test laid down that it must be established that the act complained of was an official act unduly narrowed down the scope of the protection afforded by Section 197. After referring to the earlier cases the Court summed up the results as follows:*

"There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

Applying this test it is difficult to say that the acts complained of i.e. of kicking the complainant and of abusing him, could be said to have been done in the course of performance of the 2nd respondent's duty. At this stage all that we are concerned with is whether on the facts alleged in the complaint it could be said that what the 2nd respondent is alleged to have done could be said to be in purported exercise of his duty. Very clearly it is not. We must make it clear, however, that we

express no opinion as to the truth or falsity of the allegations."

17. In (2020) 7 SCC 695 (**D. Devraja Vs. Owais Sabeer Hussain**) the Supreme Court, after making survey of the case law on the question of sanction in paragraphs-66, 67, 68, 69, 70 and 71 has held as under:-

66. *Sanction of the Government, to prosecute a police officer, for any act related to the discharge of an official duty, is imperative to protect the police officer from facing harassive, retaliatory, revengeful and frivolous proceedings. The requirement of sanction from the Government, to prosecute would give an upright police officer the confidence to discharge his official duties efficiently, without fear of vindictive retaliation by initiation of criminal action, from which he would be protected under Section 197 of the Code of Criminal Procedure, read with Section 170 of the Karnataka Police Act. At the same time, if the policeman has committed a wrong, which constitutes a criminal offence and renders him liable for prosecution, he can be prosecuted with sanction from the appropriate Government.*

67. *Every offence committed by a police officer does not attract Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act. The protection given under Section 197 of the Criminal Procedure Code read with Section 170 of the Karnataka Police Act has its limitations. The protection is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and official duty is not merely a cloak for the objectionable act. An offence committed entirely outside the scope of the duty of the*

police officer, would certainly not require sanction. To cite an example, a policeman assaulting a domestic help or indulging in domestic violence would certainly not be entitled to protection. However, if an act is connected to the discharge of official duty of investigation of a recorded criminal case, the act is certainly under colour of duty, no matter how illegal the act may be.

68. *If in doing an official duty a policeman has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the policeman of the protection of the government sanction for initiation of criminal action against him.*

69. *The language and tenor of Section 197 of the Code of Criminal Procedure and Section 170 of the Karnataka Police Act makes it absolutely clear that sanction is required not only for acts done in discharge of official duty, it is also required for an act purported to be done in discharge of official duty and/or act done under colour of or in excess of such duty or authority.*

70. *To decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty. In the case of an act of a policeman or any other public servant unconnected with the official duty there can be no question of sanction. However, if the act alleged against a policeman is reasonably connected with discharge of his official duty, it does not matter if the policeman has exceeded the scope of his powers and/or acted beyond the four corners of law.*

71. If the act alleged in a complaint purported to be filed against the policeman is reasonably connected to discharge of some official duty, cognizance thereof cannot be taken unless requisite sanction of the appropriate Government is obtained under Section 197 of the Code of Criminal Procedure and/or Section 170 of the Karnataka Police Act."

18. It is also well settled that an application under Section 482 CrPC is maintainable to quash the proceedings for want of sanction or if same are frivolous or in abuse of process of the Court. If there is no reasonable relationship with the official/public duty the protection under Section 197 CrPC will not be available to such a public servant. However, for the alleged offence committed by the police personnel, which may be in excess of his official/public duty, without sanction the Court is barred to take cognizance of the offence.

19. In the present case, it is not in dispute that the applicants, along with other police personnel were complying the order of the court below, as such, it cannot be said that the police officers were not acting in discharge of their official duty. Even if the police official had exceeded to some extent their authority in discharge of their official/public duty, then also sanction would be required for their prosecution. In absence of sanction, the criminal proceedings against the applicants would be non-est and void and the same are liable to be quashed.

20. In view thereof, the application is hereby **allowed**. Consequently, the impugned proceedings of Complaint Case No.2803 of 2018 (Lalchand Vs. Vishwanath Singh Rathour and others),

under Sections 323, 342, 379, 504 and 506 IPC, Police Station-Bhelpur, District-Varanasi against the applicants are, hereby, quashed.

(2023) 11 ILRA 656
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 395 of 2023
 With
 Application U/S 482. No.5071 of 2023

Parmeshwar Srivastava @ Pappi
...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
 Sri Prakash Chandra Srivastava, Sri Amit Kumar Srivasatva, Sri Rishab Srivastava

Counsel for the Respondents:
 G.A., Sri Rajendra Singh, Sri Shiv Bahadur Singh

(A) Criminal Law - Revision - The Negotiable instruments Act, 1981 - Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the account, Section 141 - Offences by companies - for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative - liability under Section 138 of the NI Act - Section itself makes the drawer liable and no other person - An action in respect of a criminal or a quasi-criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated - proceedings in such matters are in personam and cannot be used to foist an offence on some other person, who

under the statute was not liable for the commission of such offence.(Para -10, 13)

Complaint filed in respect of dishonor of six cheques - drawn by accused in favour of complainant - grounds - false, concocted and baseless facts and is not maintainable in the eye of law - legal formalities complete under N.I. Act - accused summoned by court on finding sufficient evidence against him - evidence to be recorded during trial - discharge application moved by revisionist/accused - dismissed by C.J.M. - case was fixed for recording statement of the accused.(Para - 2, 5, 6)

HELD:-Court below addressed issues raised by the accused in discharge application in proper manner while dismissing the discharge application moved by revisionist by a reasoned order. The cheques, signed by a revisionist in his private capacity, not as an authorized signatory of the company, and the payee is an individual. Complaint against the revisionist for the charge under Section 138 N.I. Act is maintainable and not legally barred for non-arrangement of the company as an accused. Impugned order not vitiated by any illegality, irregularity. (Para -15, 16, 17)

Criminal Revision dismissed. (E-7)

LIST OF CASES CITED:-

1. Aneeta Hada Vs Godfather Travels & Tour Pvt. Ltd., 2012 LawSuit (SC) 244
2. Sheoratan Aggarwal & anr. Vs St. of M.P., 1984 4 SCC 352
3. St. of Madras Vs C.V. Parekh & anr., 1970 3 SCC 491
4. Himanshu Vs B. Shivamurthy & anr., Crl. Appeal No. 1465 of 2009
5. Mainuddin Abdul Sattar Shaikh Vs Vijay D. Salvi, Crl. Appeal No. 1472 of 2009
6. P. Rasiya Vs Abdul Nazeer & anr., Crl. Appeal Nos. 1233-35 of 2022

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

1. Heard Sri Prakash Chandra Srivastava, learned counsel for the revisionist/applicant, learned counsel for the opposite party No.2, learned AGA for the State and perused the material placed on record.

2. Instant criminal revision has been preferred against judgment and order dated 9.1.2023 passed by learned C.J.M. Varanasi in Complaint Case No. 9647 of 2021, under Section 138 N.I. Act, P.S. Rohaniya, District Varanasi, whereby discharge application moved by revisionist/accused has been dismissed and the case was fixed for recording statement of the accused.

3. Factual matrix of the case in brief is that complainant who is respondent no. 2 in present revision filed a complaint before the court of Special C.J.M., Varanasi, under Section 138 N.I. Act which is registered as criminal case no. 9647 of 2021 wherein he has stated that complainant is having huge chunk of plots in Mauza Badi Khajuri Varanasi. The accused Parmeshwar Srivastava came into contact with him and posed himself as Director/Office bearer of Shine City Infra Project Limited and stated that he was purchasing plots for said Company and also promised to pay dividends by borrowing money in personal capacity from people. Complainant's wife Sadhna Singh sold her plot to Shine City Infra Project Limited in the year 2014 and received its sale proceeds. Accused visited the complainant and asked for paying him Rs. 4 crore to meet out the financial difficulties of the said Company. The complainant relying on representations of the accused who was his old acquaintance, lent him Rs. 3,92,00,000/- in presence of witnesses which was collected by him from different sources and he assured him to

refund the said amount within six months. Wife of the complainant also paid Rs. 2,00,00,000/- to the accused for purchasing some plots from said Company on reposing trust on representations of the accused. Accused gave 31 cheques to Sadhna Singh for her two crore rupees but got these cheques back from her and gave an allurement of making money double, thus accused took total Rs. 5,92,00,000/- from the complainant and his wife which he failed to repay. He had not given any plot to them lying with said Company. At one point of time, he gave a cheque of Rs. 3,24,00,000/- to the complainant on 10.5.2018 but subsequently he asked him to not present the said cheque for encashment but ultimately he did not pay the amount of said cheque. The complainant gave six cheques bearing dates 20.4.2021, 25.4.2021 of different amounts to discharge the debts of the complainant and his wife and assured him to pay remaining Rs. 2,00,00,000/- soon. The complainant produced said cheques before his bank Union Bank of India, Raja Talab, Rohaniya, Varanasi, however, three cheques were dishonoured with remarks "payment stopped by drawer" on 13.5.2021. Three cheques were dishonoured with remarks "payment stopped by drawer and funds insufficient", were dishonoured on 11.5.2021 and thus, he could not get the payment of said six cheques. After receiving the cheques back with said remarks of Bank. The complainant gave a registered notice to the accused through his counsel and when accused failed to pay the amount of said cheques, he filed present complaint on 18.6.2021.

4. Learned Special C.J.M. examined the accused/revisionist by order dated 14.9.2021 under Section 138 N.I. Act for trial. Accused assailed the said summoning

order before this Court by moving an application under Section 482 Cr.P.C. No. 14311 of 2022 which is said to be pending before this Court.

5. Accused revisionist moved an application for discharge on 9.9.2022 with prayer that the said complaint was based on false, concocted and baseless facts and is not maintainable in the eye of law. The revisionist was informed by the office bearer or Director of said Company Shine City Infra Project Limited. He would neither purchase plots nor he had assured any dividend to the complainant, in fact four signed cheques of the accused got missing in the city of Varanasi which anyhow came in the hands of complainant who filled up amounts arbitrarily on said cheques whereas the accused had informed the said bank on 1.12.2020 and at P.S. on 27.11.2020 regarding missing of four cheques and issued instructions to bank to stop the payment. Relationship of the complainant and accused were cordial and he had negotiated with the accused for sale of his plots at village Lohta for which the accused had issued two cheques, Cheque No. 94401 for Rs. 9,00,000/- and Cheque No. 94409 for Rs. 10,00,000/- as earnest money but the complainant had not presented the said cheques for encashment and on pretext of missing of said cheques, he received Rs. 18,50,000/- through cheques/RTGS and Rs. 50,020, cash from the accused from 5.11.2020 to 20.1.2020 as transaction of the complainant has made with Shine City Infra Limited, whom he has not impleaded as a party in complaint. The said complaint is not maintainable and barred under Prize Chits and Money Circulation Scheme (Banning) Act 1978 and Banning of Unregulated Deposit Scheme Act, 2019 and Section 58 N.I. Act and Section 219 Cr.P.C.

6. Learned magistrate dismissed the said discharge application dated 9.9.2022 by impugned order dated 9.1.2023, wherein the court observed that complaint has been filed in respect of dishonor of six cheques drawn by the accused in favour of complainant after completing legal formalities under N.I. Act and accused has been summoned by the court on finding sufficient evidence against him and evidence has to be recorded during trial.

7. Learned counsel for the revisionist submitted that learned magistrate has rejected the discharge application moved by revisionist vide impugned order in illegal manner and without considering the grounds taken therein in proper perspective. Impugned order is vitiated by illegality, irregularity and perversity and is not sustainable under law. It is further submitted that four blank cheques which were kept in the bag were lost by the revisionist in Sigra Tehsil, Varanasi and the accused had given information to his Bank and P.S. with regard to loss of those cheques, however, said cheques anyhow got in the hands of complainant and he filed a complaint subsequently on 18.6.2021. The revisionist is neither Officer nor Director in Shine City Infra Project Limited. He is not involved in purchase of land and he has not given any promise to give profit to the complainant. This is also false to say that revisionist demanded Rs. 4,00,00,000/- as debt from respondent no. 2. The contention of complainant that he had given Rs. 3.92 crore as debt to the revisionist is also false. The four signed but blank cheques were kept by the revisionist for payment of house construction items which got misplaced. The revisionist paid Rs. 90,00,000/- through cheques and cash to the complainant. Even that respondent no. 2 filed present complaint with malafide

intention which is highly improbable that without taking any receipt, complainant handed over such huge amount of Rs. 3.92 crore as debt to the revisionist and also gave Rs. 2 crore cash for booking of plots. In fact wife of complainant herself sold a plot in favour of complainant and received Rs. 6.92,000/- from the Company. The revisionist was in fact working in the said Company but was neither office bearer nor the Director of the said Company. Due to some financial irregularity committed by promoters of the company, the revisionist was made accused in some criminal cases lodged under Sections 419, 420, 120B IPC on assumption of being office bearer of the Company and he has been enlarged on bail by this Court in most of those cases. It is nowhere stated in complaint that revisionist had taken the money or signed cheques in private capacity. In absence of impleading the Company in array of the accused person, complaint is not maintainable. He has been wrongly introduced in the complaint as Director of the said Company. The accused has not signed the cheques in private capacity. Complaint is also not maintainable due to non-compliance of provisions of Section 141 of N.I. Act.

8. Per contra, learned counsel for the respondent no. 2 submitted that the case is of summon nature in which there is no specific provision for discharge, therefore, discharge application was itself not maintainable before court below. The complainant challenged summoning order before this Court through application under Section 482 Cr.P.C. but no interim or stay order was issued therein. The complainant has issued impugned cheques in personal capacity and not as authorized signatory of the Company, therefore, provisions of Section 141 of N.I. Act are not applicable

in the case. Revision deserves to be dismissed.

9. Learned counsel for the revisionist placed reliance on a Full Bench judgment of Hon'ble Apex Court in *Aneeta Hada vs. Godfather Travels & Tour Pvt. Ltd.*, 2012 LawSuit (SC) 244, wherein Hon'ble Apex Court allowed the criminal appeal preferred against order of High Court dismissing the petition under Section 482 Cr.P.C. filed by the appellant and quashed the proceedings under Section 138 N.I. Act against the accused appellant. Hon'ble Apex Court in said judgment held its own decision in *Sheoratan Aggarwal and another v. State of Madhya Pradesh*, 1984 4 SCC 352, runs counter to the ration laid down in a Larger Bench judgment in the case of *State of Madras v. C.V. Parekh and another*, 1970 3 SCC 491. Hon'ble Apex Court in *Anita Hada's case* (supra) reproduced provisions of Section 141 of N.I. Act as under:-

“15. At this juncture, we may refer to Section 141 which deals with offences by companies. As the spine of the controversy rests on the said provision, it is reproduced below: -

141. Offences by companies. –
(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his

knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act, has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

16. On a reading of the said provision, it is plain as day that if a person who commits offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions,

there is a 'deemed' concept of criminal liability."

10. The court held that in view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries has to be treated restricted to its own facts as has been explained by us hereinabove.

11. However, in Anita Hada's case (supra), appellant was authorized signatory of the Company registered under the Companies Act, 1956. She issued cheques in favour of the respondent Company which was dishonoured as a consequence of which the respondent initiated a criminal action by filing a complaint before the magistrate under Section 138 N.I. Act.

12. Learned counsel for the revisionist further placed reliance on a judgment Himanshu Vs. B. Shivamurthy & Anr., Crl. Appeal No. 1465 of 2009, decided on 17.1.2019, wherein Hon'ble Apex Court held that in absence of Company being arraigned, complaint against the appellant, therefore, was not maintainable. The appellant had signed the cheque as Director of the Company and on its behalf.

Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138 N.I. Act, High Court was not in an error in holding that Company could not be arraigned as an accused.

13. On the other hand, learned counsel for the respondent placed reliance on a judgment of Hon'ble Apex Court in Mainuddin Abdul Sattar Shaikh v. Vijay D. Salvi, Crl. Appeal No. 1472 of 2009, wherein Hon'ble Apex Court held in paragraph no. 11 as follows:-

"11. About the liability under Section 138 of the NI Act, where the cheque drawn by the employee of the appellant company on his personal account, even if it be for discharging dues of the appellant-company and its Directors, the appellant-company and its Directors cannot be made liable under Section 138. Thus, we observe that in the abovementioned case, the personal liability was upheld and the Company and its Directors were absolved of the liability. The logic applied was that the Section itself makes the drawer liable and no other person. This Court in P.J. Agro Tech Limited (supra) noted as under:

"An action in respect of a criminal or a quasi-criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated. The proceedings in such matters are in personam and cannot be used to foist an offence on some other person, who under the statute was not liable for the commission of such offence."

(Emphasis Supplied)

14. In P. Rasiya vs. Abdul Nazeer and another, Crl. Appeal Nos. 1233-35 of 2022,

Hon'ble Apex Court while deciding the appeal against conviction of the case under Section 138 N.I. Act observed that presumption under Section 139 N.I. Act is a statutory presumption and, therefore, once it is presumed that the cheque is issued in whole or in part of any debt or other liability which is in favour of the complaint/holder of the cheque, in that case it is for the accused to prove the contrary. The High Court has also failed to appreciate that it was exercising the revisional jurisdiction and there were concurrent findings of fact recorded by the courts below.

15. From perusal of impugned order and in the light of aforesaid judicial authorities of Hon'ble Apex Court, it is found that learned court below has addressed issues raised by the accused in discharge application in proper manner while dismissing the discharge application moved by revisionist by a reasoned order. From perusal of cheques in question, Cheque No. 94401, 94405, 94406, 94407, 94408, 94409, which is admittedly signed by revisionist, it bears that said cheques are signed by him not as an authorized signatory of the Company, say Shine City Infra Project Limited but it appears to be signed in his private capacity and not as authorized signatory of the company. The payee of the cheque is complainant who is not a Company but an individual.

16. On perusal of complaint also it appears that grievance of the complainant is directly against the revisionist projected himself as office bearer of the said company, therefore in these facts situation, the mandate of Section 141 N.I. Act is not applicable in the case wherein it is provided that if the person committing an offence under Section 138 N.I. Act is Company,

every person responsible to the Company for the conduct of negligence of the company as well as the Company shall be deemed guilty of the offence. The complaint is not legally barred for non arrangement of Company as an accused and the complaint filed against revisionist for charge under Section 138 N.I. Act is maintainable as such. The other issues raised by complainant are matter of evidence and which can only be decided after tender of evidence by the trial court and no finding can be given in present revision thereon. There is also force in the submissions of learned counsel for the respondent that there is no provision for discharge in the scheme of Cr.P.C. in a summons case and offence under Section 138 N.I. Act is in the nature of summons case and under Section 143 of the Act, the court of Judicial Magistrate is empowered to try the cases summarily. In summons cases, there is a provision under Section 258 Cr.P.C. wherein in a summons case instituted otherwise than complaint, magistrate is vested with the jurisdiction to stop the proceedings at any stage without pronouncing any judgment in certain cases and such stoppage of proceedings, if made before the evidence of principle witnesses has been recorded, it will have effect of discharge, however, said provision is not applicable in a case instituted upon complaint, therefore, no good reason is found warranting interference of this Court in impugned order passed by learned court below.

17. Case is liable to be decided on merits instead of being dismissed at pre-trial stage, as prayed by learned counsel for the revisionist before trial court as well as before this Court by seeking his discharge. Impugned order is not vitiated by any

illegality, irregularity. Revision is devoid of merit and deserves to be dismissed.

18. Revision stands dismissed, accordingly.

19. Learned counsel for the applicant submitted that in view of rejection of discharge application by court below, moved by applicant and filing of criminal revision before this Court, present application has lost its significance.

20. Consequently, Application u/s 482 Cr.P.C. also stands **dismissed**.

(2023) 11 ILRA 663
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.10.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Revision No. 3577 of 2023

Smt. Khairunnisha **...Revisionist**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Revisionist:
Sri Bhuvnesh Kumar Singh

Counsel for the Respondents:
G.A.

(A) Criminal Law - Revision - Indian Penal Code, 1860 - Sections 323, 504, 506 & 302 - The Code of Criminal Procedure, 1973 - Section 319 - Power to proceed against other persons appearing to be guilty of offence - "Judges condemned when guilty is acquitted" - innocent should not be punished, at the same time, real culprit should not be allowed to escape - Applicability /guidelines - for summoning a person to face trial under Section 319 Cr.P.C.— discretionary and extra ordinary

power - should only be exercised sparingly and in cases where the circumstances warrant it, not because the Magistrate or Sessions Judge believes another person may be guilty - Only where strong and cogent evidence occurs against the person from the evidence led before the court that such power should be exercised and not in a casual or cavalier manner - test under Section 319 - one which is more than prima facie case as exercised at the time of framing of the charge - but short of satisfaction to an extent that the evidence if goes un rebutted would lead to conviction. (Para -15, 16, 17, 36)

Revisionist indulged actively in murder of deceased along with other co-accused persons - an application made by informant under Section 319 Cr.P.C. - to face trial along with other two co-accused -Trial judge summoned revisionist to face trial - Whether recorded his prima facie satisfaction - while passing impugned order under Section 319 Cr.P.C. **(Para - 8, 12, 37)**

HELD:- Trial judge found that presence of revisionist at the time and place of incident is prima facie visible, as evidenced by the statements of witnesses under Sections 161 Cr.P.C., P.W.-1 and P.W.2 in dock, and other evidence. Revisionist has been rightly summoned to face trial alongside other co-accused. No illegality or infirmity in the impugned order. No interference by this revisional Court under Section 397/401 Cr.P.C. **(Para - 37, 38)**

Criminal Revision dismissed. (E-7)

LIST OF CASES CITED:-

1. Sukhpal Singh Khaira Vs St. of Punj., 2023 (1) SCC 289
2. Hardeep Singh Vs St. of Punj., (2014) 3 SCC 92
3. Mohammad Espini Vs Yogendra Chandak & ors., AIR 2017 SC 4804
4. Brijendra Singh & ors. Vs St. of Raj., (2017) 7 SCC 706

5. Sugreev Kumar Vs St. of Punj. & Ant, 2020 14 SCC 472

6. Bholu Ram Vs St. of Punj. & anr. , (2008) 9 SCC 340

7. S. Mohd. Ispahani Vs Yogendra Chandak & ors. , (2017) 16 SCC 226

8. Sandeep Kumar Vs The St. of Har. & anr. , 2023 SCC OnLine SC 888

9. Manjeet Singh Vs St. of Har. & ors. , 2021 SCC OnLine SC 632

10. Sukhpal Singh Khaira Vs St. of Punj. , (2023) 1 SCC 289

11. Mohd. Shafi Vs Mohd. Rafiq & anr. , Appeal (Crl.) No. 530 of 2007

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

Challenge to this revision

1. This criminal revision has been preferred against order dated 19.05.2023 passed by learned Additional Sessions Judge, Court No.2, Bijnor in Session Trial No. 825 of 2020 (State Government Vs. Mazid and others), arising out of Case Crime No.71 of 2020, Police Station Kiratpur, District Bijnor, whereby revisionist has been summoned under section 319 Cr.P.C. to face trial in the above stated case for offences under sections 323, 504, 506, 302 I.P.C.

Genesis of the present case

2. Brief facts of the case as cropped up from the records of the present criminal revision are that on 18.4.2020, opposite party no.2 namely, Musabbar lodged an F.I.R. against the revisionist, her husband and her son stating therein that rivalry of her family was going on with the family of

one Mazid son of Jahid. Two days ago Mazid and Jahid had threatened to kill Danish. On 17.4.2020 at 5.30 P.M. when Danish was going to Bhojpur to get medicines, Mazid took Danish to his house where his mother and father also came and surrounded him. With the intention to kill Danish, Mazid hit Danish with Tabal on his head. Jahid had beaten Danish with a stick and his wife Khairunnisha (present revisionist) pushed Danish due to which he fell on the ground unconsciously. Majid, Jahid and Khairunnish (revisionist) were abusing, beating and threatening to kill Danish. After some time Danish was done to death due to the injuries sustained by him by the accused persons.

The case of the revisionist

3. The revisionist and opposite party no.2 are resident of same village and a strong political rivalry is going on between their families since long. The first informant has malafide intention against the revisionist and her family. Due to the aforesaid reason, the first informant lodged a first information report on 18.4.2020 against the revisionist, her husband and her son under Section 323, 504, 506, 308 I.P.C. Initially the first information report was lodged under section 323, 308, 504, 506 I.P.C. but during the treatment when the injured Danish has done to death, after that Section 302 I.P.C. was added in the present offence. Though the revisionist was named in the F.I.R. but during investigation her involvement was not found and thus, no charge-sheet was filed against her.

4. Further it is the case of the revisionist that PW 1 and PW 2 are interested witnesses in the present offence and are real brothers, therefore, they have given totally false statement before the

court below only for making false case against the revisionist and other accused persons. The statements made by the witnesses that revisionist had pushed Danish are false and baseless and that revisionist is being falsely implicated just to create undue pressure and that no prima facie case for summoning the revisionist is made out and therefore, the order impugned is liable to be quashed by this Court.

5. Submission of the learned counsel for the revisionist

(I) The learned Additional Session Judge has mechanically summoned to the revisionist only on the basis of prima facie case while the settled law clearly provides that for exercising the powers under section 319 Cr.P.C., the additional accused can be summoned on the basis of strong evidence more than prima facie case but in the present matter, the Additional Sessions Judge did not follow the settled principle of law, therefore, the impugned order is absolutely illegal.

(II) The Hon'ble Apex court as well as this Court have categorically held in the series of judicial precedents that the categorical conclusion of investigating agency should not be disbelieved by the trial court at the time of exercising powers under section 319 Cr.P.C. out in the present matter the learned Additional Session Judge has not considered the view of the Hon'ble Apex Court and mechanically summoned to the revisionist without appreciating conclusion of investigating agency and by doing so, the learned Additional Session Judge has committed manifest error of law.

(III) The revisionist is innocent and she has neither committed any offence

under section 302, 323, 504, 506 LP.C. nor any offence under section 302, 323, 504, 506 I.P.C. is made out against the revisionist.

(IV) The revisionist has neither assaulted to the deceased in any manner nor she was involved in the alleged offence, therefore, no offence under section 302, 323, 504, 506 I.P.C. is made out against the revisionist.

(V) The revisionist is old lady and she is suffering from abdominal and kidney disease. A photocopy of medical prescription report of the revisionist is being annexed herewith and marked as Annexure No.10 to this affidavit.

(VI) The learned trial judge has passed the impugned order clearly against the provisions of law and without application of his judicial mind.

On the cumulative strength of the aforesaid, learned counsel for the revisionist submits that the order impugned cannot be legally sustained and is liable to be dismissed.

6. Per contra, learned counsel for opposite party no.2 and the learned A.G.A. for the State have disputed the submissions made by the learned counsel for the revisionists by contending that there is no illegality or infirmity in the order passed by the trial judge summoning the revisionist under Section 319 Cr.P.C. for facing trial in the case in hand.

7. Learned A.G.A. further submits that the proposition of exercising the power under Section 319 Cr.P.C. before conclusion of trial or before pronouncing the sentence has been justified and upheld

by the Constitutional Bench of the Hon'ble Supreme Court in the case of **Sukhpal Singh Khaira Vs State of Punjab** reported in 2023 (1) SCC 289.

8. Learned A.G.A. then submits that the material/evidence on record against the revisionist was found to be more than prima facie to show that the revisionist indulged actively in the murder of the deceased Danish along with other co-accused persons, namely Majid and Zahir.

9. Learned A.G.A. then submits that the trial judge, while passing the impugned order, has taken all the precautions and did not hurriedly summon the revisionist exercising its powers under Section 319 Cr.P.C. While summoning the revisionist the trial Judge has followed all the precautions and guidelines as framed by the Apex Court in the case of **Hardeep Singh Vs. State of Punjab**, reported in (2014) 3 SCC 92.

10. The learned A.G.A. contends that there is ample material on record collected during the investigation as well as during the trial against the revisionist which goes to show that she was actively involved in the commission of the alleged offence i.e. murder of the deceased Danish. The trial Judge has rightly considered the entire material collected during the course of investigation as well as the material brought on record during the trial and thereafter finding that there was more than prima facie case against the revisionist, summoned her by exercising the power under section 319 Cr.P.C.

11. This Court has considered the submissions made by the learned counsel for the parties and gone through the records

of the present criminal revision specifically the order impugned.

LEGAL ISSUES

12. The legal issue, which is cropped up for consideration before this Court :

“Whether the trial judge has recorded his prima facie satisfaction for summoning the revisionist to face trial while passing the impugned order under Section 319 Cr.P.C.?”

13. Before considering the first issue, it is necessary for this Court to reproduce Section 319 Cr.P.C., which is being quoted herein below:

“319. Power to proceed against other persons appearing to be guilty of offence.---(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.”

EXPLANATION OF SECTION 319 CR.P.C.

14. From bare reading of Section 319 Cr.P.C. this Court is of the view that the language used in Sec. 319 Cr.P.C. is plain, simple and unambiguous. However, there are some grey areas which sometimes deviate the Court for the established principles of law.

15. Before going to analyze Section 319 Cr.P.C., it would be necessary to understand the principles highlighting the Section and the nature of power vested with the Court including the court of sessions. Section 319 Cr.P.C. springs out of the doctrine “Judges condemned when guilty is acquitted”. This doctrine must be used as beacon light while explaining the ambit and spirit underlying the enactment of Section 319 Cr.P.C. It is also based on the principle that innocent should not be punished, at the same time, real culprit should not be allowed to escape.

16. The power under Section 319 Cr.P.C. is the really an extraordinary power which is conferred upon the court and it should be used sparingly only if compelling

reasons/circumstances exist for taking cognizance against other person against whom action has not been taken. Section 319 Cr.P.C. is a special provision and it seeks to meet an extraordinary situation. It although confers of vide amplitude but is required to be exercised sparingly.

17. Power under Section 319 Cr.P.C.. is a discretionary and an extra ordinary power which is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against the person from the evidence led before the court that such power should be exercised and not in a casual or cavalier manner.

18. A scrutiny of Section 319 Cr.P.C.. would show the Section has four parts from sub-Sections (1) to (4). The first part deals about when and how the power under the section can be exercised. The second part speaks about how to secure the presence of the newly added accused, if he is not attending the court. The third part depicts how the presence of the newly added accused can be secured if he is not attending the court. The fourth part speaks about how the court should proceed and try against the said accused.

19. Section 319 Cr.P.C. empowers only to the 'court' proceeds against such person. The word court includes court of Sessions (Sec.9 Cr.P.C.), Court of Judicial Magistrate (11 Cr.P.C.) and Court of Metropolitan Magistrate (16 Cr.P.C.). [Ref.: **Hardeep Singh (Supra)**].

20. Power under section 319 of the code can be exercised by the court suo moto or on an application by someone including accused already before it, if it is satisfied that any person other than an accused has committed an offence and he is to be tried together with the accused.

21. Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has necessarily not to be an accused already facing trial. The very purpose invoking Section 319(1) Cr.P.C. clearly shows that even persons who have been dropped by police during investigation, but against whom evidence showing their involvement of the offence comes before the court are included in the expression 'any person not being accused'.

22. If a person had not been charge-sheeted he may come within the purview of the description of such a person has contained in Section 319 Cr.P.C. of the Court. Although, he is not named in the charge sheet or he has been discharged from the case, which would warrant in prosecution thereafter with a good chance of his conviction. However, concerning a person who has been discharged no proceedings can be commenced against him directly under Section 319 Cr.P.C. without recourse to provision of Section 300(5) read with Section 398 Cr.P.C. A person not named in FIR and not charge sheeted can be summoned under Section 319 Cr.P.C. Even though, any person initially be named in the FIR as an accused, but not charge sheeted can also be added to face trial. Where a person was not summoned by the Magistrate under Section 204 Cr.P.C. but his name surfaced in the statement recorded under Section 244

Cr.P.C. a person can be summoned as accused under Section 319 Cr.P.C. Power under Section 319 Cr.P.C. can be exercised against the person not to subjected to investigation or a person placed in column 2 of charge sheet against whom cognizance had not been taken or a person who has been discharged. The accused against whom proceeding has been quashed can also be added under Section 319 Cr.P.C.

FINDINGS RECORDED BY THE TRIAL COURT

23. This Court now comes to the legality or otherwise of the order impugned. The court below by means of the order impugned has recorded relevant facts for coming to the conclusion to summon the revisionist to face trial under Section 319 Cr.P.C. that heard and examined the records in light of Section 319 Cr.P.C. on the the application given by the informant. As per the First Information Report dated 18-04-2020, the prosecution story is that the informant and the informant's family were having a rivalry with the family of Majid, son of Zahir. Two days ago, Majid and his father Zaheer had threatened to kill Danish. On 17-04-2020 at 5:30 pm, when Danish was going to Bhojpur to get medicines, Majid surrounded Danish in front of his house, his parents also came, Majid threatened to kill Danish. With intention to kill, Zahir beat Danish with a stick and the revisionist pushed Danish, then Danish became unconscious and fell on the ground. Majid and Zahir and the revisionist were beating and abusing and threatening to kill Danish. The incident was witnessed by the informant, Afzal and Qayyum. Thereafter the informant went to the police station along with injured Danish. Danish was referred from Kiratpur Hospital to Bijnor

and after that he was referred from Bijnor to Meerut. The condition of Danish was serious and he was admitted in Meerut. On the basis of the above written complaint, the said FIR was registered on 18-04-2020 at 14:05 p.m. against Majid, Zaheer and the revisionist under Sections 323, 504, 506, 308 I.P.C. Thereafter, on behalf of the informant, another complaint was given alleging therein that on 17-04-2020 at around 5:30 pm, Majid, Zahir and revisionist Khairunnisha had beaten Danish brutally by Tabal, sticks and lathi with the intention to kill him due to which he seriously sustained injuries and in connection with which a case was registered at the police station and for his proper treatment he got treated by the Doctor of District Hospital Bijnor, who referred him to Meerut and during treatment he has been done to death on 20th April, 2020 at 09:15 a.m. After conclusion of the investigation in the present case, the charge sheet under Sections 323, 504, 506, 302 of the Indian Penal Code has been submitted before the concerned Court on 08.06.2020 by the investigating Officer against the accused Majid and Zaheer.

24. The trial judge has further recorded that the witness PW-1 Musabbar (plaintiff) has stated in his examination-in-chief that at the corner of the east of the house of Majid, he, Zahir and the revisionist intercepted Danish and Majid hit Danish by Tabal on his head with intention to kill him and due to push of the revisionist, Danish fell down from the motorcycle and he became unconscious. P.W.-1 has further stated that Danish died during treatment. Witness PW-2 Muzaffar has stated in his examination-in-chief that "Majid hit Danish on his head by Tabal with an intention to kill him and the

accused Zahir and the revisionist hit Danish by sticks and also the revisionist pushed Danish due to which he fell down and became unconscious. It was further stated that he died during treatment.

25. The trial judge has further recorded that in the same context, the case diary was also observed by the court and from the perusal of the First Information Report, the name of the proposed accused Kherunnisha is being shown. In this perspective, the statements of witnesses recorded under Section 161 CrPC were examined. The informant Musabbar has supported the prosecution's case under Section 161 CrPC in his statement. Apart from the above, the statements of independent witnesses, namely, Kallu Singh and Yakub recorded under Section 161 Cr.P.C. were examined. Independent witness, namely, Kallu Singh has stated in his statement that after hearing the noise/scream, he along with other people reached the spot of fight to intervene and saw that blood was flowing from the head of Danish and father of Majid, namely, Zahir was standing there with a stick and the Majid had a Tabal.

26. On the basis of statements of independent witnesses and eye-witnesses and other collected evidence, the Investigating Officer has found that the implication of the revisionist in the present case is wrong and he has not submitted the charge-sheet against her, whereas she was named in the First Information Report. On the basis of the aforesaid fact, the trial judge was of the view that from perusal of the statements of prosecution witnesses, namely, P.W. 1 Musabbar (informant) and P.W. 2 Muzaffar) and from the overall observation of the above case, the presence of the proposed accused-revisionist at the

place of incident and her prima facie involvement in the crime are being shown.

27. The trial judge has also considered and highlighted the law settled by the Apex Court qua applicability of Section 319 Cr.P.C. The trial judge has referred the Constitution Bench judgment of the Apex Court in the case of Hardeep Singh (Supra), other judgment in the case of Mohammad Espini Banan Yogendra Chandak and others Supreme Court reported in AIR 2017 SC 4804. The trial judge has also referred the judgements of the Apex Court in the case of Brijendra Singh & Ors vs. State of Rajasthan reported in (2017) 7 SCC 706 and in the case of Sugreev Kumar v. State of Punjab. & Ant, (reported in 2020) 14 SCC 472.

28. After referred the aforesaid law settled by the Apex Court, the trial judge has opined that from the evidence produced by the prosecution and perusal of the First Information Report, it is found from the application filed by by the informant being paper no. Kha-5 and the entire evidence available on record that the presence of accused-revisionist at the spot and her involvement along with the main accused Majid and Zaheer in causing injury to the deceased Danish by pushing him from motorcycle is prima facie visible. No such oral or documentary evidence has been brought on record by the investigator to prove that the accused revisionist was not present at the spot when the incident took place but was present somewhere else. Because it is clear from the entire evidence that she was present at the spot and was helping in committing the incident. It has not been explained by the investigator why her name was exonerated while filing the charge-sheet.

29. On the basis of aforesaid finding, the trial judge has come to the conclusion that the evidence produced by the prosecution at this stage does not support the case of the proposed accused i.e. revisionist and in the present case there appears to be involvement beyond the prima facie level. In such a situation, in the opinion of the court, it would be justified to summon the proposed accused revisionist Khairunisha for trial. The application of the prosecution under Section 319 Code of Criminal Procedure being paper No. 5-B is acceptable in the interest of justice. It is against this order that the present criminal revision has been filed.

CASE LAWS ON THE SUBJECT

30. For arriving at a conclusion to question framed by this Court herein above, it is important for this Court to refer certain case laws as settled by the Apex Court. The Apex Court in the case of **Bholu Ram Vs. State of Punjab & Another** reported in (2008) 9 SCC 340 has opined as follows:

“58. In our considered opinion, the Revisional Court was not justified in entering into correctness or otherwise of the evidence at the stage of issuance of summons to respondent No.2. Admittedly, the Judicial Magistrate had considered a limited question whether on the basis of evidence of prosecution witnesses, prima facie offence had been made out against respondent No.2. He was, on the basis of such evidence, was satisfied that the case was required to be gone into and issued a summons. To us, the Revisional Court was not right in interfering with that order. Hence, even on that ground, the order was not in accordance with law.”

31. In the case of **S. Mohammed Ispahani Vs. Yogendra Chandak & Others** reported in (2017) 16 SCC 226 the Apex Court has held as follows:

“33) As against the above, the High Court, in the impugned judgment, has been influenced by the fact that names of the appellants were mentioned in the FIR and even in the statement of witnesses recorded under Section 161 of the Cr.P.C. these appellants were named and such statements under Section 161 Cr.P.C. would constitute ‘documents’. In this context, the High Court has observed that ‘evidence’ within the meaning of Section 319 Cr.P.C. would include the aforesaid statements and, therefore, the appellants could be summoned.

34) The aforesaid reasons given by the High Court do not stand the judicial scrutiny. The High Court has not dealt with the subject matter properly and even in the absence of strong and cogent evidence against the appellant, it has set aside the order of the Chief Metropolitan Magistrate and exercised its discretion in summoning the appellants as accused persons. No doubt, at one place the Constitution Bench observed in Hardeep Singh’s case that the word ‘evidence’ has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. In paragraph 105 of the judgment, Criminal Appeal No. 1720 of 2017 & Ors.

however, it is observed that ‘only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner. This sentence gives an impression that only that evidence which has been led before the Court is to be seen and not the

evidence which was collected at the stage of inquiry. However there is no contradiction between the two observations as the Court also clarified that the ‘evidence’, on the basis of which an accused is to be summoned to face the trial in an ongoing case, has to be the material that is brought before the Court during trial. The material/evidence collected by the investigating officer at the stage of inquiry can only be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C.

35) It needs to be highlighted that when a person is named in the FIR by the complainant, but Police, after investigation, finds no role of that particular person and files the charge sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge sheet, it can do so. At that stage, chance is given to the Criminal Appeal No. 1720 of 2017 & Ors.

complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 of the Cr.P.C. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused.”

32. Again the Apex Court in the case of **Sandeep Kumar Vs. The State of Haryana & Another** reported in 2023 SCC OnLine SC 888 has opined as follows:

“12. The entire purpose of criminal trial is to go to the truth of the matter. Once there is satisfaction of the Court that there is evidence before it that an accused has committed an offence, the court can proceed against such a person. At the stage of summoning an accused, there has to be a prima facie satisfaction of the Court. The evidence which was there before the Court was of an eye witness who has clearly stated before the Court that a crime has been committed, inter alia, by the revisionist. The Court need not cross-examine this witness. It can stop the trial at that stage itself if such application had been moved under Section 319. The detail examination of the witness and other witnesses is a subject matter of the trial which has to begin afresh. The scope and ambit of Section 319 CrPC has been discussed and dealt with in detail in the Constitution Bench judgment of Hardeep Singh Vs. State of Punjab & Others reported in (2014) 3 SCC 92 where it said:

“13. Section 319 CrPC springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr. PC.

14. It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial.”

33. In the case of **Manjeet Singh Vs. State of Haryana & Others** reported in 2021 SCC OnLine SC 632 the Apex Court has observed as follows:

“13. The ratio of the aforesaid decisions on the scope and ambit of the powers of the Court under Section 319 CrPC can be summarized as under:

“(i) That while exercising the powers under Section 319 CrPC and to summon the persons not charge-sheeted, the entire effort is not to allow the real perpetrator of an offence to get away unpunished;

(ii) for the empowerment of the courts to ensure that the criminal administration of justice works properly;

(iii) the law has been properly codified and modified by the legislature under the CrPC indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law;

(iv) to discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished;

(v) where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial;

(vi) Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it;

(vii) the court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by

manipulating the investigating and/or the prosecuting agency;

(viii) Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial;

(ix) the power under Section 319 (1) CrPC can be exercised at any stage after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre-trial stage intended to put the process into motion;

(x) the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence;

(xi) the word “evidence” in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents;

(xii) it is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation;

(xiii) if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s);

(xiv) that the Magistrate/court is convinced even on the basis of evidence

appearing in examination-in-chief, powers under Section 319 CrPC can be exercised;

(xv) that power under Section 319 CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not wait till the said evidence is tested on cross-examination;

(xvi) even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in the charge-sheet can be summoned to face the trial, provided during the trial some evidence surfaces against the proposed accused (may be in the form of examination-in-chief of the prosecution witnesses);

(xvii) while exercising the powers under Section 319 CrPC the Court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial.”

34. The Constitution Bench of Five Judges’ of this Court in the case of **Hardeep Singh (Supra)**, has observed as follows:

“93 Section 319 Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court.

The word “appear” means “clear to the comprehension”, or a phrase near to, if not synonymous with “proved”. It

imparts a lesser degree of probability than proof.

94. In *Pyare Lal Bhargava Vs. The State of Rajasthan*, AIR 1963 SC 1094, a four-Judge Bench of this Court was concerned with the meaning of the word 'appear'. The court held that the appropriate meaning of the word 'appears' is 'seems'. It imports a lesser degree of probability than proof. In *Ram Singh & Ors. Vs. Ram Niwas & Anr.*, (2009) 14 SCC 25, a two-Judge Bench of this Court was again required to examine the importance of the word 'appear' as appearing in the Section. The Court held that for the fulfillment of the condition that it appears to the court that a person had committed an offence, the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as an accused in the case.

95. At the time of taking cognizance, the court has to see whether a *prima facie* case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of *prima facie* case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench of this Court in *Vikas Vs. State of Rajasthan*, 2013 (11) SCALE 23, held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such

person could be tried together with the already arraigned accused persons.

96. In *Rajendra Singh (Supra)*, the Court observed:

"Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not."

97. In *Mohd. Shafi (Supra)*, this Court held that it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 Cr.P.C., it must arrive at a satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted.

98. In *Sarabjit Singh & Anr. Vs. State of Punjab & Anr.*, AIR 2009 SC 2792, while explaining the scope of Section 319 Cr.P.C., a two-Judge Bench of this Court observed:

"....For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the

person sought to be summoned.....Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied.” (Emphasis added)

99. In *Brindaban Das & Ors. Vs. State of West Bengal*, AIR 2009 SC 1248, a two-Judge Bench of this Court took a similar view observing that the court is required to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons under Section 319 Cr.P.C. entails a de novo trial and a large number of witnesses may have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity.

A similar view has been reiterated by this Court in *Michel Machado & Anr. Vs. Central Bureau of Investigation & Ors.*, AIR 2000 SC 1127.

100. However, there is a series of cases wherein this Court while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 Cr.P.C., has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The Court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further. (Vide *State of Karnataka Vs. L. Munishwamy & Ors.*, AIR 1977 SC 1489; *All India Bank Officers' Confederation etc. v. Union of India & Ors.*, AIR 1989 SC 2045; *Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia*, (1989) 1 SCC 715; *State of M.P. Vs. Dr. Krishna Chandra Saxena*, (1996) 11 SCC 439; and *State of M.P. Vs. Mohan Lal Soni*, AIR 2000 SC 2583).

101. In *Dilawar Babu Kurane Vs. State of Maharashtra*, AIR 2002 SC 564, this Court while dealing with the provisions of Sections 227 and 228 Cr.P.C., placed a very heavy reliance on the earlier judgment of this Court in *Union of India Vs. Prafulla Kumar Samal & Anr.*, AIR 1979 SC 366 and held that while considering the question of framing the charges, the court may weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out and whether the materials placed before this Court disclose grave suspicion against the accused which has not been properly explained. In such an

eventuality, the court is justified in framing the charges and proceeding with the trial. The court has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but court should not make a roving enquiry into the pros and cons of the matter and weigh evidence as if it is conducting a trial.

102 *In Suresh Vs. State of Maharashtra*, AIR 2001 SC 1375, this Court after taking note of the earlier judgments in *Niranjan Singh Karam Singh Punjabi Vs. Jitendra Bhimraj Bijaya*, AIR 1990 SC 1962 and *State of Maharashtra Vs. Priya Sharan Maharaj*, AIR 1997 SC 2041, held as under:

“9.....at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.” (Emphasis supplied)

103. Similarly in *State of Bihar Vs. Ramesh Singh*, AIR 1977 SC 2018,

while dealing with the issue, this Court held:

“.....If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.....”

104. In *Palanisamy Gounder & Anr. Vs. State*, represented by Inspector of Police, (2005) 12 SCC 327, this Court deprecated the practice of invoking the power under Section 319 Cr.P.C. just to conduct a fishing inquiry, as in that case, the trial court exercised that power just to find out the real truth, though there was no valid ground to proceed against the person summoned by the court.

105. Power under Section 319 Cr.P.C. is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a *prima facie* case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than *prima facie* case

as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused."

35. The another Constitution Bench of the Five Judges' of the Apex Court in the case of **Sukhpal Singh Khaira Vs. State of Punjab** reported in (2023) 1 SCC 289 has observed as follows:

"22. Thus, to put the matter in perspective, a perusal of the recommendation of the Law Commission would indicate the intention that an accused who is not charge sheeted but if is found to be involved should not go scot-free. Hence Section 319 of CrPC was incorporated which provides for the Court to exercise the power to ensure the same before the conclusion of trial so as to try such accused by summoning and being proceeded along with the other accused. In Shashikant Singh (supra), a Bench of two Hon'ble Judges, on holding that the joint trial is not a must has held the requirement as contained in Section 319 (1) of CrPC as only directory, and as such the judgment of conviction dated 16.07.2001 against the charge-sheeted accused was considered not to be an impediment for the court to proceed against the accused who was

added by the summoning order dated 07.04.2001, which in any case was prior to the conclusion of the trial which in our view satisfies the requirement since the summoning order was before the judgment. In the case of Hardeep Singh (supra) also the power of the Court under Section 319 of CrPC has been upheld, reiterated, and it has been held that such power is available to be exercised at any time before the pronouncement of judgment. Therefore, there is no conflict or diverse view in the said decisions insofar as the exercise of power, the manner and the stage at which power is to be exercised. However, a certain amount of ironing the crease is required to explain the connotation of the phrase "could be tried together with the accused" appearing in sub-section (1) read with the requirement in sub-section 4 (a) to Section 319 of CrPC and to understand the true purport of exercising the power as per the phrase "before the pronouncement of judgment".

23. A close perusal of Section 319 of CrPC indicates that the power bestowed on the court to summon any person who is not an accused in the case is, when in the course of the trial it appears from the evidence that such person has a role in committing the offence. Therefore, it would be open for the Court to summon such a person so that he could be tried together with the accused and such power is exclusively of the Court. Obviously, when such power is to summon the additional accused and try such a person with the already charged accused against whom the trial is proceeding, it will have to be exercised before the conclusion of trial. The connotation 'conclusion of trial' in the present case cannot be reckoned as the stage till the evidence is recorded, but, is to be understood as the stage before

pronouncement of the judgment as already held in Hardeep Singh (supra) since on judgment being pronounced the trial comes to a conclusion since until such time the accused is being tried by the Court.”

36. On overall evaluation and deeper scrutiny of the law settled by the Apex Court, this Court finds that while passing the impugned order the trial judge has not committed any illegality in examining the law laid down by Five Judges of Constitution Bench of the Apex Court in the case of **Hardeep Singh (Supra)**, which has been followed in the recent judgment of Five Judges’ of Constitution Bench of the Apex Court in the case of **Sukh Pal Singh Khaira (Supra)**, wherein the Apex Court has framed certain guidelines for invoking and exercising power under Section 319 Cr.P.C. for summoning any person to face trial against whom final report has been submitted by the Investigating Agency. The trial judge has correctly read the law that the power under Section 319 Cr.P.C. is a discretionary and an extra ordinary power it is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against the person from the evidence led before the court that such power should be exercised and not in a casual or cavalier manner [(Ref.:Hardeep Singh, Sukhpal Singh Khaira (Supras) and Mohd. Shafi Vs. Mohd. Rafiq & Anr. passed Appeal (Crl.) No. 530 of 2007 dated 9th April, 2007]. The trial judge has also correctly read that the test it has to be applied under Section 319 Cr.P.C. is one which is more than prima facie case as exercised at the time of framing of the charge but short of satisfaction to an extent that the evidence if goes un rebutted would lead to conviction [Hardeep

Singh (Supra), Sukhpal Singh Khaira (Supra) & Brijendra Singh (Supra)].

37. The trial judge while passing the impugned order has recorded categorical finding of fact that on the examination of the first information report, the statements of the witnesses, namely, Musabbar, Muzaffar and Tasleema recorded under Sections 161 Cr.P.C., the statements of P.W.-1 and P.W.2 in dock and other evidence, it is clear that the presence of the revisionist at the time and place of incident is prima facie visible. On the basis of such categorical finding, the trial judge has rightly passed the order impugned for summoning the revisionist under Section 319 Cr.P.C. on an application made by the informant to face trial along with other two co-accused.

38. Consequently, the present revision devoid of merits and is accordingly dismissed, as there is no illegality or infirmity in the order impugned passed by the trial judge for summoning the revisionist to face trial under Section 319 Cr.P.C. so as to warrant any interference by this revisional Court under Section 397/401 Cr.P.C.

39. There shall be no order as to costs.

(2023) 11 ILRA 678
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2023

BEFORE

THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Revision No. 3914 of 2022

Sheelandra @ Rinku	...Revisionist
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Revisionist:

Sri	Hari	Prakash	Mishra

Counsel for the Respondents:

G.A.

(A) Criminal Law - Revision - Indian Penal Code, 1860 -Section 376 (3) & 506 - The Juvenile Justice (Care And Protection Of Children) Act, 2015 - Section 3/4 , Section 94 - Presumption And Determination Of Age - Scope Of Invoking Jurisdiction Of High Court In Criminal Revision - inherent and revisional jurisdiction should be used cautiously, especially when involving factual appreciation - court findings can be considered perverse if they are based on ignoring or excluding relevant material, considering irrelevant/inadmissible evidence, or defying the weight of evidence - finding may be considered perverse if it contradicts the evidence or defies logic, leading to the vice of irrationality.(Para - 12, 13)

(B) The Juvenile Justice (Care & Protection of Children) Act, 2015 - Section 94 (2) (iii) - if a birth certificate is not available, the age must be determined through an ossification test or other medical test. (Para - 16)

Before J.J.B. O.P. no.2 filed objection - as per voter list revisionist was 25 years old - I.O. recorded that revisionist was 22 years old - Appellate Court's Findings on Revisionist's Age - Revisionist's educational certificate deemed unreliable - Based on computerised ration card, final voter list of Panchayat 2021 voter list, and CW-1 father's statement, revisionist deemed not a child in conflict with law - held - Revisionist was above 20 at the time of incident – J.J.B. after reviewing U.P. Examination Board marks-sheet, transfer certificate, and educational admission certificates - determined juvenile was 16 years, 11 months, and 24 days old at the time of incident. **(Para -3,4,18)**

HELD:- Appellate court's perverse finding on the revisionist's age determination is against facts, evidence, and law. Impugned order set aside. Juvenile Justice Board's order affirmed. **(Para -19)**

Criminal Revision allowed. (E-7)

LIST OF CASES CITED:-

1. Raj Kumar Vs St. of H.P., (2008) 11 SCC 76
2. St. of Mah. Vs Jagmohan Singh Kuldip Singh Anand & ors., (2004) 7 SCC 659
3. Krishnan & anr. Vs Krishnaveni & anr., (1997) 4 SCC 241
4. Amit Kappor Vs Ramesh Chander, (2012) 9 SCC 460
5. Rajinder Kumar Kindra Vs Delhi Administration, AIR 1984 SC 1805
6. H.B. Gandhi & ors. Vs Gopi Nath & Sons, 1992 supp. (2) SCC 312
7. Triveni Rubber & Plastics Vs C.C.E. , Cochin AIR 1994 SC 1341
8. Gaya Din (D) thr. Lrs. & ors. Vs Hanuman Prasad (D) thr. Lrs. & ors. , AIR 2001 SC 386
9. Gamini Bala Koteswara Rao & ors. Vs St. of A.P. thr. Secy. , (2009) 10 SCC 636
10. Rishipal Singh Solanki Vs St. of U.P. & ors. , (2022) 8 SCC 602

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

1. Heard Sri Hari Prakash Mishra, learned counsel for the revisionist and Sri Nagendra Singh, learned brief holder for the State. Despite service of notice upon opposite party no.2, none has appeared.

2. The present criminal revision has been preferred to set aside the judgment and order dated 25.07.2022 passed by Sessions Judge, Etah in Criminal Appeal No.47 of 2022 by which the appellate court allowed the criminal appeal and set aside the order dated 01.06.2022 passed by Juvenile Justice Board, Etah in Criminal Misc. Case No. 94 of 2021 arising out of

Case Crime No. 525 of 2021, under Section 376 (3), 506 IPC and 3/4 POCSO Act, whereby the Juvenile Justice Board declared the revisionist.

3. Before the Juvenile Justice Board the opposite party no.2 filed his objection, alleging that as per voter list the revisionist was 25 years old and the Investigating Officer recorded that the revisionist was 22 years old on 19.11.2020.

4. The appellate court observed that the educational certificate of the revisionist is not a reliable document and on the basis of computerised ration card of the revisionist, final voter list of Panchayat year 2021 and as per statement of CW-1 father of the revisionist, the revisionist was not a child in conflict with law and held that the revisionist was above 20 years old at the time of the incident, which had taken place in August, 2020.

5. Learned counsel for the revisionist submits that the appellate court has grossly erred while relying upon the voter list, statement of juvenile made before the investigating officer and discarded the High School Certificate of the revisionist and set aside the well considered order of Juvenile Justice Board on the basis of perverse finding.

6. **Per contra;** learned A.G.A. for the State defended the impugned judgment and order passed by the Appellate Court.

7. I have carefully considered the submissions made by the learned counsel for the revisionist and learned A.G.A. for the State and perused the material on record.

8. Before appreciating the evidence and submissions of the revisionist, it would be appropriate to discuss the scope of invoking the jurisdiction of the High Court in Criminal Revision.

9. The Supreme Court observed in **Raj Kumar v. State of Himachal Pradesh, (2008) 11 SCC 76**, as under:

"9. In Duli Chand v. Delhi Admn, (1975) 4 SCC 649 the scope of invoking jurisdiction of the High Court in criminal revision was examined and it was held in a case involving vehicular accident as follows: (AIR p. 1960)

The question whether the accused was guilty of negligence in driving the bus and the death of the deceased was caused due to his negligent driving is a question of fact which depends for its determination on an appreciation of the evidence. Where the Magistrate, and the Additional Sessions Judge arrived, on an assessment of the evidence at a concurrent finding of fact that the death of the deceased was caused by negligent driving of the bus by the accused and the High Court even though justified in refusing to re-appreciate the evidence reviewed the same in order to satisfy itself that there was evidence in support of the finding and that the finding was not perverse, came to the conclusion that the evidence established the death of the deceased was caused by the negligent driving of the bus by the accused, the Supreme Court on an appeal under Article 136 refused to interfere.

10. In State of Orissa v. Nakula Sahu, (1979) 1 SCC 328, it was held that the High Court should not have interfered with the concurrent findings recorded by the trial court and the Sessions Judge in

exercise of revisional jurisdiction when there was no error or fact or law arrived at by the trial court or the Sessions Judge.

11. In *State of Kerala v. Puttumana Illah Jathavedan Namboodiri*, (1999) 2 SCC 452, it was held that the revisional jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice.

10. In *State of Maharashtra v. Jagmohan Singh Kuldip Singh Anand & Others*, (2004) 7 SCC 659, the Apex Court has been observed that:

"22. The Revisional Court is empowered to exercise all the powers conferred on the Appellate Court by virtue of the provisions contained in Section 401 CrPC. Section 401 CrPC is a provision enabling the High Court to exercise all powers of an Appellate Court, if necessary, in aid of power of superintendence or supervision as a part of power of revision conferred on the High Court or the Sessions Court. Section 397 CrPC confers power on the High Court or Sessions Court, as the case may be, "for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceeding of such inferior court." It is for the above purpose, if necessary, the High

Court or Sessions Court can exercise all appellate powers. Section 401 CrPC conferring powers of an appellate court on the revisional court is with the above limited purpose. The provisions contained in Section 395 to Section 401 CrPC, read together, do not indicate that the revisional power of the High Court can be exercised as a second appellate power."

11. In *Krishnan & Another v. Krishnaveni & Another*, (1997) 4 SCC 241, the Supreme Court observed as under:

"1. Exercises of the revisional power by the high court under Section 397 read with Section 401 is to call for the records of any inferior Criminal Court and to examine the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and to pass appropriate orders. The Court of Sessions and the Magistrates are inferior criminal courts to the High Court and Courts of judicial Magistrate are inferior criminal courts to the sessions judge. Ordinarily, in the matter of exercise of power of revision by any High Court, Section 397 and Section 401 are required to be read together. Section 397 gives powers to the High Court to call for the records as also suo motu power under Section 401 to exercise the revisional power on the grounds mentioned therein, i.e. to examine the correctness, legality or propriety of any finding sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court, and to dispose of the revision in the manner indicated under Section 401 of the Code. The revisional. power of the high Court merely conserves the power of the high Court to see that justice is done in

accordance with the recognised rules of criminal jurisprudence and that its subordinates courts do not exceed the jurisdiction or abuse the power vested in them under the code or to prevent abuse of the process of the inferior criminal courts or to prevent miscarriage of justice."

12. It is well settled principle of law that the inherent as well as revisional jurisdiction should be exercised cautiously. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. (**Vide: Amit Kappor v. Ramesh Chander (2012) 9 SCC 460.**)

13. It is also well settled principle of law that the findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible evidence. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (**Vide: Rajinder Kumar Kindra v. Delhi Administration AIR 1984 SC 1805; H.B. Gandhi & Ors. v. Gopi Nath & Sons 1992 supp. (2) SCC 312; Triveni Rubber & Plastics v. Collector of Central Excise, Cochin AIR 1994 SC 1341; Gaya Din (D) thr. Lrs. & Ors. v. Hanuman Prasad (D) thr. Lrs. & Ors. AIR 2001 SC 386; Aruvelu & Anr. (Supra); and Gamini Bala Koteswara Rao & Ors. v. State of Andhra Pradesh thr. Secretary (2009) 10 SCC 636.**)

14. Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, provides as follows:

"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.”

15. The main thrust of argument is as to whether the High School Certificate of the revisionist can be discarded on the basis of age mentioned in the voter list of year 2020 and statement of the revisionist, which was recorded during the investigation in the enquiry provided under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

16. Section 94 (2) (iii) of the Juvenile Justice (Care & Protection of Children) Act, 2015 clearly provides that the date of birth from the school or matriculation or equivalent certificate by the concerned examination board has to be first preferred in the absence of age the birth certificate issued by the Corporation or Municipal Authority or Panchayat. In the absence of these such document the age is to be determined through ossification test or any other latest medical age determination test conducted on the orders of the concerned authority.

17. In **Rishipal Singh Solanki vs. State of Uttar Pradesh And Others (2022) 8 SCC 602**, the Supreme Court has held as under:

“22. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The

juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (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. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year. If a juvenile in conflict with law was found to be below 18 years, an order had to be passed declaring the status of the juvenility by the Court. The said procedure was also applicable to dispose off cases where the status of the juvenility had not been determined in accordance with the Act and the Rules made thereunder.”

“32.3 In Arnit Das v. State of Bihar - (2000) 5 SCC 488, this Court observed that while considering the question as to determination of the age of an accused for the purpose of ascertaining whether he is a juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced in support of the plea that he was a juvenile and, if two views may be possible, the Court should lean in favour of holding the accused to be a juvenile in borderline cases. This is because the Act being a welfare legislation, the Courts should be

zealous to see that a juvenile derives full benefits of the provisions of the Act but at the same time it is also imperative for the Courts to ensure that the protection and privileges under the Act are not misused by unscrupulous persons to escape punishment for having committed serious offences.”

32.13. In para 36 of parag Bharti (2016) 12 SSC 744 it was observed:

‘36. It is settled position of law that if the matriculation or equivalent certificates are available and there is no other material to prove the correctness of date of birth, the date of birth mentioned in the matriculation certificate has to be treated as a conclusive proof of the date of birth of the accused. However, if there is any doubt or a contradictory stand is being taken by the accused which raises a doubt on the correctness of the date of birth then as laid down by this Court in Abuzar Hossain vs. State of W.B., (2012) 10 SCC 489, an enquiry for determination of the age of the accused is permissible which has been done in the present case.’

18. Now I return back to case in hand, the Juvenile Justice Board vide order dated 01.06.2022 after considering the mark-sheet of U.P. Examination Board Year 2019 of the revisionist and Transfer Certificate of earlier school and statement of CW-2 and CW-3, who have proved the educational admission certificate, wherein the date of birth of the juvenile is 25.12.2002 and the Juvenile Justice Board declared that on the date and time of incident the juvenile was 16 years, 11 months and 24 days old .

19. Taking into account the totality of facts and keeping in mind, the ratio of the

Apex Court’s judgment in the case of **Rishipal Singh Solanki vs. State of Uttar Pradesh And Others (2022) 8 SCC 602**, and the reasons recorded and discussed above, I am of the considered view that the appellate court recorded perverse finding into the enquiry for determination of age of the revisionist and is against the facts, evidence and law and the impugned order dated 25.07.2022 is liable to be set aside and the order date 01.06.2022 passed by the Juvenile Justice Board is liable to be affirmed. Hence the present criminal revision is liable to be allowed.

20. In view of the above, the present criminal revision is allowed and the order dated 25.07.2022 passed by Sessions Judge, Etah is set aside and the order dated 01.06.2022 passed by Juvenile Justice Board, Etah is affirmed.

21. The office is directed to send back the original record to the court concerned with certificate copy of the judgement immediately.

(2023) 11 ILRA 684

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 26.09.2023

BEFORE

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Revision No. 4105 of 2022

With

Criminal Revision 2373 of 2023

Abhijeet @ Rahul

...Revisionist

Versus

State of U.P. & Anr.

...Respondents

Counsel

for

the

Revisionist:

Sri Sundeep Shukla

Counsel for the Respondents:

G.A., Sri Sunil Kumar Dwivedi

(A) Criminal Law - Revision - The Code of Criminal Procedure, 1973 - Section 125 - Order for maintenance of wives, children and parents - wife, child and parents should not be left in a helpless state of distress, destitution and starvation, Indian Penal Code, 1860 - Sections 498-A, 370, 323, 504, The Dowry prohibition Act, 1961 - Section 3/4 , Domestic Violence Act, 2005 - Sections 18, 19, 20 - Obligation of the husband is on higher pedestal when the question of wife and children arises - A wife is entitled to live a life similar to her husband's, with the husband's status and stata being a prominent factor - As long as the wife is granted adequate maintenance within section 125 Cr.P.C., she can live with dignity as she would have lived in her matrimonial home - Merely because the applicant-wife is capable of earning - not sufficient reason to reduce the maintenance awarded - not be a ground to reject her claim for maintenance. (Para -12, 16, 21, 22)

FIR against her husband, parents-in-law, and sister-in-law - dowry demand, matrimonial cruelty, ill treatment, physical assault, and unnatural intercourse - Revisionist-husband ordered to pay Rs.4,000/- as monthly maintenance to opposite party No.2(wife of revisionist) - from application filing date to judgment date - and thereafter Rs.8,000/- per month - Arrears of maintenance to be paid in four monthly installments - Any earlier sum received by applicant will be adjusted towards maintenance awarded in judgment - matter was referred to Mediation Center - arrest of accused persons was stayed until the next listing date - interim order was vacated. **(Para - 1, 6)**

HELD:-Amount awarded under Section 125 Cr.P.C. may be reduced to some extent to balance the equities of both parties, as there is no certainty of the husband's fixed income but

his ability to earn. Criminal Revision No.2373 of 2023, filed against the ex-parte judgement and order dismissed and impugned orders affirmed. Criminal Revision No.4105 of 2022 partially allows, and the impugned order is modified to maintain the Rs.4000/- monthly maintenance award from application to judgement, but reduce it to Rs.6,000/- per month, subject to other conditions.**(Para - 23, 24, 25)**

Criminal Revision partly allowed. (E-7)

LIST OF CASES CITED:-

1. Kirtikant D. Vadodaria Vs St. Of Guj. & anr. , (1996) 4 SCC 489
2. K.Vimal Vs K.Veerawamy , (1991) 2 SCC 375
3. Chander Parkash Bodh Raj Vs Shila Rani Chander Prakash, AIR 1968 Delhi 174
4. Chaturbhuj Vs. Sita Bai, (2008) 2 SCC 316
5. Durga Singh Lodhi Vs Prembai & ors., 1990 Cr.L.J. 2065
6. Shamima Farooqui Vs Shahid Khan, AIR 2015 SC 2025
7. Shailja VsKhobbanna, AIR 2017 SC 1174
8. Sunita Kachwaha & ors. Vs Anil Kuchwaha, (Hon'ble Apex Court) Criminal Appeal No.2310 of 2014

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

1. Criminal Revision No.4105 of 2022 (Abhijit Alias Rahul vs. State of U.P. and Another) is directed against the judgment and order dated 12.9.2022, passed by Additional Principal Judge, Family Court, Court No.2, Bulandshahr in Maintenance Case No.930 of 2015 (Smt. Poonam Sharma vs. Abhijit Alias Rahul), under Section 125 Cr.P.C., Police Station Kotwali Nagar, Bulandshahr, whereby the revisionist-husband has been directed to

pay Rs.4,000/- as monthly maintenance to opposite party No.2, who is wife of the revisionist from the date of filing of application to date of judgment and thereafter Rs.8,000/- per month. The arrears of maintenance at the rate of Rs.4,000/- per month has been directed to be paid in four monthly installments. This is also directed that any sum received by the applicant earlier will be liable to be adjusted towards maintenance awarded in the judgment.

2. Criminal Revision No.2373 of 2023 is directed against the ex-parte judgement and order dated 8.1.2019 passed by Additional Chief Judicial Magistrate, Bulandshahr in Case No.1503 of 2015 (Smt. Poonam vs. Abhijit @ Rahul and others), under Sections 18, 19 and 20 of Domestic Violence Act, Police Station Kotwali Nagar, Bulandshahr, whereby the respondents who are husband and in-laws of Smt. Poonam Sharma were directed to provide a room in shared household of the respondents and they are also directed to refrain from causing any physical or mental pain to the applicant. The respondent No.1 has been directed to pay Rs.2500/- per month from the date of order towards meeting out the basic needs of the applicant related to food, clothing, medical and other expenses. The impugned order passed by learned Magistrate in proceeding under Domestic Violence Act was challenged by the opposite parties in Criminal Appeal No.11 of 2019, (Abhijit @ Rahul and others vs. Smt. Poonam Sharma and another), which was dismissed by learned Sessions Judge, Bulandshahr vide judgment and order dated 6.7.2019 and the ex-parte judgment passed by the learned Magistrate has been affirmed. Both the orders of courts below are challenged by the revisionists in present criminal appeal.

Thus, the criminal Revision No.4105 of 2022 has been filed by the husband of the applicant against judgement and order of Additional Principal Judge, Family Court whereas in Criminal Revision No.2373 of 2022, judgment and orders of both the courts below are challenged by the respondents, including husband of the complainant.

3. As both the criminal revisions are related to same contesting parties and relates to similar matter, thus, these criminal revisions are being decided by this common judgment:-

4. The factual matrix of the case are that the marriage of the revisionist Abhijit @ Rahul and Smt. Poonam Sharma-respondent No.2 was solemnized on 19.6.2014. According to applicant, her father spent around Rs.10 lacs in the marriage but her husband and in-laws were not satisfied with the gifts and cash given in the marriage. They started demanding a Santro Car and Rs.1 lac cash as additional dowry. The parents of the applicant tried to make them understand their inability to fulfill their demands but they did not oblige and persisted in making their demands. The husband of the applicant used to engage in anal intercourse with the applicant against the order of nature and the applicant raised a complaint to her in-laws regarding this offending act of her husband but they even countenanced the commissions of her husband. One day, she was speaking to her family members on telephone, suddenly her husband, father-in-law, mother-in-law and sister-in-law Arushi confronted her, abused her and gave beating to her due to which she suffered injuries. She narrated the incident to her father when he visited her on 5.8.2015 and he took her alongwith him to his place. The applicant and his parents

waited for sometime that good sense will prevail amongst her husband and in-laws. Her father even visited her in-laws on 24.10.2015 and tried to make reconciliation but the husband and in-laws of the applicant refuses to listen to him and keep the applicant with them. The applicant has been residing with her parents since then and has now become a burden over them. The opposite party Abhijit works in a private company namely, Dayal Group, Meerut and earns around Rs.40,000/- as monthly salary. The applicant is a home maker and she has not having any independent source of income. In proceeding under Protection of Women from Domestic Violence Act, the applicant further stated that she was subjected to anal intercourse by her husband in the night of 2.8.2015 forcefully, which caused much pain to her. When her father visited her husband and in-laws on 5.8.2015, her in-laws directed him to take her alongwith him otherwise same things will be done to her. In proceeding under Protection of Women from Domestic Violence Act summons were served on respondent, who includes husband, parents-in-law and sister-in-law of the complainant through District Protection Officer but even after holding of service as sufficient by court of learned Magistrate, they neither appeared nor filed any objection or written statement therein and the case proceeded ex-parte against them. Complainant examined himself in evidence as PW-1, in which she supported complaint version and learned court below considered the evidence on record and observed that the complainant could not make any statement in her complaint or affidavit, which could prove the monthly income of opposite party No.1. Therefore, on the basis of meticulous consideration of material on record, the Court is of the opinion that the opposite party No.1- the

husband of the complainant be directed to pay Rs.2500/- as monthly payment to meet out the food, cloth, medical and other basic necessities of the applicant from the date of order i.e. 8.1.2019. The respondents were also directed to provide accommodation of one room to the applicant in shared household and they were directed to refrain from causing any physical or mental pain to the complainant.

5. The opposite parties filed a criminal appeal against judgment and order passed by learned Magistrate before the court of Session. Learned Appellate Court considered the material placed on record and observed that even after service of summons, the appellant failed to appear before the court below. Learned court below held service of summon as sufficient on opposite party through registered post vide order dated 16.8.2018. The notice under Domestic Violence Act may be served on respondents in accordance with the provisions of Section 12(c) of the Act as well as under Order 5 CPC or Chapter VI of Cr.P.C. The applicant failed to appear on many dates during the course of hearing of appeal and it appeared that they are not having any interest in proceeding with the criminal appeal. The amount of Rs.2500/- as monthly maintenance awarded to the applicant is proper. So far as the allegations of demand of dowry levelled against the appellants is concerned, this is a question of fact, which may be decided on merits of the case. The notice was also served upon the opposite parties and appellants through District Protection Officer. Learned appellate court dismissed the appeal filed by the opposite parties in proceeding under Protection of Women from Domestic Violence Act.

6. From perusal of record, it also appeared that respondent No.2 Smt. Poonam Sharma also lodged an FIR against her husband and parents-in-law and sister-in-law Arushi (nand) on 15.11.2015, as Case Crime No. 114 of 2015, under Sections 498-A, 370, 323, 504 IPC and 3/4 of D.P. Act, wherein she has made accusation of demand of dowry, subjecting her matrimonial cruelty, ill treatment and physical assault against her husband and in-laws in general and allegation of committing unnatural intercourse with her against her husband in particular on 2.8.2015. The matter was referred to Mediation Center vide order dated 9.12.2015 in Criminal Misc. Writ Petition No.28945 of 2015 and till the next date of listing, arrest of the petitioners-accused persons was stayed. However, the interim order was vacated and writ petition was dismissed for want of prosecution vide order dated 15.3.2016 passed by this Court. The police investigated the case and filed charge-sheet against accused Abhijit @ Rahul, Shiv Kumar and Smt. Veenus, under Sections 498-A, 323, 504 IPC and 3/4 of D.P. Act, after conclusion of investigation and dropped the name of unmarried sister-in-law of the applicant as her naming in FIR was found false. No offence under Section 377 IPC was found to be made out against the accused Abhijit. The accused persons were enlarged on bail vide orders of trial court after filing of chargesheet.

7. In impugned judgment and order dated 12.9.2022, passed by learned Additional Principal Judge, Family Court, the opposite party Abhijit alias Rahul appeared and filed written statement before the Court as 17-B/5 and admitted the factum of marriage with applicant. However, he denied the allegations of demand of dowry made against him and his

family members. He further stated that the applicant used to hanging around telephone till mid night and used to visit her parental home after a gap of every two or three weeks and when he objected to this, she would create fuss and used to misbehave with him and his family member, getting annoyed of the protest made by her husband towards her conduct. She was even caught while speaking to some person in he late night on mobile phone and she did not show her mobile phone on being asked. He denied committing any unnatural sexual act with the applicant. She left her matrimonial home out of her own free-will, as a mark of protest of objection made by her husband and in-laws to the aforesaid conduct of the applicant. She lodged false FIR against her husband and in-laws of matrimonial cruelty and demand of dowry. He also stated that at present he is unemployed. The applicant has passed B.Ed Examination and she is also a Diploma holder of NTT and IGD, Bombay Art and she earns Rs.20,000/- per month by giving tuition. She is more educated than opposite party and is able to maintain herself. She is earning sufficiently while residing at her parental place against wishes of husband. She is not dependent on her parents.

8. Learned court below considered the statement of APW-1 Smt. Poonam Sharma and statement of OPW-1 Abhijit @ Rahul and OPW-2 Shiv Kumar and after hearing the submissions of learned counsel for the parties held that this is admitted fact that the applicant is legally wedded wife of opposite party. She is residing at her parental place due to sufficient reason and reasonable cause. She has denied to make earning from private work and stated that she is homemaker. She has not learned stitching, weaving or embroidery and she is

qualified lady and M.A., B.Ed passed out. She has also obtained NTT Diploma from IGD Bombay Art but she does not teach in any school. She has not even taught in any school prior to filing of the case. According to the learned Additional Principal Judge, Family Court, opposite party cannot shirk from his responsibility to maintain his wife, which is his legal and moral responsibility. This is the requirement of justice that the applicant should be made to lead her life in the manner and up to the standard which she was leading while living with her husband. Learned court below also cited certain judgments of this Court and other High Courts in support of his finding that merely due to the fact that the applicant is an educated lady, she cannot be divested to seek maintenance from her husband in absence of any independent source of income of her. Learned court below also observed that the applicant failed to adduce any cogent, factual or reliable evidence in support of the income of the opposite party. Although, she has stated that the opposite party works in Dayal Group, Meerut and earns Rs.40,000/- as monthly salary. The opposite party has stated in his objection that presently he is unemployed. He has stated in his cross-examination that he has done MBA in the year 2010 and he was engaged in a job in Dayal Fertilizers, Meerut at the time of marriage and his gross salary was Rs.26,178/- per month with Rs.1500/- annual increment. He has also stated that his father was employee in State Insurance Corporation and retired in the year 2019. Thus, the opposite party has admitted this fact that he has earned a professional degree of MBA and he is highly educated and is able to earn income and he is capable to maintain his wife, which is his legal and moral responsibility. Learned court below also considered the fact that in proceeding under Domestic

Violence Act in Complaint Case No.1503 of 2015, learned Magistrate has also awarded Rs.2500/- monthly maintenance to the applicant, which is payable by opposite party. After considering the principle of balancing between the litigating parties and totality of facts and circumstances of the case, the learned Family Judge has awarded Rs.4,000/- as monthly maintenance from the date of filing of application to date of judgment and thereafter Rs.8000/- per month as monthly maintenance.

9. Learned counsel for the revisionist submitted that opposite party No.2 is more educated than the revisionist. She is capable of earning. An ex-parte decree of divorce has been awarded in favour of the revisionist but opposite party No.2 has filed an appeal before this Court against the decree of divorce. The revisionist is not earning at present and is not able to pay the amount of maintenance awarded in proceeding under Sections 18, 19, 20 of Protection of Women from Domestic Violence Act. He has paid the amount awarded in proceeding under Domestic Violence Act to the complainant. However, for want of any regular income, the revisionist is not in a position to pay the amount awarded by Additional Principal Judge, Family Court. Learned Additional Principal Judge, Family Court failed to consider the fact that the income of the revisionist has not been proved in proceeding initiated by the applicant, he should not be saddled with providing maintenance to his wife, that too to the tune of Rs.8,000/- quantified in impugned judgment and order. The real bone of contention between the parties is that the applicant used to engage in long telephonic conversation with some person, which was objected by her husband and in-laws but she failed to mend her ways and instead left

her matrimonial home on her own. The revisionist has also filed copies of demand draft as Annexure No.8 to the revision memo in support of his plea that he has been paying the amount of maintenance awarded by the learned Magistrate in proceeding under Domestic Violence Act. The allegations made against the revisionist are false and frivolous and have no leg to stand. He made his best efforts to get back the association of his wife but for the reason best known to her, she refused to live with him. The impugned order dated 12.9.2022 is nothing but an abuse of process of law. The monthly amount awarded in impugned judgement by family court is not proportionate to the income of the revisionist. Learned court below has overlooked the fact that the revisionist has been directed to pay Rs.2500/- to opposite party No.2 in proceeding under Domestic Violence Act and the same has been paid till August, 2022 and there is no arrears due upon the revisionist. As a matter of fact, the revisionist has never received any notice and summon in proceeding under Domestic Violence Act ever issued by learned Magistrate. Both the courts below have acted on the basis of presumption that summon has been served upon him. The proceeding were decided by learned Magistrate ex-parte without any knowledge of the revisionist and same is liable to be set aside and appropriate orders may be passed in present criminal revision.

10. Learned counsel for the opposite party No.2 as well as learned AGA has vehemently opposed the contentions made by the learned counsel for the revisionist and submitted that the impugned orders passed by the learned Magistrate, learned appellate court as well as learned Session Judge after considering the material placed on record and there is no illegality,

irregularity or perversity in the impugned orders.

11. Here, it would be pertinent to mention the provisions of Section 125 Cr.P.C.:-

125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means."

12. Hon'ble Apex Court in paragraph No.15 of a judgement passed in **Kirtikant D. Vadodaria vs State Of Gujarat & Anr (1996) 4 SCC 489** held that "While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents etc. and to prevent destitution and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in section 125 provide a speedy remedy to those women, children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation."

13. Hon'ble Apex Court in **K.Vimal vs K.Veerawamy (1991) 2 SCC 375** while discussing the basic purpose of Section 125 of the Code of Criminal Procedure opined that Section 125 Cr.P.C. is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife.

14. The proceeding for maintenance under Section 125 Cr.P.c. is of summary nature and the purpose or object of the same is to provide immediate relief to the applicant. An application under Section 125 Cr.P.C. can be moved by the wife on fulfillment of two conditions:- (a) the husband has sufficient means, (b) he neglects or refuses to maintain his wife, who is unable to maintain herself. The

Magistrate, in such cases, may direct the husband to pay such monthly sum of the money, as deemed fit taking into consideration the financial capacity of the husband and other relevant factors.

15. Delhi High Court in **Chander Parkash Bodh Raj vs Shila Rani Chander Prakash, AIR 1968 Delhi 174** held that "an able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodied person to show to the Court cogent grounds for holding that he is unable, for reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. In the present case, as the husband has not frankly disclosed to the Court, as he ought, his allowances which he admittedly gets, the presumption would be easily permissible against him."

16. From the aforesaid annunciation of law, it is obvious that the obligation of the husband is on higher pedestal when the question of wife and children arises. When the woman leaves, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain his wife due to financial constraints as long as he is capable of earning. As per law, the wife is entitled to live a life in the similar manner as she would have lived in the house of her husband and that is where the status and state of the husband becomes a prominent one, as long as the wife is held entitled to grant of maintenance within the parameters of section 125 Cr.P.C., it has to be adequate

so that she can live with dignity as she would have lived in her matrimonial home.

17. Hon'ble Supreme Court in **Chaturbhuj Vs. Sita Bai, (2008) 2 SCC 316** has held the grant of maintenance to wife is a measure of social justice. The court held as under:-

*"Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in captain **Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70** falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in **Savitaben Somabhai Bhatiya v. State of Gujarat (2005) 3 SCC 636**.*

18. A Division Bench of Madhya Pradesh High Court in the case of **Durga Singh Lodhi Vs. Prembai and others, 1990 Cr.L.J. 2065** has held that mere absence of visible means or real estate will not entitle such a person to escape the liability to pay maintenance awarded under Section 125(1), as even at the stage of enforcement of the order under Section 125(1), an able bodied healthy person capable of earning, must be subjected to pay maintenance allowance. If, with this visible capacity to earn, he avoids payments, it has to be held that he has so done for no sufficient cause. If such a person avoids to discharge that obligations despite issuance of a distress

warrant, he can be sentenced to imprisonment for a term specified in sub-section (3) of Section 125 Cr.P.C.

19. In a decision of Hon'ble Supreme Court in the case of **Shamima Farooqui Vs. Shahid Khan, AIR 2015 SC 2025**, Hon'ble Supreme Court has held as under:-

"A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 Cr.P.C., it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar."

20. In present case an admitted fact emerges on the basis of admission of parties during their evidence before the Family Court that the revisionist is an MBA qualified person and was working in a private company namely Dayal Fertilizers, Meerut at the time of marriage and at that time his salary was Rs.26,178/- accompanied with yearly increments. His father retired in the year 2019, who was posted in State Insurance Corporation, however, the revisionist has stated that at present he is unemployed. The applicant could not rebut this statement and failed to produce any evidence regarding his income and earnings at the time when parties adduced their evidence before the court

below. However, this is admitted position that he is capable of earning being an MBA qualified person, who was previously employed in a private company. On the other hand he failed to adduce any evidence regarding any independent income of the applicant despite the fact that she is also qualified woman and is capable of earning.

21. Hon'ble Apex Court in **Shailja vs Khobbanna**, AIR 2017 SC 1174 addressed the issue of quantum of maintenance of a professionally capable woman and laid down that such a woman too have a right to maintenance and that, the courts must take into consideration the difference between the capability of earning and the actual earning of the applicant-wife while deciding upon the quantum of maintenance. Merely because the applicant-wife is capable of earning is not sufficient reason to reduce the maintenance awarded by the family court.

22. In **Sunita Kachwaha And Ors vs Anil Kuchwaha**, Hon'ble Apex Court in judgment dated 28.10.2014 passed in Criminal Appeal No.2310 of 2014 held that "Inability to maintain herself is the pre-condition for grant of maintenance to the wife. The wife must positively aver and prove that she is unable to maintain herself, in addition to the fact that her husband has sufficient means to maintain her and that he has neglected to maintain her. In our considered view, merely because the appellant-wife is a qualified post graduate, it would not be sufficient to hold that she is in a position to maintain herself. In any event, merely because the wife was earning something, it would not be a ground to reject her claim for maintenance."

23. In present case, the learned Family Court has not quantified the

monthly income of the revisionist in absence of any evidence regarding his present employment but has come to the conclusion that he has sufficient means to provide maintenance to his wife. Learned counsel for the respondent No.2 also submitted that the revisionist has contracted second marriage after decree of divorce, which is under challenge at the instant of opposite party No.2. Therefore, I find no substantial error in impugned order passed by learned Magistrate in proceeding under Domestic Violence Act as well as the impugned order passed by learned Additional Principal Judge, Family Court, Meerut in present criminal revision. However, this fact is liable to be taken into consideration that the revisionist has filed copies of bank draft through which he has paid the amount awarded by the learned Magistrate in proceeding under Domestic Violence Act to the opposite party No.2. Apart from Rs.2500/- per month in proceeding under Domestic Violence Act, in proceeding under Section 125 Cr.P.C., the learned Family Court awarded maintenance of Rs.4,000/- per month from the date of application to date of judgment and thereafter, at the rate of Rs.8,000/- per month with observation that any amount received by the applicant previously shall be liable to be adjusted in present order, under Section 125 Cr.P.C. Therefore, in absence of ascertainment of any fixed income of the husband but his ability to earn, I am of the opinion that the amount awarded in proceeding under Section 125 Cr.P.C. is liable to be reduced to some extent with a view to strike a balance of equities in respect of both the parties.

24. The Criminal Revision No.2373 of 2023 filed against ex-parte judgement and order dated 8.1.2019 passed by Additional Chief Judicial Magistrate,

Bulandshahr in Case No.1503 of 2015 (Smt. Poonam vs. Abhijit @ Rahul and others), under Sections 18, 19 and 20 of Domestic Violence Act, Police Station Kotwali Nagar, Bulandshahr as well as order dated 6.7.2019 passed in Criminal Appeal No.11 of 2019 is hereby **dismissed** and impugned orders passed by courts below are affirmed.

25. The Criminal Revision No.4105 of 2022 is **partly allowed** and the impugned order dated 12.9.2022 passed by learned Principal Judge, Family Court is modified to the extent that the amount of maintenance awarded from the date of application to date of judgement to the tune of Rs.4000/- per month is kept intact and affirmed but instead of Rs.8,000/- per month awarded from the date of judgment, is modified to the extent of Rs.6,000/- per month, subject to other conditions imposed in impugned judgment by Family Court.

(2023) 11 ILRA 694

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 30.10.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 133 of 2022

Haridas Yadav **...Appellant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Appellant:

Arun Sinha, Ram Chandra Singh, Siddhartha Sinha, Smriti

Counsel for the Opposite Parties:

G.A., Vivek Singh

Criminal Law-The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)

Act,1989-Section 14-A (2)---Criminal appeal against impugned order rejecting the bail of the appellant under Sections 452, 456, 376, 354, 504, 506 I.P.C. and Section 3(1) (dha), 3 (2) (5), 3(2) (5) a SC/ST Act---Prosecutrix is living with her family members and her family is a joint family and it is not possible for the appellant or any other person to commit the alleged crime and they were not aware about the said incident or no action has been taken by those person or by the prosecutrix for last six months, as alleged by the prosecutrix in the F.I.R., which clearly establish that a totally improbable story has been called out by the prosecutrix in the F.I.R. as well as in her St.ment recorded under Section 161 and 164 Cr.P.C.;--- The present F.I.R. has been lodged only with the enmity of the sitting Pradhan, as the sitting Pradhan of the village is inimical to the appellant as the appellant is the supporter to the other candidate, who contested against the sitting Pradhan---The parties appears to be consenting parties; further considering the fact that appellant is in jail since 26.07.2021 and has now by done a substantial period of detention---The learned court below has failed to appreciate the material available on record, the impugned order passed by the trial court is liable to be set aside.

Appeal allowed.(E-15)

List of the cases referred:-

1. Kamal Vs St. of Har., 2004 (13) SCC 526
2. Dataram Singh Vs St. of UP & anr., reported in (2018) 3 SCC 22

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

1. The case is taken up in the revised call.

2. Heard Ms. Smriti, the learned counsel for the appellant as well as Sri Ashok Kumar Singh, the learned A.G.A. for the State-opposite party No. 1 and perused the entire record.

3. Learned A.G.A. has filed counter affidavit and in reply thereto learned counsel for the appellant has filed rejoinder affidavit.

4. Today when the case is taken up, neither any counsel has appeared on behalf of opposite party No. 2 nor counter affidavit has been filed on her behalf.

5. This Court vide order dated 25.01.2022 issued notice to the opposite party No.2. As per the office report dated 23.04.2022 notice has already been served upon the opposite party No. 2. Sri Vivek Singh, Advocate has put in appearance on behalf of opposite party No.2, but has not filed any counter affidavit till date. The matter was listed more than ten times, but no counter affidavit has been filed. Thereafter, this Court vide order dated 17.07.2023 granted ten days time to file counter affidavit. The order dated 17.07.2023 is being reproduced herein-below:

“Ms. Smriti, the learned counsel for the appellant submits that she has searched Shri Vivek Singh, the learned counsel for the opposite party No. 2 but she could not find her, even her mobile number has also been put by him in block list.

The matter was listed several times but the learned counsel for the opposite party No. 2 neither appeared nor filed any counter affidavit.

Accordingly, Shri Vivek Singh, the learned counsel for the opposite party No. 2 is granted ten days' and no more time to file counter affidavit. Three days, thereafter, is allowed to the learned counsel for the appellant to file rejoinder affidavit.

Put up this case on 26.07.2023 peremptorily before appropriate Court.”

Thereafter, on 28.08.2023 this Court again granted time to file counter

affidavit. The order dated 28.08.2023 is being reproduced herein-below:

“Ms. Smriti, learned counsel for the appellant submits that in spite of several attempts, she could not find Sri Vivek Singh, learned counsel for the opposite party no.2 in the premises of the High Court. She also submits that she tried to search Sri Vivek Singh, learned counsel for the opposite party no.2 several times, however, she could not know about his whereabouts. She further submits that she may be given one more opportunity to serve written notice upon him about mentioning of the case to be taken up out of turn.

The reason appears to be justified.

One more opportunity is being given to learned counsel for the appellant to serve a written notice upon Sri Vivek Singh, learned counsel for the opposite party no.2 about mentioning of the case to be taken up out of turn.

Sri Vivek Singh, learned counsel for the opposite party no.2 is also directed to appear in this case on the next date fixed for argument.

Put up this case on 11.09.2023 peremptorily.”

6. Learned counsel for the appellant submits that Sri Vivek Singh, learned counsel for the opposite party No.2 never used to take written notice, so that the matter be taken up. Thus, she has sent notice by Speed Post on 04.09.2023 and on 05.09.2023. The copy of the Speed Post receipts are being shown to the Court, in which the said notice was already received. The said track consignment as well as the photocopy of the receipts of both the dates are taken on record. Learned counsel for

the appellants submits that as the matter pertains to bail, thus the case may be finally heard by this Court.

7. Sri Ashok Kumar Singh, Learned A.G.A. submits that as the notice has already been served by the Speed Post and there is a track consignment that the notice has already been served and the counsel is avoiding to appear in this case, thus he submits that the matter may be heard finally.

8. In the above circumstances, this Court has no option but to proceed for final arguments to decide the present appeal.

9. The present criminal appeal under Section 14-A (2) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act has been preferred against the impugned order dated 22.10.2021 passed by the Court of Special Judge, SC/ST (P.A.) Act Hardoi in Bail Application No. 2776/2021 in Case Crime No. 516/2021, under Sections 452, 456, 376, 354, 504, 506 I.P.C. and Section 3(1) (dha), 3 (2) (5), 3(2) (5) a SC/ST Act, Police Station Bilgram, District Hardoi, whereby the bail application of the appellant has been rejected.

10. Learned counsel for the appellant submits that the appellant is innocent and has been falsely implicated in the present case, due to enmity and village party bandi. No such incident took place as alleged by the prosecution. She further submits that the prosecution has made improbable story inasmuch as according to the F.I.R. and according to the statement of the prosecutrix recorded under Section 161 and 164 Cr.P.C., the appellant has committed rape for the last six months while threatening her and about a month before

the present incident, the prosecutrix has informed to her family members about the act of the appellant, but nobody of the family members has lodged the F.I.R. or has made any complaint to any authorities, thus she submit that the parties appears to be consenting, but only with the fear of the society and of the family member, the present case has been lodged against the appellant.

11. Learned counsel for the appellant further submits that as per the prosecution the appellant has committed rape upon the prosecutrix on 12.07.2021, but no F.I.R. was lodged and again a false incident of 24.07.2021 has been introduced by the prosecutrix, in which it is alleged that the prosecutrix was allegedly molested by the appellant and thereafter the present F.I.R. was lodged against the appellant on 25.07.2021, thus there is a delay of more than 12 days in lodging of the F.I.R. and no proper and plausible explanation has been given by the prosecutrix, that also falsify the entire prosecution story.

12. Learned counsel for the appellant submits that as a matter of fact, the appellant has never entered into the house of the prosecutrix in the night after jumping the boundary wall of the prosecutrix and false allegation has been made against the appellant, as the house of the prosecutrix is surrounded by many other houses of the locality and it is not possible for the appellant to enter into the house in the night and if so happen then there must be hue and cry by the family members of the prosecutrix or by prosecutrix itself, but no such happening took place.

13. Learned counsel for the appellant further submits that it is not in dispute that the prosecutrix is living with her family

members and her family is a joint family and it is not possible for the appellant or any other person to commit the alleged crime and they were not aware about the said incident or no action has been taken by those person or by the prosecutrix for last six months, as alleged by the prosecutrix in the F.I.R., which clearly establish that a totally improbable story has been called out by the prosecutrix in the F.I.R. as well as in her statement recorded under Section 161 and 164 Cr.P.C.

14. Learned counsel for the appellant further submits that as per school record, the prosecutrix is major girl, aged about more than 19 years and her date of birth as per school certificate is 20.08.2001, thus she is major and she knew her consequential very well.

15. Learned counsel for the appellant further submits that the appellant is young boy aged about 19-20 years and due to the present case his entire career is at stake. The present F.I.R. has been lodged only with the enmity of the sitting Pradhan, as the sitting Pradhan of the village is inimical to the appellant as the appellant is the supporter of the other candidate, who contested against the sitting Pradhan. Thus, the sitting Pradhan put forward the opposite party No.2 for lodging of the present F.I.R. against the appellant, giving her greed to get some financial aid by the State Exchequer.

16 . Learned counsel for the applicant has further placed reliance of Hon'ble Apex Court judgments in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of

the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

17. Learned counsel for the appellant further submits that accused/appellant is languishing in jail since 26.07.2021, and in case the appellant is enlarged on bail, he shall not misuse the liberty of bail and he shall also fully cooperate with the trial. He has further submitted that there is no possibility of the appellant to intimidate or pressurize the witnesses or any other persons acquainted with the facts of the present case.

18. For the aforesaid reasons, learned counsel for the appellant submits that the instant criminal appeal deserves to be allowed and the order dated 22.10.2021 passed by the Court of Special Judge, SC/ST (P.A.) Act Hardoi in Bail Application No. 2776/2021 in Case Crime No. 516/2021, under Sections 452, 456, 376, 354, 504, 506 I.P.C. and Section 3(1) (dha), 3 (2) (5), 3(2) (5) a SC/ST Act, Police Station Bilgram, District Hardoi deserves to be set aside and consequently, the accused/appellant deserves to be enlarged on bail during pendency of the trial.

19. Several other submissions in order to demonstrate the falsity of the allegations made against the appellant have also been placed forth before the Court. The

circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the appellant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is having criminal history of three cases except the present case which has been explained in Para 7 of the rejoinder affidavit and he is in jail since 26.07.2021 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

20. Per contra, Sri Ashok Kumar Singh, learned A.G.A. has vehemently opposed the prayer by submitting that there is an allegation against the appellant in the statement recorded under Section 161 and 164 Cr.P.C. as well as in the version of the F.I.R., thus prima facie commission of offence is made out against the appellant. Therefore, the accused/ appellant is not entitled to be enlarged on bail and the instant criminal appeal deserves to be dismissed. However, he has been unable to dispute the other factual submissions advanced by the learned counsel for the accused/appellant.

21. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, unlikelihood of early conclusion of trial and also in absence of any convincing material to indicate the possibility of tampering with the evidence and considering the fact that there appears force in the argument of learned counsel for

the appellant that according to the statement of the prosecutrix recorded under Section 161 and 164 Cr.P.C., the appellant has committed rape for the last six months while threatening her and about a month before of the present incident, the prosecutrix has informed to her family members about the act of the appellant, but nobody of the family members has lodged the F.I.R. or has made any complaint to any authorities; there appears force in the argument of learned counsel for the appellant that it is not in dispute that the prosecutrix is living with her family members and her family is a joint family and it is not possible for the appellant or any other person to commit the alleged crime and they were not aware about the said incident or no action has been taken by those person or by the prosecutrix for last six months, as alleged by the prosecutrix in the F.I.R., which clearly establish that a totally improbable story has been called out by the prosecutrix in the F.I.R. as well as in her statement recorded under Section 161 and 164 Cr.P.C.; there also appears force in the argument of learned counsel for the appellant that the present F.I.R. has been lodged only with the enmity of the sitting Pradhan, as the sitting Pradhan of the village is inimical to the appellant as the appellant is the supporter to the other candidate, who contested against the sitting Pradhan. Thus, the sitting Pradhan put forward the opposite party No.2 for lodging of the present F.I.R. against the appellant, giving her greed to get some financial aid by the State Exchequer; the parties appears to be consenting parties; further considering the fact that appellant is in jail since 26.07.2021 and has now by done a substantial period of detention and further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex

Court in the case of **Kamal (supra) and Dataram Singh Vs. State of UP and another**, reported in **(2018) 3 SCC 22**, this Court is of the view that the learned court below has failed to appreciate the material available on record, the impugned order passed by the trial court is liable to be set aside.

22. Accordingly, the appeal is **allowed**. Consequently, the order dated 22.10.2021 passed by the Court of Special Judge, SC/ST (P.A.) Act Hardoi in Bail Application No. 2776/2021 in Case Crime No. 516/2021, under Sections 452, 456, 376, 354, 504, 506 I.P.C. and Section 3(1) (dha), 3 (2) (5), 3(2) (5) a SC/ST Act, Police Station Bilgram, District Hardoi is hereby reversed and set aside.

23. Let the appellant, **Haridas Yadav**, be enlarged on bail in Case Crime No. 516/2021, under Sections 452, 456, 376, 354, 504, 506 I.P.C. and Section 3(1) (dha), 3 (2) (5), 3(2) (5) a SC/ST Act, Police Station Bilgram, District Hardoi with the following conditions:-

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

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

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

(b) The appellant shall not commit an offence similar to the offence of

which he is accused, or suspected, of the commission of which he is suspected, and

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

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

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

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

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

(vii) The appellant shall remain present, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in

is proved by doctor. Therefore, learned trial court found the accused-appellants guilty and convicted them. The conclusion of learned trial court does not suffer with any infirmity or lacuna. The contradictions are minor in nature and the prosecution proved the case beyond reasonable doubt, hence no merit is found in the appeal and the appeal is liable to be dismissed--- Trial court has power to find the accused guilty for lesser offence even if charge is made for major offence, but when the charge was framed for lesser offence the court cannot convict the accused for major offence without alteration of charge. Hence when the prosecution has proved prosecution version regarding major offence under section 307 IPC and it is proved by the evidence that all the appellants acted with common intention then trial court rightly convicted appellants under section 307 IPC read with section 34 IPC. Hence there is no illegality in the judgment of trial court, if the accused-appellants are convicted under section 307 read with section 34 IPC.

Appeal dismissed. (E-15)

List of the cases referred:-

BEFORE

1. Maqbool Vs St. of A.P., AIR 2011 SC 184
2. U.O.I. Vs Prakash P. Hinduja AIR 2003 SC 2612
3. Amar Singh Vs Balwinder Singh, AIR 2003 SC 1164
4. Sambu Das Vs St. of Assam, AIR 2010 SC 3300
5. Ram Bihari Yadav Vs St. of Bihar", AIR 1998 SC 1850,
6. Paras Yadav Vs St. of Bihar", AIR 1999 SC 644,
7. Dhanraj Singh Vs St. of Punj., AIR 2004 SC 1920,
8. Ram Bali Vs St. of U.P. AIR 2004 SC 2329

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

1 I heard Sri Sumit Kumar Srivastava,
learned counsel for the applicants, Sri Ajay
Kumar Srivastava, learned AGA for the
State and perused the material available on
record.

Counsel for the Opposite Party:
G.A.

Criminal Law-The Indian Penal Code,1860-Sections 307 & 34--- Learned trial court found the case proved on the basis of medical evidence, site plan and oral evidence of injured. FIR is prompt. Enmity is admitted. Gunshot injury was found, which

2. Present appeal has been preferred by the appellants against the judgment and order dated 01.08.2000, passed by Vth Additional Sessions Judge, Pratapgarh, in Session Trial No.57 of 1997, whereby the appellants have been convicted under section 307 IPC read with section 34 IPC and all the appellants except appellant Mausim Ali, have been sentenced to under go rigorous imprisonment of 7 years and payment of the fine of Rs.2,000/- each and further to under go imprisonment of 3 years in default of payment of fine and the appellant Mausim Ali is convicted under section 307 IPC read with section 37 IPC and sentenced to pay the fine of Rs.2,000/- and in default of payment of fine to undergo further imprisonment for a period of 3 months. During the pendency of appeal the appellants Hashim Ali son of Mausim Ali and Maushim Ali(appellant nos.2 and 4) have died and appeal was abated on their behalf vide order dated 26.08.2022. Appellants Mohd. Idris and Phullan son of Mausim Ali were released on bail.

3. Wrapping the facts in brief, on 16.07.1996 at about 9.00 A.M., when the informant(Abdul Hamid) was planting the paddy in his fields the accused-appellants Mausim Ali and Hashim Ali, Phullan and Mohd. Idris sons of Maushim Ali, assaulted him with lathi-danda and fire arm due to old animosity. He tried to escape towards his house, but Hashim, Phullan and Mohd. Idrish started firing and his brother Abdul Wahid(P.W.-1) stuck in the fields, filled with water. The fire, shot his bother, when he raised noise the witnesses Bachai, Hatim Ali, Sabit Ali, Iddu @ Neta, reached there and challenged the accused, then all of them went to their house.

4. On the basis of a written report FIR was registered in Police Station Kotwali, Pratapgarh, as Case Crime No.569 of 1996, under section 307 IPC. Chik report was prepared at the same time and entered into G.D. The investigation was conducted by S.I. Rajesh Kumar Singh(P.W.-5), got the injured medically examined in the hospital, inspected the spot and prepared site plan on the pointing out of informant Abdul Hamid. He recorded the statement of informant Abdul Hamid and witnesses. The statement of injured Abdul Wahid could not be recorded on that date, due to his injuries. He recorded the statement of injured on 18.07.1996 when he became normal to give his statement. After collecting sufficient evidence against the accused-appellants, investigating officer submitted charge sheet in the court.

5. The Magistrate took the cognisance of the case and after compliance of provisions section 207 Cr.P.C., committed the case to the court of session for trial. The charges were framed against the accused-appellants under section 307 IPC. and read over & explained to the accused persons, who abjured from the charges and claimed to be tried.

6. Prosecution adduced 5 witnesses to prove the case against the accused-appellants, which are as follows:-

(I) P.W.-1, Abdul Wahid
(Injured)

(ii) P.W.-2, Sabit Ali (Witness)

(iii) P.W.-3, Dr. P.K. Agarwal
(Witness)

(iv) P.W.-4, Dr. V.K. Verma
(Radiologist)

(v) P.W.-5, Investigating officer

7. Besides oral evidence, few documentary evidences were also produced by the prosecution, which are as follows:-

(I) FIR (Ex.Ka-1)

(ii) Medical examination report (Ex.Ka-2)

(iii) Radiological report (Ex.Ka-3)

(iii) Site plan (Ex.Ka-4)

(iv) Charge sheet (Ex.Ka-5)

(v) Chik report (Ex.Ka-6)

(vi) G.D. (Ex.Ka-7)

8. After the conclusion of evidences, the statement of appellants were recorded under section 313 Cr.P.C. All the accused deposed in their statements recorded under section 313 Cr.P.C. that they are innocent and they have been falsely implicated in the present case by the informant, as his father was in police department. All the accused denied the incident and stated that the case was registered on the basis of forged written report and witnesses deposed due to animosity and witness Iddu Neta has expired. All the appellants have stated that Mausim Ali was acquitted of the incident of Kaddipur assault. Accused confessed that Idris, Phullan and Mussim Ali were charged and tried in abduction case. Accused have states that Phullan and Idris were tried under section 307 IPC and also for firing in Ramleela ground, but they have been acquitted of the offence under section 307 IPC and section 25 Arms Act.

9. After hearing the public prosecutor and the counsel for the accused-appellants, learned trial court relied upon the prosecution version and held that the FIR is prompt, accused and informant are resident of the same village, therefore, they are well acquainted with everyone. Medical report corroborates the prosecution version, therefore, prosecution case is proved beyond reasonable doubt. It is also held by the trial court that if the injured witness appeared in the dock and proved the case as a ocular witness then the motive of assault becomes negligible and irrelevant. Abdul Hamid who was informant of the case expired during the trial, therefore, he could not be produced as prosecution witness, however the injured Wahid proved the prosecution version. On the basis of the evidence on record, learned trial court convicted all the four accused under section 307 read with section 34 IPC and punished them with the aforesaid conviction. Aggrieved with the aforesaid judgment the present appeal is filed by the appellants.

10. I have heard the counsel for the appellants, learned AGA for the State and perused the record.

11. It is submitted on behalf of the appellants that impugned judgment and order dated 01.08.2000 is illegal, unjust and improper. Medical evidence has not supported the prosecution version. There are major inconsistencies and contradictions in the statements of the witnesses. Investigation of the case is tainted and prosecution has failed to prove their case beyond reasonable doubt. Trial court did not consider their defence while passing the impugned judgment, hence the impugned judgment is liable to be set-aside.

12. Per contra, learned AGA for the State submitted that the injured witness Abdul Wahid is produced as P.W.-1 and he proved the prosecution version and his injuries very well supported by medical evidence which is proved by Dr. P.K. Agarwal(P.W.-3). FIR is prompt and there is no possibility of addition or concoction or distortion, in the contents of FIR. Hence the impugned judgment is based on reliable evidence of facts hence appeal is liable to be rejected.

13. Before analysis of the evidence it is desirable to recapitulate the evidence on record. P.W.-1 Injured, Abdul Wahid stated on oath that on the date of incident at about 9.00 A.M. he alongwith his brother Abdul Hamid were planting the paddy and the fields were filled with water. They were on the western boundary of their fields. The accused-appellants Mausim Ali, Hashim Ali, Phullan and Idris started assaulting them with lathi-danda and fire arms due to old animosity. He alongwith his brother tried to escape towards his house, but he could not escape. Accused surrounded them from three sides and opened fire. He sustained injuries in the left side of shoulder blade, neck upper arm and chest. Hearing the noise of firing his brother came back and raised alarm, then witnesses Bachai, Hatim Ali, Sabit Ali, Iddu Nata, arrived there and accused took to their heels. His brother Abdul Hamid scribed FIR near the Kotwali Sadar and FIR was registered on his application. He was medically examined by the doctor and his statement was recorded by the investigating officer on the third day of the incident. Informant Abdul Hamid died during course of trial, therefore, he could not appear to deposed in court and FIR was proved by the injured as secondary evidence.

14 P.W.-2, Sabit Ali, who is maternal uncle of the injured, deposed that he proceeded to Hakim Ke Purwa by Jeep from his house, as his house is 12 miles away from the place of occurrence. He left his Jeep near toll and thereafter he proceeded on foot to Kadipur via chowk and jail road. Thereafter, he went to the house of Bachai and alongwith Bachai went towards Hakim Ke Purwa for the purchase of buffalo. When they reached near tube-well they saw that the accused-appellants Mausim Ali, Hashim Ali, Phullan and Mohd. Idrish, having illegal weapons in their hands, opened fire on the injured Abdul Wahid, who fell down in the field. When they scolded the accused-appellants, they took to their heels towards their house. He accompanied injured Abdul Wahid and informant Abdul Hamid to their house and thereafter went away to purchase Buffalo.

15. P.W.-3 P.K. Agarwal, medical officer appeared in the court and stated that he examined injured Abdul Wahid aged about 32 years, was brought by home guard Prathvipal No.2048, Police Station Kotwali Nagar. The following injuries were found on his body:-

(i) Multiple pellet injuries on left side neck and left side face the area of 12 c.m. X 12 c.m. present and swelling of 0.5 c.m. X 0.5 c.m. circular with piercing lacerated wound at centre .03 c.m. X .03 c.m. circular with fresh oozing and many such injuries hard object (pellets) palpable from above. Total numbers approximately 15 on neck and 15 on face.

(ii) Similar pellet injuries on front of chest and left side on area of 12 c.m. X 12 c.m. upper and left part of the chest

alongwith axilla. Total number of injuries about 50, all bleeding

(iii) 7-8 pellets injuries on back of left upper arms.

It is opined by the doctor that all the injuries are caused by fire arm. Duration fresh. Kept under observation. Admitted to district hospital PBH. Referred to surgeon for surgery and radiologist for X-ray of head, neck and chest.

Doctor prepared the injury report and in his statement doctor deposed that general condition of patient was satisfactory, however, air pressure was slightly less in left lungs.

16. P.W.-4 Dr. V.K. Verma deposed that he conducted X-ray of injured Abdul Wahid Contofanic Angle of left lungs was clear. Bones of head and neck were normal. P.W.-4 proved X-ray report and X-ray plate.

17. P.W.-5, investigating officer deposed that after getting investigation of the case he copied FIR and injury report in the case diary and G.D. He recorded the statement of informant Hamid and inspected the site plan on his pointing out. He could not record the statement of injured Abdul Wahid on that day because he was not fit for recording of his statement. Therefore, he recorded the statement of injured in the third day of the incident. He recorded the statement of witnesses Sabit Ali, Iddu Nata and Bachai. He proved site plan, charge sheet, G.D. and other police papers.

18. F.I.R. reveals that the incident occurred on 16.07.1996 at about 9 A.M. and FIR was lodged at about 9.30 A.M.

Therefore, there is no delay in lodging of the FIR and there is no possibility of distortion or concoction in the contents of FIR.

19. It is submitted on behalf of learned counsel for the appellant that medical evidence has not supported the prosecution case. I perused the medical report in the light of other material on record. According to the FIR accused-appellants surrounded Abdul Wahid as he was struck in water filled in the fields and opened fire upon him, which hit in his left shoulder blade, neck upper arms and chest. The contents of FIR are proved by injured witness P.W.-1 and P.W.-2, witness Sabit Ali. No contradiction is found in the statement of injured regarding the injuries. Injuries are corroborated by doctor P.W.-3. There is no contradiction in the statements of witnesses and the statement of doctor regarding the injuries of P.W.-1. P.W.-4 doctor V.K. Verma substantiated the injury report and proved the injuries of P.W.-1. However, he deposed that lungs and bones were not damaged as per X-ray report but he deposed that metallic shadow were found in X-ray on face, neck and chest. P.W.-3 submitted that both the injuries may be caused by one and the same shot of fire. The fire was not opened from the closed range, however, he could not reveal the range of fire. Palpable head pellet injuries were found on the face, neck and chest. Therefore, there is no contradictions in the statement of doctor, P.W.-3, Radiologist, P.W.-4 and injured P.W.-2.

20. It is submitted that weapon was not recovered from the possession of accused. From the perusal of record it is evident that investigating officer did not recovered the weapon used in the incident. Appellants are not being tried under Arms

Act, but no explanation is sought by learned counsel for the appellants during the course of cross examination of P.W.-5. Recovery of weapon is within the jurisdiction of investigating officer and if investigating officer commits any fault during investigation, it does not extend any benefit to accused, as informant has no control over investigation. Hence if the case is otherwise proved by prosecution, then mere fault at the instance of investigating officer, do not render the prosecution version unreliable.

21. P.W.-5, investigating officer, admitted in his cross-examination that he did not seized blood stain cloths of injured nor he prepared recovery memo thereof. He did inquire about the blood stain cloths from head constable or doctor. This is minor laps on behalf of investigating officer and any laps or latches on behalf of investigating officer in a case of killing by shooting, where the I.O. failed to collect bloodstained soil and empty shells from the scene, do not demolished the complete prosecution version. Since the eye-witnesses deposed to the firing of shots resulting in death, which was corroborated by medical evidence, the loopholes in the investigation do not cause prejudice to the accused. It is held by Apex Court in its Judgment passed in **Maqbool vs. State of A.P.**, AIR 2011 SC 184 that “*There is no rigid rules to appreciation the evidence. Effect of shortcomings on the part of I.O. is part of task of judge in appreciation of Evidence to assess the effect of shortcomings of I.O. Doctor had proved the injuries of injured, therefore, if the blood stain clothes of the injured are not recovered by the investigating officer, it does not mean that no injury was sustained by injured.*”

22. As the general principle, it can be stated that error, illegality or defect in investigation cannot have any impact unless miscarriage of justice is brought about or serious prejudice is caused to the accused. It is held by Apex Court in its Judgment passed in “**Union of India vs. Prakash P. Hinduja** AIR 2003 SC 2612” that “*If the prosecution case is established by the evidence adduced, any failure or omission on the part of the I.O cannot render the case of the prosecution doubtful*”. It is also held by Apex Court in its Judgment passed in “**Amar Singh vs. Balwinder Singh**, AIR 2003 SC 1164” and “**Sambu Das vs. State of Assam**, AIR 2010 SC 3300” that “*If the direct evidence is credible, failure, defect or negligence in investigation cannot adversely affect the prosecution case, though the court should be circumspect in evaluating the evidence*”. It is also held by Apex Court in its Judgment passed in “**Ram Bihari Yadav vs. State of Bihar**”, AIR 1998 SC 1850, “**Paras Yadav vs. State of Bihar**”, AIR 1999 SC 644, “**Dhanraj Singh vs. State of Punjab**”, AIR 2004 SC 1920, “**Ram Bali vs. State of U.P.** AIR 2004 SC 2329” that “*If investigation is faulty, illegal or suspicious, the rest of the evidence should be scrutinized independent of the impact of the faulty investigation; otherwise criminal trial will descend to the I.O ruling the roost. Yet if the court is convinced that the evidence of eyewitnesses is true, it is free to act upon such evidence though the role of the I.O in the case is suspicious. An accused cannot be acquitted on the sole ground of defective investigation; to do so would be playing into the hands of the I.O. The absence of independent witness of recovery under Section 27, Evidence Act is not sufficient to create doubt regarding truth of the prosecution version.*”

23. Learned counsel for the appellants argued that investigating officer did not collect blood contaminated water or blood stain earth which goes to show that no such incident happen. This arguments of learned counsel for the appellants finds no favour, as investigating officer himself clear at page-7 of examination that the field were filled with water and paddy was being planted, therefore, it was not possible to collect blood stain water or earth.

24. It is also argued by learned counsel appellants that there is contradiction on the points that whether the place of occurrence was muddy or dry. Learned counsel for the appellants has placed reliance on the page-11 of the statement of P.W.-2, who stated on oath that "injured did not fall on the field, there was no water or mud and the place of occurrence was dry". The contents of learned counsel for the appellants do not find any favour to this contention also, as in the very next line P.W.-2 stated that injured fell down at the very place where the fire hit him. In the site plan, the field is found filled with water. The statement of injured was recorded on 11.11.1999 about three years after the incident. Documentary evidence proved that the fields were under water, as the paddy was being planted at that time. Therefore, this minor contradictions do not destroy the prosecution version.

25. Learned counsel for the applicants argued that P.W.-2 Sabit Ali is the interested witnesses, as he is maternal uncle of injured Abdul Wahid. Sabit Ali, P.W.-2 replied in page-7 of his statement that he is not the real maternal uncle of injured and he is maternal uncle of injured due to village relationship with the injured. Sabit Ali is the eye witness and he deposed that he was going to purchase buffalo along with

one Bachai of the village. Injured was surrounded by all the accused having weapons in their hands and fired at Abdul Wahid. He was present near the house of Bachai which is at the distance of one farlong. Mohd. Idrish shot fire from the distance of 6-7 steps. Accused flad towards north of the place of occurrence. The presence of this witness is not doubtful, therefore, his evidence cannot be thrown out, merely on the ground that he is the maternal uncle of the injured, due to village relationship. He accompanied injured Abdul Wahid and informant Abdul Hamid to their house and thereafter went away to purchase Buffalo.

26. Learned counsel for the appellant submitted that P.W.-2 is 85 years old and he admitted that his vision has diminished since the age of 75 years. During the statement this witness could not identify the fingers shown to him, but his statement was recorded about four years after the incident. For the shake of argument, if I disbelieve the evidence of P.W.-2, even then the injured, P.W.-1 himself proved the incident beyond reasonable doubt, which is corroborated by the evidence of P.W.-3, Dr. P.K. Agarwal and P.W.-4, Dr. V.K. Verma, Radiologist.

27. It is further argued on behalf of the accused-appellants that injured was history-sheeter and he must be shot fire by some one else due to rivalry. P.W.-1 injured admitted in his statement that he himself and his brothers Abdul Hamid and Abdul Rashid, were the accused in the case of section 308 IPC, which was filed by the appellant Maushim Ali. Prior to this incident accused-appellants Maushim Ali, Mohd. Idrish and Hashim, assaulted the father of injured Abdul Sakoor and the case is pending in the court of concerned Chief

Judicial Magistrate. The accused-appellants were pressurising the informant and injured to withdraw the case which was pending against the accused-appellants and when they refused to do so the present incident had occurred, therefore, there is no possibility to implicate them falsely without any reason. The enmity is double edged weapon, hence the incident happened due to this enmity. Therefore, the contention of learned counsel for the appellants finds no favour that accused-appellants are falsely implicated in the present case and the incident occurred somewhere else by some other persons.

28. Accused-appellants produced D.W.-1, Head Constable No.38, Om Prakash Shukla, who narrated criminal history of Washir son of Amin, but Washir is neither informant nor witness or injured in this case, therefore, this defence witness is of no use for defence except disclosing criminal antecedents of Washir.

29. Learned trial court found the case proved on the basis of medical evidence, site plan and oral evidence of injured. FIR is prompt. Enmity is admitted. Gunshot injury was found in the body of injured and informant, which is proved by doctor. Therefore, learned trial court found the accused-appellants guilty and convicted them in this case. The conclusion of learned trial court do not suffer with any infirmity or lacuna. The contradictions are minor in nature and the prosecution proved the case beyond reasonable doubt, hence no merit is found in the appeal and the appeal is liable to be dismissed.

30. Lastly, learned counsel for the accused-appellants submitted that all the appellants were charged with section 307 IPC, however, they were convicted under

section 307 read with section 34 IPC without amending any charge, therefore, the judgment is liable to be set-aside on this sole ground.

31. So far as section 34 IPC is concerned, it is not substantive offence, which is quoted herein below:-

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

32. Trial court has power to find the accused guilty for lesser offence even if charge is made for major offence, but when the charge was framed for lesser offence the court cannot convict the accused for major offence without alteration of charge. Hence when the prosecution has proved prosecution version regarding major offence under section 307 IPC and it is proved by the evidence that all the appellants acted with common intention then trial court rightly convicted appellants under section 307 IPC read with section 34 IPC. Hence there is no illegality in the judgment of trial court, if the accused-appellants are convicted under section 307 read with section 34 IPC. Therefore, the appeal is liable to be dismissed on this ground also.

33. In view of the aforesaid, the appeal is **dismissed**.

34. Appellant nos.2 and 4 namely Hashim and Maushim Ali are died. The appellant nos.1 and 3 namely Phullan and Mohd. Idris are still alive and are on bail. They are directed to surrender before the

court concerned for serving out the remaining sentence, awarded to them by the trial court. The sureties are discharged.

35. Let copy of this judgment alongwith the lower court record, if any, be sent to the trial court concerned for further necessary action and compliance.

(2023) 11 ILRA 708
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2023

BEFORE

THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 994 of 2023

Anil Pandey. **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:

Sri Amit Kumar Pandey, Sri Sunil Kumar Singh

Counsel for the Opposite Party:

G.A., Sri Dharmendra Kumar Chaubey, Sri Pravin Kumar Tiwari

Criminal Law-The Code of Criminal Procedure, 1973-Section 389(1) ---Court is

duty-bound to objectively assess the matter and record the reasons for its conclusion for deciding the application under Section 389(1) Cr.P.C. --- On perusal of the testimony of PW-1 and PW-2, prima-facie, it transpires that the testimony are trustworthy and reliable as both are victims of sexual offence and advances by same man. And no explanation has been put forth for the false implication of the accused-appellant except that the complainant and victim was in relationship, even if it is presumed, at this stage, the victim was in a relationship with the accused, it does not give a licence to the accused to exploit the women for

all time to come and also to have evil eyes on her young daughter---The complainant had to withdraw the complaint dated 02.11.2024 lodged at PS Civil Lines, Ballia, under pressure from the accused and his family members which shows that the accused wields substantial and compelling influence in the administration, and may cause harm to the complainant and her daughter's safety and security if released on bail at this stage.

Application for suspension of sentence is dismissed at this stage.(E-15)

List of the cases referred:-

1. Chaman Lal Vs St. of U.P. & anr.2004(7) SCC 525
2. Om Prakash Sahni Vs Jai Shankar Chaudhary & anr. 2023 SCC OnLine SC 551
3. Rajesh Ranjan Yadav alias Pappu Yadav Vs CBI (2007) 1 SCC 70
4. Ash Mohammad Vs Shiv Raj Singh alias Lalla Babu (2012) 9 SCC 446
5. Bhagwan Rama Shinde Gosai Vs St. of Gujarat (1999) 4 SCC 421
6. St. of Har. Vs Hasmat (2004) 6 SCC 175

(Delivered by Hon'ble Vinod Diwakar, J.)

Crl. Misc. Suspension of Sentence Application No.1 of 2023

1. I have heard learned counsel for the appellant, learned counsel for the complainant, and learned A.G.A. for the State on suspension of sentence.

2. The accused-appellant Anil Pandey has been convicted in Sessions Trial No.13 of 2018 (State vs. Anil Pandey), arising out of Case Crime No. 88 of 2017, under Sections 376, 394, 323 and 506 I.P.C., Police Station Kotwali, District Ballia, and has been sentenced to suffer R.I. for ten

years in respect of offences, mentioned herein above, apart from fine.

3. As per the prosecution case, on 22.11.2014, the complainant filed a written complaint to the police stating that the accused-appellant has been exploiting the complainant for the last sixteen months. The accused has taken anklets and other ornaments after beating the complainant. The accused had an evil eye on the complainant's daughter, and when the complainant and her daughter resisted the move of the accused, he assaulted and threatened to defame the complainant's daughter. It is also an allegation in the FIR that if the complainant's daughter does not gratify the sexual impulses of the accused-appellant, he will defame her daughter on social media and made viral her photos. When the complainant's daughter did not succumb to the urge of the accused-appellant, he circulated the inappropriate pictures by morphing her daughter's image to her relatives and co-villagers.

4. On these sets of allegations, on 12.01.2017, an FIR bearing Case Crime No. 88 of 2017, under Section 376, 394, 354, 323 and 506 IPC was registered against the accused at P.S. Revati, District Ballia, U.P. The accused was tried for the aforesaid offences and has been convicted and sentenced accordingly, apart from fine.

5. Learned counsel for the accused-appellant submits that the victim and appellant resided together for more than four years as husband and wife, and the mobile number of the appellant was also mentioned in the victim's Aadhar Card and Ration Card. He further submits that when the appellant refused to fulfil the demand for money of the complainant, she falsely implicated the accused. The submission is

that the appellant was on regular bail during the trial. Therefore, the accused-appellant be enlarged on bail.

6. The counsel further submits that the accused-appellants name has been mentioned as guardian in the admission form of complainant's daughter, which shows that the accused has consensual relationship with the complainant since long. The case is registered with the oblique motive to falsely implicate the accused on the basis of concocted story which is apparent from the testimony of PW-1 and PW-2. There are material contradictions and improvements in the testimony of PW-2, who is daughter of the complainant.

7. Be that as it may, the detailed examination of the merits of the case may not be required by the courts while considering the application for suspension of sentence, but at the same time, the exercise of discretion has to be based on well-settled principles and in a judicious manner, and not as a matter of course as held by Apex Court in *Chaman Lal v. State of U.P.* and *Anr1*.

8. The principles which must guide the suspension of sentence in a rape case have been reiterated in several decisions of Apex Court. I may refer to **Om Prakash Sahni v. Jai Shankar Chaudhary and Another 2**, wherein while referring to series of judgments passed by the Apex Court on suspension of sentence, His Lordship has referred to **Rajesh Ranjan Yadav alias Pappu Yadav v. CBI3**, **Ash Mohammad v. Shiv Raj Singh alias Lalla Babu4**, **Bhagwan Rama Shinde Gosai v. State of Gujarat5**, and has held as follows:-

“3. When a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances. Of course, if there is any statutory restriction against suspension of sentence it is a different matter. Similarly, when the sentence is life imprisonment the consideration for suspension of sentence could be of a different approach.

9. In **State of Haryana v. Hasmat**⁶ the Apex Court stated as under:-

“6. Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the applicant on bail. There is a distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellate court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.

(emphasis supplied)”

10. The mere fact that during the period of trial, the accused was on bail and there was no misuse of liberty, does not per se warrants suspension of execution of sentence and grant of bail. What is really necessary is to consider whether reasons exist to suspend execution of the sentence and grant of bail.

11. At this stage, I refer to the decision of the two-Judge Bench of Apex Court in **Omprakash Sahni’s case (supra)**, where His Lordship J.B. Pardiwala, J., speaking for the Court, observed as follows:

“22. Thus, when we speak of suspension of sentence after conviction, the idea is to defer or postpone the execution of the sentence. The purpose of postponement of sentence cannot be achieved by detaining the convict in jail; hence, as a natural consequence of postponement of execution, the convict may be enlarged on bail till further orders.

23. The principle underlying the theory of criminal jurisprudence in our country is that an accused is presumed to be innocent till he is held guilty by a court of the competent jurisdiction. Once the accused is held guilty, the presumption of innocence gets erased. In the same manner, if the accused is acquitted, then the presumption of innocence gets further fortified.

24. From perusal of Section 389 of the CrPC, it is evident that save and except the matter falling under the category of sub-section 3 neither any specific principle of law is laid down nor any criteria has been fixed for consideration of the prayer of the convict and further, having a judgment of conviction erasing the presumption leaning in favour of the accused regarding innocence till contrary recorded by the Court of the competent jurisdiction, and in the aforesaid background, there happens to be a fine distinction between the prayer for bail at the pre-conviction as well as the post-conviction stage, viz Sections 437, 438, 439 and 389(1) of the CrPC.”

12. This Court is duty-bound to objectively assess the matter and record the reasons for its conclusion for deciding the application under Section 389(1) Cr.P.C .

13. Returning back to the case in hand, the complainant was examined as PW-1, and her daughter was examined as PW-2. The complainant stated that the accused had exploited her for sixteen months. She was mentally and physically tortured and faced regular beating and humiliating incidents. The accused used to say that he had made a video of her and would circulate it on the internet if she would not satisfy his lust. On many occasions, the accused made the complainant naked in front of her daughter and son. The accused occasionally does dirty talks with the complainant's daughter and, on a few occasions, attempted to rape her. The accused circulated morphed pictures of the complainant's daughter among her relatives and co-villagers. Three hundred such pamphlets were circulated. The complainant had lodged a complaint on 22.11.2014 at P.S. Civil Lines against such an aggravated move of the accused, but the same was withdrawn under the pressure of the accused's relative and fearing her safety and security. The same is exhibited as Ex. 4 Kha/5. The police had conducted the complainant's medical, and her statement under Section 161 Cr.P.C. was also recorded regarding the complaint dated 22.11.2014; even after that, the complainant had to withdraw the complainant under pressure from the accused-appellant.

14. The complainant's daughter was also examined as PW-2. She has supported the prosecution's case. The witness stated that the accused used to beat her mother mercilessly, and also had an evil eye on

her. When her mother resisted such a move by the accused, she was abused and beaten. Her morphed pictures were also circulated amongst her relatives and co-villagers.

15. The Court is also conscious of the fact that the women hesitate to register a rape case against her paramour in Indian society because of fear of social stigma. The victim may fear being judged, ostracized, or blamed by their family, friends or community members. This fear of social stigma can discourage women for reporting sexual crime, particularly if the perpetrator is someone known intimately.

16. There is also fear of retaliation in the mind of the victim. The victims may fear reprisals or threats from the perpetrator or their associates if they report that kind. This fear can be heightened when the perpetrator is someone they have closed relationship with, such as a partner or paramour. The women who report rape or sexual assault may fear retaliation from the perpetrator, the family, or their community. This can include threats, violence or social isolation.

17. Many sexual offence cases go under reporting due to fear of social stigma, victim-blaming, and the perception that reporting may bring same bad name upon the victim and their family. This leads to a significant number of cases not being registered, which naturally affects the over all conviction rate.

18. After hearing the counsel for the parties and on perusal of the record, I am of the view that :

18.1 Even though the minute examination of evidence and detailed documentation of the case's merit is not

warranted at this stage. Still, this court is duty bound to objectively assess the matter and record the reasons on its conclusion for deciding the application for suspension of sentence.

18.2 On perusal of the testimony of PW-1 and PW-2, prima-facie, it transpires that the testimony of PW-1 and PW-2 are trustworthy and reliable as both are victims of sexual offence and advances by same man. And no explanation has been put forth for the false implication of the accused-appellant except that the complainant and victim was in relationship, even if it is presumed, at this stage, the victim was in a relationship with the accused, it does not give a licence to the accused to exploit the women for all time to come and also to have evil eyes on her young daughter.

18.3 The complainant had to withdraw the complaint dated 02.11.2024 lodged at PS Civil Lines, Ballia, under pressure from the accused-appellants and his family members. This shows that the accused wields substantial and compelling influence in the administration, and may cause harm to the complainant and her daughter's safety and security if released on bail at this stage.

18.4 On perusal of the custody certificate of the accused-appellant, it reflects that the accused has undergone custody of only 153 days till 07.05.2023, even though he has been awarded a maximum sentence of ten years along with lesser sentences, apart from fine.

18.5 The accused-appellant is not a man of the clean antecedent. A Case Crime No. 0057 of 2020 P.S. Kotwali, District Ballia, under Section 419 and 422

IPC has been registered against the accused-appellant.

19. For the reasons detailed above, the application for suspension of sentence is dismissed at this stage.

20. While concluding, however, I hasten to add that my observations are confined to the question as to whether a case of suspension of sentence are made out or not and shall not affect the merit of the case when the appeal comes up for hearing before this Court.

21. If the appeal is not listed for final hearing after a year, the prayer for suspension of sentence may be revived, afresh and shall be decided on merits of the case.

22. List the appeal for hearing at the earliest.

(2023) 11 ILRA 712
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.11.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1284 of 2002

Ali Hasan

...Appellant

Versus

State of U.P.

...Opposite Party

Counsel for the Appellant:

R.P. Dwivedi

Counsel for the Opposite Party:

G.A.

(A) Criminal Law - appeal against conviction under Section 20B(ii)B of N.D.P.S. Act - Narcotic Drugs and Psychotropic Substances Act, 1985 -

Sections 8/20 - Prohibition of certain operations & Punishment for contravention in relation to cannabis plant and cannabis - It is mandatory for the empowered officer to inform the suspect of their right to be searched before a gazetted officer or Magistrate under Section 50(1) of the NDPS Act - Failure to comply could result in the recovery of the illicit article suspect and invalidate the conviction.(Para -16, 17)

(B) Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 50 - Conditions under which search of persons shall be conducted - search of the suspected person must be done before the Magistrate or Gazetted Officer, Section 55 & 57 - seized contraband article be kept by Station House Officer in safe custody and report of arrest and seizure be sent immediately to immediate Superior Officer within 48 hours - only on account of the fact that prosecution case is based on testimony of police witness, it cannot be thrown out, if the evidence of such witness is wholly reliable. (Para - 14, 15)

Accused flees after police vehicle - carrying charas for sale - Police asks for consent for search by gazetted officer- Accused consents to police search - Upon search, a plastic bag containing charas was recovered - trial Court convicted and sentenced appellant - aggrieved - hence appeal - no independent eye-witnesses of alleged recovery - making prosecution case doubtful - appellant was not produced before any Gazetted Officer or Magistrate before his search - no compliance of Section 50 N.D.P.S. Act - unreliable testimony of police personnel - illegalities and material irregularities committed by witnesses. **(Para - 4, 18 to 21)**

HELD:- Prosecution case based on oral testimony of police personnel. Prosecution failed to prove its case beyond reasonable doubt against appellant. Trial court erred in discussing the prosecution's evidence and has passed a judgment against the settled principle of law, including the provisions of the N.D.P.S. Act. Impugned judgment and order set aside and

reversed. Accused/appellant acquitted. **(Para - 14, 22, 23)**

Criminal Appeal allowed. (E-7)

LIST OF CASES CITED:-

1. Vijaysinh Chandubha Jadeja Vs St. of Guj. , 2010 (2) EFR 755
2. St. of Raj. Vs Parmanand & anr., (2014) 2 SCC (Cri) 563
3. Vijaysinh Chandubha Jadeja Vs St. of Guj. , 2010 (2) EFR 755
4. St. of Raj. Vs Parmanand & anr. , (2014) 2 SCC (Cri) 563

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

1. The case is taken up in the revised call.

2. Heard learned counsel for the parties.

3. This appeal has been preferred against the judgment and order dated 16.09.2002 passed by learned Special / Additional Sessions Judge (E.C. Act), Bahraich in Sessions Trial No.62 of 1998, Case Crime No.309 of 1998, under Sections 8/20 of N.D.P.S. Act, Police Station Pakharpur, District Bahraich, convicting and sentencing the appellant under Section 20B(ii)B of N.D.P.S. Act for three years rigorous imprisonment alongwith fine of Rs.20,000/- and in default of payment of fine, the appellant was further directed to undergo six months' rigorous imprisonment.

4. The prosecution story, in brief, as disclosed in the first information report, is that while the S.H.O. Udairaj Singh alongwith some police personnel was

patrolling and searching some accused of another crime, he saw a man, who on seeing police vehicle, started fleeing away. The police party caught that man and on being asked his name, he told his name as Ali Hasan. The accused was further inquired as to why he was fleeing after seeing the police vehicle, in reply, he informed that he was carrying charas and he used to supply charas and for selling the same, he was going to Lucknow. The police party asked the accused whether he want to get searched by a gazetted officer or police may make a search upon him. The accused consented that police may make search upon him. On being searched, a plastic bag was recovered containing charas. On the basis of aforesaid incident, Case Crime No.309 of 1998, under Sections 8/20 of N.D.P.S. Act was registered at Police Station Pakharpur, District Bahraich.

5. Investigation was handed over to the Sub Inspector Dayashanker Mishra, who in turn got the sample chemically examined and received a report. He took the statements of witnesses of recovery and prepared the site plan and on finding sufficient evidence, he filed charge sheet against the accused in the Court.

6. The accused-appellant was charged for offence u/s 8/20 N.D.P.S. Act; to which he pleaded not guilty and claimed for trial.

7. In support of the prosecution case, the prosecution examined Udairaj Singh, Inspector as P.W.-1, S.I. Ram Gopal Yadav as P.W.-2, Dayashanker Mishra, I.O. as P.W.-3 and Constable Radheshyam as P.W.-4.

8. Formal proof of prosecution papers have been admitted by the accused.

9. Appellant was examined under Section 313 of Code of Criminal Procedure, 1973, (in short 'Code') wherein he stated that he had been falsely implicated due to enmity with the Block Pramukh.

10. Learned trial Court, after going through the evidence available on record as well as after due hearing the learned counsel for both the parties, convicted and sentenced the appellant under Section 20B(ii)B of N.D.P.S. Act for three years rigorous imprisonment alongwith fine of Rs.20,000/- and in default of payment of fine, the appellant was further directed to undergo six months' rigorous imprisonment.

11. Aggrieved by the aforesaid judgment and order, the appellant has filed this appeal.

12. Learned counsel for the appellant argued that Section 50 of the N.D.P.S. Act is a mandatory provision. The arresting officer has not complied with that provision. As such, the recovery is illegal which vitiates the trial. Learned counsel further submitted that the alleged place of recovery is public place but no effort to invite the public witness at the time of recovery was made by the police party. Learned trial Court without proper appreciation of the evidence available on record has illegally convicted the appellant vide impugned judgment and order which is liable to be set aside as the prosecution has miserably failed to prove its case beyond reasonable doubt. In support of his argument learned counsel for the appellant has placed reliance on law laid down by Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2010 (2) EFR 755 and State of Rajasthan*

Vs. Parmanand and another, (2014) 2 SCC (Cri) 563.

13. Learned A.G.A. vehemently opposed the submission of learned counsel for the appellant and submitted that there is no illegality in the impugned judgment and order as it is settled provision of law that only on the solitary testimony of witness, conviction can be maintained and statement of police witness cannot be rejected on the ground that he is a police witness. Learned A.G.A. further submitted that impugned judgment and order, passed by trial Court, is well reasoned, well discussed and appeal is liable to be dismissed.

14. After considering the arguments advanced by learned counsel for the parties and after perusal of record, this Court finds that the prosecution case is based on oral testimony of police personnel. It is settled principle of law that only on account of the fact that prosecution case is based on testimony of police witness, it cannot be thrown out, if the evidence of such witness is wholly reliable.

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

16. Hon'ble Supreme Court in ***Vijaysinh Chandubha Jadeja Vs. State of***

Gujarat, 2010 (2) EFR 755, while discussing the importance and relevancy of section 50 of N.D.P.S. Act, in para-22, has opined as under:-

"22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in Re Presidential Poll (1974) 2 SCC 33, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate

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

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

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

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

18. Admittedly, the prosecution has not produced other independent eye-witnesses of the alleged recovery and even no explanation has been offered by the prosecution for their non-production. All the witnesses are police personnel. Non-production of independent eye witness is serious lacuna which has made the prosecution case very doubtful.

19. In addition to above, admittedly the appellant, prior to his search, was not produced before any Gazetted Officer or Magistrate, whereas according to prosecution before his search the police personnel were informed by the appellant that he was carrying the charas. Prosecution has also not produced any written consent of the appellant for his search. From perusal of testimony of prosecution witnesses, it does not transpire that any efforts were made by them to produce the appellant before any Gazetted Officer or Magistrate, as required by Section 50 of

N.D.P.S. Act, in view of law laid down by Apex Court in *Vijaysinh Chandubha Jadeja (Supra)*.

20. Further, it is also pertinent to note at this juncture that not only the manner in which the appellant was searched, is doubtful, the prosecution has also not prosecuted the case seriously, knowing that severe punishment has been provided in N.D.P.S. Act. It produced only four witnesses i.e Udairaj Singh, Inspector as P.W.-1, S.I. Ram Gopal Yadav as P.W.-2, Dayashanker Mishra, I.O. as P.W.-3 and Constable Radheshyam as P.W.-4 and withheld other witness without any justification.

21. In the light of above discussion, it is clear that the prosecution has failed to prove the mandatory compliance of Section 50 N.D.P.S. Act. In absence of compliance of mandatory provision of Section 50 N.D.P.S Act, the prosecution case, based on testimony of police personnel i.e. Udairaj Singh, Inspector as P.W.-1, S.I. Ram Gopal Yadav as P.W.-2, Dayashanker Mishra, I.O. as P.W.-3 and Constable Radheshyam as P.W.-4, whose statements are not wholly reliable, cannot be held as proved beyond reasonable doubt in view of the other illegalities and material irregularity committed by the witnesses as discussed above.

22. Thus this Court is of the view that prosecution has miserably failed to prove its case beyond reasonable doubt against the appellant. The trial Court has not properly discussed the evidence produced by the prosecution and has passed the impugned judgment and order against the settled principle of law including provisions of N.D.P.S. Act. This Court, therefore, unable to uphold the conviction

and sentence of the appellant. The appellant is entitled to be acquitted. The impugned judgment and order is liable to be set aside and accordingly, appeal is liable to be allowed.

23. In view of the above, impugned judgment and order dated 16.09.2002 passed by learned Special / Additional Sessions Judge (E.C. Act), Bahraich in Sessions Trial No.62 of 1998, Case Crime No.309 of 1998, under Sections 8/20 of N.D.P.S. Act, Police Station Pakharpur, District Bahraich, is **set aside** and **reversed** and accused/appellant, namely, **Ali Hasan** is **acquitted** of the charges levelled against him. Consequently, the appeal is **allowed**. His personal bond and surety bonds are canceled and sureties are discharged.

24. Let a copy of this judgment alongwith the lower court record be sent immediately to the Trial Court concerned for necessary compliance.

25. No order as to the costs.

(2023) 11 ILRA 717
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.11.2023

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 3040 of 2023

Kalimulla

...Appellant

Versus

Smt. Mehroz Jafri & Anr. ..Opposite Parties

Counsel for the Appellant:

Pal Singh Yadav, Ashish Kumar Singh,
Prathama Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Sections 340, 344, 341 & 195 – Indian Penal Code, 1860 – Sections 191, 192 & 193 – Criminal Appeal – False Evidence – Forged Documents – Maintenance Proceedings – Administration of Justice

The appellant challenged the order dated 24.08.2023 passed by the Additional Principal Judge, Family Court, Lucknow, rejecting his application under Sections 340/344 Cr.P.C. in Criminal Misc. Case No. 126-C of 2015, alleging that opposite party no. 1 concealed her income tax payee status and employment to secure an ex-parte maintenance order under Section 125 Cr.P.C. The opposite party argued that no forged documents were produced, the allegations were repetitive, and the appeal was part of vexatious litigation, as the appellant had filed 37 cases against her and her family. Held: (1) The appeal was dismissed with a cost of Rs. 50,000. (2) No prima facie case was made out under Section 340 Cr.P.C., as there was no evidence of forged or fabricated documents produced during the trial to procure conviction, as required by Section 195(1)(b)(ii) Cr.P.C., per Iqbal Singh Marwah Vs Meenakshi Marwah. (3) The appellant's failure to produce income tax documents during the trial and the quasi-civil nature of Section 125 proceedings negated his claims. (4) Section 344 Cr.P.C. orders are not appealable under Section 341 Cr.P.C. (5) The appellant's actions were deemed vexatious, aimed at harassing opposite party no. 1, who had remarried after their marriage dissolved, and intended to disrupt her life, warranting dismissal to curb such litigation.

Case Law Cited:

1. Iqbal Singh Marwah & anr. Vs Meenakshi Marwah & anr., (2005) 4 SCC 370; 2005 SCC (Crl.) 1101; 2005 SCC OnLine SC 531

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

1. Heard learned counsel for the appellant, learned counsel for opposite

party no.1, learned AGA for the State and perused the material brought on record.

2. Present criminal appeal under section 341 Cr.P.C. has been preferred on behalf of the appellant against the judgment and order dated 24.08.2023 passed by Additional Principal Judge Family Court, Court No.5, Lucknow, in Criminal Misc. Case No.126-C of 2015, under section 340/344 Cr.P.C.(Kalimulla Vs. Smt. Mehroz Jafri), by which learned court below without considering the fact and material evidence filed by the appellant, rejected the application of appellant under section 340/344 Cr.P.C. in illegal and arbitrary manner.

3. Learned counsel for the appellant submits that trial court failed to appreciate the fact that respondent no.1 is doing job in multinational company and getting handsome salary and able to maintain herself and concealed the fact on the stage of evidence that she is income tax payee. The court below also failed to consider the prima-facie evidence adduced by the appellant and passed the impugned order, which is illegal & irregular and is liable to be set-aside.

4. Sri Krishna Kumar Singh, Advocate, has filed his power on behalf of the opposite party no.1 alongwith the application for dismissal of appeal supported by an affidavit. It is submitted that deponent is the father of opposite party no.1 and is authorized by opposite party no.1 through registered power of attorney dated 03.07.2018 to do pairvi on her behalf. The aforesaid application is moved by the appellant in the case being Criminal Case No.30-C of 2011, under section 125 Cr.P.C. instituted by opposite party no.1 in Family Court, Lucknow, which was finally

decided by the Family Court on 02.09.2023. The appellant challenged the aforesaid order dated 02.09.2023 before this Hon'ble High Court in Criminal Revision No.1004 of 2023 (Kalim Ulla Vs. Additional Principal Judge, Family Court, Lucknow). The Hon'ble High Court dismissed the revision vide order dated 19.09.2023, which is annexed as annexure no.1 to the application.

5. The allegation made by the appellant in his application under section 340/344 Cr.P.C. has been considered by this Hon'ble High Court vide order dated 19.09.2023, which has attained finality. The learned Principal Judge, Family Court has also considered the same contention in the order dated 24.08.2023. The order passed under section 344 Cr.P.C. is not appealable and appeal can be filed only against the order passed under section 340 Cr.P.C., therefore, the present appeal against the order dated 24.08.2023 is not maintainable. It is further submitted that Hon'ble Apex Court in various cases held that section 195(1)(b)(ii) Cr.P.C. could be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it had been produced or given in evidence in a proceeding in any court. Appellant wants to rely upon those documents (Income Tax Record), which were not produced before the court concerned during trial. The allegation made by the appellant in application under section 340/344 Cr.P.C. have been considered several times from 2015 to till date. Case No.924 of 2008 was decided on 22.01.2011 considering the reply of the appellant. Further on the basis of same allegation appellant filed a criminal case being Complaint Case No.5692 of 2015 in the court of Judicial Magistrate-I, Bhopal in which same

allegation was made by him and documents were sought to be produced by means of application under section 91 Cr.P.C. which was rejected by the court concerned. In the court of Family Court, Lucknow appellant has made the aforesaid allegation through his application under section 340/344 Cr.P.C. in Misc. Case No.131-C of 2012, under section 127 Cr.P.C., which was also rejected by the court concerned by order dated 24.08.2023. It is further submitted that Criminal Case No.30-C of 2011, under section 125(3) Cr.P.C. has been finally decided by the Family Court, Lucknow vide order dated 02.09.2023, much before filing of the present appeal, but despite of that the appellant did not mention a word about the final order dated 02.09.2023. Appellant challenged the order dated 02.09.2023 by way of Criminal Revision No.1004 of 2023 (Kalimulla Vs. Additional Principal Judge, Family Court, Lucknow), which has been dismissed by this Hon'ble High Court by order dated 19.09.2023 on merit. Appellant having complete knowledge of the pendency of SLP(Civil) No.4635 of 2023 and despite the full knowledge deliberately did not disclose this fact before this Hon'ble High Court. In order to harass and torture the opposite party no.1 and her parents the appellant has filed 37 cases including the present appeal till dated against the opposite party no.1. It is therefore prayed by learned counsel for opposite party no.1 that present appeal is liable to be dismissed.

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

7. It is revealed from the perusal of impugned judgment that the application under section 340/344 Cr.P.C. alongwith affidavit C-4 was filed under section 340/344 Cr.P.C.

on the ground that complainant was married with appellant on 05.01.2008 in Scientific Convention Centre, Lucknow free of dowry on the basis of advertisement published in Times of India in English Edition. Rs.5,62,000/- were given to opposite party before marriage and Rs.11,00,786/- were settled as an amount of Mehar alongwith jewellery and house hold goods etc. Opposite party returned to his maternal home and filed a Suit No.924 of 2008, under section 125 Cr.P.C. on the basis of false allegation. Opposite party obtained an ex-parte order of maintenance on the basis of false evidence. By way of application moved under 340/344 Cr.P.C. appellant prayed before the trial court for inquiry on the ground that opposite party was income tax payee at that time and without disclosing her status and giving the false evidence in the court she obtained the above mentioned order of maintenance, therefore, she committed the offence under sections 191, 192 and 193 IPC and she is liable to be prosecuted.

8. Per contra, learned counsel for the opposite party no.1 submitted that marriage of couple has been dissolved 8 years ago. The opposite party no.1(wife) has solemnized her marriage elsewhere after desolation of marriage and the appellant wants to destroy the matrimonial life of opposite party no.1 by filing false and fabricated cases against her, as it is evident from the list filed alongwith the applicant that 37 cases have been filed against the opposite party no.1 and her family members by the appellant. Appellant paid as maintenance only Rs.50,000/- against Rs.5,60,000/- due to her, and still Rs.3,45,500/- are due as a maintenance amount against the appellant. Out of 37 cases, 18 cases have been decided, 13 cases have been dismissed, 9 cases are still

pending in various the courts at Lucknow and one case is pending at Bhopal.

9. Learned trial court inquired on the application moved by the appellant under section 340/344 Cr.P.C. and found that no offence made out during the trial before the court concerned, therefore, the provisions of section 195 Cr.P.C. are not attracted. It is also found that from the inquiry there is no evidence to the fact that any document is prepared by forgery and produced before the court to obtain the order in her favour. Hence, the learned trial court found that from inquiry it found that no prima-facie case on the basis of evidence moved by appellant with application under section 340/344 is made out.

10. It is undisputed fact that marriage was solemnized between the parties in the year 2008 and appellant claims that during the pendency of case under section 125 Cr.P.C the fact was concealed that opposite party was income tax payee and was able to maintain herself.

11. **Section 340 Cr.P.C.** is quoted herein below:-

"(1) When upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub- section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub- section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub- section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub- section (4) of section 195.

(3) A complaint made under this section shall be signed,-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(4) In this section, " Court" has the same meaning as in section 195."

12. **Section 344 Cr.P.C.** is quoted herein below:-

"(1) If at the time of delivery of any judgment or final order disposing of

any judicial proceeding, a Court of Session or Magistrate of the first class expresses an opinion to the effect that any witness appearing in such proceeding had knowingly or wilfully given false evidence or had fabricated false evidence with the intention that such evidence should be used in such proceeding, it or he may, if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating, as the case may be, false evidence, take cognizance of the offence and may, after giving the offender a reasonable opportunity of showing cause why he should not be punished for such offence, try such offender summarily and sentence him to imprisonment for a term which may extend to three months, or to fine which may extend to five hundred rupees, or with both.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

(3) Nothing in this section shall affect the power of the Court to make a complaint under section 340 for the offence, where it does not choose to proceed under this section.

(4) Where, after any action is initiated under sub- section (1), it is made to appear to the Court of Session or Magistrate of the first class that an appeal or an application for revision has been preferred or filed against the judgment or order in which the opinion referred to in that sub- section has been expressed, it or he shall stay further proceedings of the trial until the disposal of the appeal or the application for revision, as the case may be, and thereupon the further proceedings

of the trial shall abide by the results of the appeal or application for revision."

13. Section 195 IPC is quoted herein below:-

"195. Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment. Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which 1[by the law for the time being in force in 2[India]] is not capital, but punishable with 3[imprisonment for life], or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished. Illustration A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is 3[imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to 3[imprisonment for life] or imprisonment, with or without fine."

14. From the language of section 195 IPC it is clear that "whoever gives or fabricates false evidence" the phrase means that "who actively produced any fabricated and false evidence in court"

15. In the case in hand there is no contention that opposite party has fabricated any false evidence or prepared any forged documents and produced the same in the court. The mere contention of learned counsel for the appellant is that opposite party withheld income tax paper from producing in the court during the

disposal of application for maintenance under section 125 Cr.P.C..

16. The proceedings under section 125 Cr.P.C. are quasi-civil in nature and the appellant has also the opportunity to produce those papers during his evidence, but he did not dare to file those documents during his evidence in the court. The case was decided ex-parte by the court. Hence at this stage appellant cannot be allowed to take plea that opposite party no.1 withhold the income tax papers. There is no contention that any document is fabricated and used during trial.

17. Second ingredient for attracting the provisions of section 340/344 Cr.P.C. is that *"intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which by the law for the time being in force in India is not capital, but punishable with imprisonment for life or imprisonment for a term of seven years or upwards."*

18. It is clearly evident that withholding of document of income tax return during the proceeding of maintenance application the complainant cannot procure conviction or punishment of appellant for 7 years or beyond.

19. Hence the second ingredient for attracting the provisions of section 340/344 Cr.P.C. is also not fulfilled. Thus in the impugned case it is not contended that any forged or fabricated document is prepared and produced before the trial court to procure the conviction and sentence against the appellant, hence the provisions of section 340 is not attracted.

20. So far as section 344 Cr.P.C. is concerned, the order passed under section 344 Cr.P.C. is not appealable, hence the appeal against the order passed under section 344 Cr.P.C. is not maintainable.

21. In Iqbal Singh Marwah and Another Vs. Meenakshi Marwah and Another, (2005) 4 SCC 370; 2005 SCC(CrL) 1101 and 2005 SCC OnLine SC 531, Hon'ble Apex Court held that *"The fact that the procedure for filing a complaint by Court has been provided in Chapter XXVI dealing with offences affecting administration of justice, is a clear pointer of the legislative intent that the offence committed should be of such type which directly affects the administration of justice, viz., which is committed after the document is produced or given in evidence in Court. Any offence committed with respect to a document at a time prior to its production or giving in evidence in Court cannot, strictly speaking, be said to be an offence affecting the administration of justice."*

22. It is also held by Hon'ble Supreme Court in the case of Iqbal Singh Marwah and Another Vs. Meenakshi Marwah and Another(Supra), that *"In view of the language used in Section 340 Cr.P.C. the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the Section is conditioned by the words "Court is of opinion that it is expedient in the interest of justice." This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to*

in Section 195(i)(b). This expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint. The broad view of clause (b)(ii), as canvassed by learned counsel for the appellants, would render the victim of such forgery or forged document remedyless. Any interpretation which leads to a situation where a victim of a crime is rendered remedyless, has to be discarded."

23. From the above mentioned case law it is clear that proceeding under section 340 Cr.P.C. can be initiated only if the forged document is produced in the court during the trial to procure the conviction and punishment of the opposite party, is the offence of such a nature, as to affect the administration of justice. The legislative intent is that the offence committed should be of such type which directly affect the administration of justice. If any offence committed with respect to any document at the time prior to its production or after the delivery of judgment by the court, cannot strictly speaking said an act to be an offence affecting the administration of

justice. The opening phrase of section 340 Cr.P.C. reads by words "Court is of the opinion that it is expedient in the interest of justice". This goes to show that even if the prima-facie case is made out, even then the court is not bound to take any action against the erring party. It is to be mentioned by the court that it is in the interest of justice to initiate the proceedings against the erring party under section 340 Cr.P.C. and the expediency will normally be judged by the court and not by the person effected by such forgery.

24. Thus, from the above mentioned discussions it is clear that no false or fabricated evidence was produced or prepared or used by the opposite party no.1 to procure the conviction and sentence nor it is pleaded that it will affect the administration of justice or it is expedient in the interest of justice to initiate the proceedings against the opposite party no.1. Per contra, it is clear from the record that appellant has filed 37 cases against the opposite party no.1 and her family members, who is already living in marriage relationship with another person after the dissolution of marriage with the present appellant and it is the attempt by the appellant to throw the stone in the peaceful life of opposite party no.1, such attempt should be nipped and curbed. So that vexatious litigation for harassment of counter part in the matrimonial relationship may be discouraged. Hence the appeal has no force and is liable to be dismissed.

25. Accordingly, the present appeal is dismissed with the cost of Rs.50,000/-, which shall be deposited, within 15 days from today by the appellant in the legal cell of this Court.

(2023) 11 ILRA 724
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.05.2023

BEFORE

THE HON'BLE ASHWINI KUMAR
MISHRA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 7302 of 2022
connected with other cases

Nabi Ahmad **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:
Sri Raghuvansh Mishra

Counsel for the Opposite Party:
G.A., Sri Indra Deo Mishra, Sri Shri Ram (Rawat), Sri Shushil Kumar Mishra

Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 452, 307/149, 302/149 & 506 - Suspension of Sentence - From perusal of record, it transpires two persons murdered in broad daylight, entire incident captured in CCTV - Although footage was not proved in absence of requirement of Section 65-B of Evidence Act, it was produced before trial court - No specific role assigned to co-accused/appellants in FIR or in St.ment of PW-1 and PW-2, they have kirpan and no injury found on deceased and injured, which could be inflicted from Kirpan - Being women, they are entitled to benefit of Section 437 Cr.P.C - Considering their ages, their sentence is suspended during pendency of appeal - Other co-accused are released on bail, as their names not appear in FIR, their involvement emerges only from complainant's supplementary St.ment - No specific role is attributed to them in

testimonies of injured witnesses PW-1 and PW-2 - Specific findings exist against other appellants - One of accused shot dead Jaspal Kaur and injured Jaspal Singh succumbed to injuries the next day in hospital, weapon recovered at instance of accused - PW-1 (complainant) and PW-2 (injured eye witness) consistently named accused as shooters - Other co-accused was identified as having entered complainant's house with main accused. (Para 19, 32 to 34)

Appeal partly allowed. (E-13)

List of Cases cited:

1. Preet Pal Singh Vs. St. of U.P., 2020 (8) SCC 645, (Para 35)
2. Kashmira Singh Vs St. of Punj., 1977 (4) SCC 291
3. Babu Singh & ors. Vs St. of U.P., 1978 (1) SCC 579
4. Kalyan Chandra Sarkar Vs Rajesh Ranjan & anr.2004 (7) SCC 528, (Para 11)
5. Chaman Lal Vs St. of U.P. & anr.2004 (7) SCC 525
6. Kishorij Lal Vs Rupa & ors., (2004) 7 SCC 638, (Paras 6, 8)
7. Data Ram Singh Vs St. of U.P, (2018) 3 SCC 22

(Delivered by Hon'ble Vinod Diwakar, J.)

1. We have heard Shri Raghuvansh Misra, Shri Vimlendu Tripathi, Shri Rajeev Lochan Shukla, learned counsels for the appellants, Shri I.D. Mishra learned counsel for the informant and learned A.G.A. for the State.

2. The accused-appellants- Nabi Ahmad, Banta @ Beant Singh, Rizwan, Farookh, Amanveer Singh, Ranjeet Kaur,

Karam Singh and Gulpawan Kaur have been convicted in Sessions Trial No. 379 of 2017 (State of Uttar Pradesh Vs. Amanveer Singh and others) arising out of Case Crime No. 419 of 2017, under Sections 147, 148, 452, 307/149, 302/149, 506 I.P.C., along with connected Sessions Trial Nos. 377 of 2017 and 378 of 2017, arising out of Case Crime Nos. 431 of 2017 and 432 of 2017 respectively, Police Station Bisalpur, District Rampur and the maximum sentence of life imprisonment is awarded to all the accused-appellants. The rest of the sentences are lesser sentences, and all the sentences have been ordered to run concurrently.

3. As per the prosecution case, the complainant's real brother Gurcharan Singh was murdered about two and a half years ago due to family enmity over land, whose case is pending trial in District Rampur. An attempt was also made to kill the complainant's real sister, Jaspal Kaur, and its report was registered at P.S. Bilaspur. On 28.06.2017 at around 03.00 p.m., the complainant's father, Sukhwinder Singh, was busy in the demarcation of land with the help of Patwari, Kanoongo and two police officers. All of a sudden, the complainant heard the commotion and saw Amanveer Singh son of Karam Singh, Karam Singh, Ranjeet Kaur, Gulpawan Kaur, Banta Singh, Nabi Ahmad @ Nabia, Farookh Ahmad and son of Nabia Ahmad, along with some unknown persons barged into the house of the complainant and shouted, no one should be spared today. After hearing the threatening call, all started running here and there to save their lives. Meanwhile, Amanveer Singh and his accomplice Nabia and Farookh shot at the complainant's maternal uncle Jaspal Singh and caused severe injuries. The complainant's mother also rushed inside the

house to save her life. Amanveer shot at her from his pistol and caused grievous injuries to her. The complainant's real sister Jaspal Kaur hid inside the bathroom. Amanveer broke the door and shot her dead. She died on the spot. The complainant and her mother saw Jaspal being shot at; thereafter, Amanveer shot at the complainant's father, Sukhwinder Singh, and somehow he saved his life. The entire incident was captured in a CCTV camera installed at the complainant's house. After hearing the sound of the gunshot, the police and local people arrived, and on their challenge, the assailants fled towards the sugarcane field.

4. On the basis of such written complaint, Case Crime No. 419 of 2017 at P.S. Bilaspur, District Rampur, was registered under sections 147, 148, 149, 452, 307/149, 302/149 and 506 I.P.C. Thereafter, the police initiated the investigation.

5. Jaspal Singh and Gurmeet Kaur were seriously injured in the shoot-out, whereas Jaspal Kaur died on the spot. The deceased age was 28 years. The following ante-mortem injuries were present on the dead body.

"(a) Traumatic swelling 5cm x 2cm on the back side of the head towards left and was 12 cm above the left ear.

(b) Firearm wound of entry 2.5cm x 1.00 cm viscera deep at the back of the chest towards left 9 cm below left shoulder and collar of abrasion was present."

6. The Doctor opined the cause of death was a result of shock and excessive bleeding due to ante-mortem injuries.

7. The injured Jaspal Singh was immediately taken to the hospital, and he died on the next day i.e. on 29.06.2017, at Gangasheel Hospital following ante-mortem injuries were noticed:-

"(a) 1cm x 1cm lacerated wound cavity deep. There was blackening and signs of singing all around the wound in the middle of chest 10 cm towards the centre from right nipple and was in 3 O'Clock position. This wound was wound of entry and the margins were inverted.

(b) Surgical wound 26 cm long, had 30 stitches in the middle of the stomach, and was 6.5 cm below injury number 1.

(c) One injury 1cm x 1cm x cavity deep was of tube that had been inserted after surgery and was on the left side of the stomach 9 cm away from the navel/umbilicus.

(d) One injury 1cm x 1cm x cavity deep was of tube that had been inserted after surgery and was on the right side of the stomach 8 cm away from the navel/umbilicus.

(e) One injury 1cm x 1cm x cavity deep was of tube that had been inserted after surgery and was 1.5 cm above the right side of injury number 4.

(f) Stitched wound that was of tube inserted into Lungs and was 1.5 cm long and was on right side of the chest at a distance of 10 cm from right nipple in 8 O'Clock direction.

(g) Surgical wound 4cm x 1cm x cavity deep on right side of lower waist 14 cm above the iliac crest.

The injured Gurmeet Kaur wife of Sukhwinder Singh was examined and following injuries were noticed:-

(a) Fire arm injury on the left arm below the elbow and the wound of entry was 1cm x 1cm and the exit would was 2cm x 2cm.

(b) Fire Arm injury on the outer aspect of the right shoulder 2cm x 4cm and 6 cm from the exit would point, there was wound of re-entry."

8. The investigating officer, after recording the statement of witnesses and collecting documentary evidence, filed the charge-sheet on 05.10.2017 against the accused-appellants Amanveer Singh, Karam Singh, Ranjeet Kaur, Gulpawan Kaur, Banta @ Beant Singh, Nabi Ahmad, Farookh and Rizwan in the court of C.J.M, Rampur.

9. The case was committed to the Court of Sessions on 03.05.2019. The trial court framed charges against the accused appellants. The accused-appellants denied charges and claimed trial. The prosecution, to prove its case, has produced 16 witnesses.

10. ur is an injured witness who has been examined as PW-2, whereas Doctor Paramjeet Singh, who treated the injured Gurmeet Kaur, has been examined as PW-5. Doctor D.V. Singh, who conducted the post-mortem of the deceased Jaspal Singh has been examined as PW-6. Doctor Shiv Mohan Kamal who conducted the autopsy of the deceased Jaspal Kaur has been examined as PW-8. Dr. Gyanendra Gupta who treated the deceased Jaspal Singh at Ganga Sheel Hospital has been examined

as PW-12. Rest of the witnesses are police witnesses.

11. After recording of the evidences, the accused-appellants were confronted with the incriminating evidences put forth against them under Section 313 Cr.P.C. and trial court found sufficient evidence, to convict the accused-appellants (1) Amanveer Singh, (2) Karam Singh, (3) Ranjeet Kaur, (4) Gulpawan Kaur, (5) Banta @ Beant Singh, (6) Nabi Ahmad, (7) Farookh, and (8) Rizwan for the offences under Sections 147, 148, 452, 307/149, 302/149 and 506 I.P.C.

12. Accused-appellants Amanveer Singh and Karam Singh had been acquitted from the charge punishable under Section 25 Arms Act.

13. Shri Raghuvansh Mishra, appearing for accused-appellants Nabi Ahmad, Rizwan, Farookh, Ranjeet Kaur and Gulpawan Kaur submits that there are major contradictions in the statements of eye witnesses PW-1, PW-2 and CW-1 being interested and partisan witnesses. He further urged that there were multiple versions of the alleged incident. The police has conducted botched up investigation and falsely implicated the accused-appellants. He further submits that in the FIR, it was alleged that Amanveer Singh, Nabi Ahmad and Farookh had fired at Jaspal Singh and caused grievous injuries to him whereas during trial it has come that Karam Singh and Amanveer Singh have committed murder of Jaspal Singh. The presence of PW-3 is doubtful and he was placed under suspension. The police produced CCTV footage but intentionally did not comply with the requirements of 65-B of The Indian Evidence Act with ulterior motives. The ocular testimony is contrary to the

medical evidence. The revenue officer was present at the time of the incident but was not examined during the trial. No incriminating article was recovered from accused-appellants' possession, and the FIR is ante-time. The accused-appellants were on bail during trial and have not violated the terms of bail.

14. Learned counsel appearing for accused-appellant Banta @ Beant Singh submits that as per the entire evidence, it is apparent that the role of causing firearm injury has been assigned to co-accused Amanveer Singh and Nabia @ Nabi Ahmad as well as Farookh. Despite that, the accused-appellant has been falsely implicated in this case while levelling the allegation of exhortation, which is absolutely false and baseless. The appellant was not present at the time of the incident, and his name was arrayed because of previous enmity. He further urged that, basically, it was a land dispute between the informant's family and accused Karam Singh's family, whereas the accused-appellant has absolutely no role. And he is a poor person. The accused-appellant has been languishing in jail since 05.08.2022, was on bail during the trial, and has not violated the terms of bail. The sentence awarded against the accused-appellant is too severe, and even otherwise, the impugned judgment and order suffers from manifest error in law and is highly perverse in nature. Hence, it is likely that the order would be set aside by this Hon'ble Court, and the appeal would succeed.

15. Shri Rajeev Lochan Shukla, appearing for accused-appellants Amanveer Singh and Karam Singh submits that the prosecution case is inconsistent on the place and the manner in which the prosecution alleges the offence. There is a

substantial improvement and contradiction in the statement of PW-1, PW-2 and CW-1. The presence of eye witnesses is doubtful. The prosecution has failed miserably to prove its case beyond a reasonable doubt. The investigation of the case was not conducted fairly by the investigating officer and in a casual manner. Charge-sheet has been filed without collecting cogent evidence against the accused-appellants. There are multiple versions of the alleged incident, and police have not conducted the investigation in a fair and transparent manner. In the FIR, no role of causing injury has been assigned to accused Karam Singh, Ranjeet Kaur, Gurbawan Kaur and Banta @ Beant Singh, whereas during the trial, it has come in the testimony of witnesses that accused Amanveer Singh and Karam Singh have murdered Jaspal Singh. The accused, Rizwan was not named in the FIR. He further submits that PW-1 and PW-2 reside in Punjab, and their presence at the place of the incident is highly doubtful. PW-2 is a divorcee and resides with her sister in Punjab. The prosecution has withheld this fact for the reasons best known to them. Dr. S.N. Naidu, who conducted the medical examination of PW-2, was not produced by the prosecution during the trial.

16. Learned counsel further urged that PW-2 was deliberately taken to the private hospital for preparation of a false medical report, and deceased Jaspal Singh was also taken there, but subsequently, he was shifted to Gangasheel Hospital, and no reference slip has been produced by the prosecution to this effect. The presence of PW-3 is also highly doubtful as his name was neither mentioned as an attendant in the medical examination report nor was his presence endorsed by PW-5 at the hospital. The CCTV footage, whose description has

also come in the FIR, has not been proved during the trial. The prosecution has failed to produce a certificate mandated under section 65-B of the Indian Evidence Act. He further submits that Balwant Singh, who is the son of deceased Jaspal Singh, was not produced by the prosecution, who is alleged to be an eye witness of the incident. The revenue officer, who was present at the time of the demarcation of land and claimed to have an independent witness, was not produced by the prosecution. The participation of accused Ranjit Kaur and accused Gulpawan Kaur being the female members, in the commissioning of the crime, is highly improbable and doubtful. He further submits that no active role has been assigned to the accused Ranjeet Kaur and Gulpawan Kaur in the FIR. The prosecution has not proved the recovery of firearms made from the accused Amanveer Singh and Karam Singh. The FIR is ante-time, and the veracity of the prosecution case is highly doubtful inasmuch as medical evidence is completely diffracted from the prosecution version. There is a material inconsistency between the ocular and medical evidence in this regard. It is further submitted that ocular evidence must prevail unless medical and direct evidence completely renders the prosecution story unbelievable.

17. Per contra, learned A.G.A. and counsel for the informant submit that two persons have been murdered in broad daylight, and the entire episode has been captured in the CCTV camera. The accused and complainant are decedent of a common ancestor. The father of complainant Sukhwinder Singh and Karam Singh are real brothers, and there is previous litigation pending between them. It is admitted case that on a fateful day, the

police officials and Patwari had come for the demarcation of land, and litigation was pending to this effect before the court. It is also admitted that the brother of the complainant was murdered two and half years prior to the date of the incident, and the trial is pending before the trial court. So far as the modus operandi of the commissioning of crime is concerned, it is proved beyond a reasonable doubt. The testimony of the injured PW-1 daughter and PW-2 mother is consistent, and there is no reason for the trial court to disbelieve their testimony. PW-2 suffered a severe injury on her body. Injured Gurmeet Kaur was examined as PW-2, who is also an eye witness to the incident. She suffered firearm injuries on the right shoulder and on the left elbow; PW-5 Dr. Paramjeet Singh, has duly proved her injuries. There is no reason for the prosecution to disbelieve the statement of PW-2, who lost her daughter at the young age of 28 years. The complainant has lost her maternal uncle Jaspal Singh and her real sister. The complainant had lost his brother two and half years ago. The entire crime scene is captured in CCTV camera, so the prosecution has no reason to depose falsely against her cousin, father's brother and aunt. On perusal of the trial court judgment, it is reflected that the statements of PW-1 and PW-2 are consistent and prima facie trustworthy and reliable.

18. Learned A.G.A., as well as counsel for the complainant, has further submitted that accused-appellant Nabi Ahmad has a criminal history of four cases;

(i). Case Crime No. 183 of 1994, under Section 60 of Excise Act,

(ii). Case Crime No. 207 of 1999, under Section 3 of U.P. Goonda Act, (iii).

Case Crime No. 532 of 2002, under Sections 308, 504, 506 I.P.C. and (iv). Case Crime No. 31 of 2008, under Section 110 G of Cr.P.C., all registered at Police Station Bilaspur, District Rampur.

It is further submitted that accused Amanveer Singh and Karam Singh had been in jail during the trial.

19. After hearing learned counsel for the appellants, learned A.G.A. for the State and learned counsel for the informant, and perusal of the record, it transpires that it is admitted position that two persons have been murdered in broad daylight and the entire crime scene was captured in CCTV camera, even though the CCTV footage has not been proved in the absence of the requirement of Section 65-B of the Indian Evidence Act but was produced before the trial court. The trial court has dealt with the CCTV camera footage at page 50 of the impugned judgment in the following manner:-

"The informant, in her Tahrir paper Exhibit Ka-1, has ascribed to the fact that the incident was recorded in CCTV but the investigating officer PW-13 Ajay Kumar did not collect the same nor made any attempt towards such collection and validation. The CCTV footage was provided to PW-14 Sunil Ahlawat by the informant during the course of investigation and the same has been proved as Exhibit Ka-32 but no recovery memorandum of the same was prepared nor was it sealed and no attempt was made seize the cameras installed around the place of occurrence to have the contents of CCTV footage technically verified to ascertain truth. In absence of technical verification report of the CCTV footage and accompanying certification under

s.65B Indian Evidence Act, 1872, the CCTV footage cannot be relied upon."

20. The twin set of arguments are placed before this court to seek suspension of sentence by the counsel for accused-appellant;

(I) The accused-appellants Nabi Ahmad, Banta @ Beant Singh, Rizwan, Farookh, Ranjeet Kuar and Gulpawan Kaur were on bail during the trial, so they are entitled to be released on bail post-conviction.

(ii) The accused-appellants are entitled to the benefit of non-production of a certificate issued under Section 65-B of the Indian Evidence Act to prove the contents of CCTV as it is fatal to the prosecution case and renders the order of conviction *prima facie* erroneous.

21. Before we proceed to decide the application for suspension of sentence on merits; it's safe to avert to the legal position.

22. As observed by Apex Court in **Preet Pal Singh vs. State of U.P.1**, there is a difference between the grant of bail under Section 439 of the CrPC in case of pre-trial arrest and suspension of sentence under Section 389(1) of the CrPC and grant of bail, post-conviction. In the earlier case, there may be a presumption of innocence, which is a fundamental postulate of criminal jurisprudence; the courts may take a liberal view depending on the facts and circumstances of the case, whereas in the case of post-conviction bail, there is a finding of guilt against the accused persons and the question of presumption of conviction does not arise. The Court considering an application for suspension of sentence and grant of bail is to consider

the prima facie merits of the appeal, coupled with other factors. There should be strong and compelling reasons for the grant of bail, and strong, compelling reasons must be recorded in the order granting bail.

23. The discretion under Section 389(1) Cr.P.C., is to be exercised judicially, and this court is obliged to consider whether the accused has a strong likelihood to succeed in the appeal, and there is no unreasonable delay in disposal of the appeal, as held by Supreme Court in **Kashmira Singh v. State of Punjab²** and **Babu Singh and Ors. v. State of U.P.³**

24. In **Kalyan Chandra Sarkar v. Rajesh Ranjan and Anr⁴**, the Hon'ble Supreme Court has held-

"11. The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind."

25. Even though a detailed examination of the merits of the case may not be required by the courts while considering the application for bail, but at the same time, the exercise of discretion has to be based on well-settled principles and in a judicious manner, and not as a matter of course as held by Apex Court in **Chaman Lal v. State of U.P. and Anr⁵**.

26. The Hon'ble Supreme Court, in the catena of judgments, has held that even though detailed examination of evidence and detailed documentation of merits of the case may not be required at the time of suspension of the sentence but the appellate court is duty-bound to objectively assess the matter and record the reasons for its conclusion and for deciding the application under section 389 (1) Cr.P.C.

27. Hon'ble Supreme Court in **Preet Pal Singh (supra)** has held as under:-

"35. There is a difference between grant of bail under Section 439 of the CrPC in case of pre-trial arrest and suspension of sentence under Section 389 of the CrPC and grant of bail, post conviction. In the earlier case there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in Dataram Singh v. State of U.P. and Anr. (supra). However, in case of post conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) of the Cr.P.C.

28. In considering an application for suspension of sentence, the Appellate Court is only to examine if there is a such patent infirmity in the order of conviction that renders the order of conviction *prima facie* erroneous. Where there is evidence that the Trial Court has considered, it is not open to a Court considering an application under Section 389(1) Cr.P.C. to re-assess and/or re-analyze the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail."

29. In ***Kishorij Lal v. Rupa and Others***⁶; Hon'ble Supreme Court has curled out the following principle:-

"6. The mere fact that during the trial, they were granted bail and there was no allegation of misuse of liberty, is really not of much significance. The effect of bail granted during trial loses significance when on completion of trial, the accused persons have been found guilty. The mere fact that during the period when the accused persons were on bail during trial there was no misuse of liberties, does not per se warrant suspension of execution of sentence and grant of bail. What really was necessary to be considered by the High Court is whether reasons existed to suspend the execution of sentence and thereafter grant bail. The High Court does not seem to have kept the correct principle in view.

8. In *Vijay Kumar v. Narendra*⁷ and *Ramji Prasad v. Rattan Kumar Jaiswal*⁸ it was held by this Court that in cases involving conviction under Section 302 IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted. The impugned order of the High Court does not meet the requirement. In

Vijay Kumar case, it was held that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the court should consider the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder. These aspects have not been considered by the High Court, while passing the impugned order".

30. In ***Preet Pal Singh (supra)***, a distinction has been drawn between the grant of bail under Section 439 Cr.P.C. in pre-trial arrest and suspension of sentence under Section 389(1) Cr.P.C. and the grant of bail, post-conviction. In the earlier case, there may be a presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may take a liberal approach, depending on the facts and circumstances, on the principle that bail is the rule and jail is an exception as held by Hon'ble Supreme Court in ***Data Ram Singh Vs. State of U.P.***⁹ However, in the case of post-conviction bail, there is a definite finding of guilt against the accused persons, and no question of presumption of innocence does arise, nor the principle of bail being the rule and the jail is an exception is attracted. Rather, the court shall actively take a *prima facie* view on the merits of the appeal coupled with other factors, and there should be strong and compelling reasons for the grant of bail. The relevant portion of the judgment of Preet Pal Singh (Supra) is extracted hereinbelow:-

"35. There is a difference between grant of bail under Section 439

CrPC in case of pre-trial arrest and suspension of sentence under Section 389 CrPC and grant of bail, post conviction. In the earlier case, there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in Dataram Singh v.State of U.P. [Dataram Singh v. State of U.P., (2018) 3 SCC 22 : (2018) 1 SCC (Cri) 675] However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) CrPC.

31. Returning back to the case in hand, as discussed in the preceding para, it is established during the trial that accused Amanveer Singh, along with accused Nabi Ahmad and accused Karam Singh caused grievous injuries to complainant Sharandeep Kaur, who has been examined as PW-1 and her mother Gurmeet Kaur (PW-2). Both the witnesses are witnesses of fact and are injured. It is admitted position that in a broad day shoot-out case, Jaspal Kaur died on the spot due to a gun-shot injury, and Jaspal Singh succumbed to a gun-shot injury, the next day in the Hospital. The entire crime scene was captured on CCTV.

31.1. The counsel for the accused appellants could not demonstrate any patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. It is not open to this court to reassess and /or reanalyze the evidence and take a different view for disposal of the application under Section 389(1) Cr.P.C.

31.2. The accuse-appellant Amanveer Singh is also involved in FIR No.432 of 2022 registered under Section 3/25 Arms Act at P.S. Bilaspur, District Rampur and F.I.R. No.725 of 2017 under Section 325/323/427 IPC at P.S. Bilaspur, District Rampur.

31.3. The accused-appellant Karam Singh is also involved in FIR No.432 of 2022 registered under Section 3/25 Arms Act at P.S. Bilaspur, District Rampur and F.I.R. No.725 of 2017 under Section 325/323/427 IPC at P.S. Bilaspur, District Rampur.

31.4 The accused-appellant Nabi Ahmad is also involved in half a dozen cases; the details are as follows;

(i) F.I.R. No.116 of 2021 under Section 147, 323, 452, 427, 504 and 506 I.P.C. at P.S. Bilaspur, District Rampur.

(ii) FIR No.183 of 1994 under Section 60 of The Excise Act at PS Bilaspur, District Rampur.

(iii) FIR No.207 of 1999 under Section 3 U.P. Control of Goonda Act, 1970.

(iv) FIR No.532 of 2002 U/S 308, 504, 506 IPC P.S. Bilaspur, District Rampur.

(v) FIR No.31 of 2008 U/S 110 G Cr.P.C. at P.S Bilaspur, District Rampur.

(vi) FIR No.120 of 2018 U/S 135, Electricity Act, P.S. Bilaspur, District Rampur.

31.5. The accused-appellant, Rizwan is also involved in F.I.R No.116 of 2021 U/S 147, 323, 452, 427, 504, 506 IPC at P.S Bilaspur, District Rampur. The accused-appellant was on bail during trial and has been languishing in jail since 05.08.2022.

31.6. The accused-appellant Ranjit Kaur is also involved in FIR No.725 of 2017 U/S 325, 323, 327 IPC at P.S. Bilaspur, District Rampur and FIR no.180 of 2018 U/S 325 and 506 IPC at P.S. Bilaspur, District Rampur. The accused-appellant was on bail during trial and has been languishing in jail since 05.08.2022.

31.7 The accused-appellant Gulpawan Kuar is also involved in FIR No.186 of 2018 U/S 323, 506 IPC at P.S. Bilaspur, District Rampur. The accused-appellant was on bail during trial and has been languishing in jail since 05.08.2022. The accused-appellant is a young lady of age 31 years.

31.8 The accused-appellant Banta Singh @ Beant Singh was on bail during trial and has been languishing in jail since 05.08.2022 and reportedly had no criminal history.

31.9. The accused-appellant Farookh is also involved in FIR No.120 of 2018 U/S 135 Electricity Act, at P.S Bilaspur, District Rampur. The accused-appellant was on bail during trial and has been languishing in jail since 05.08.2022.

32. Considering the fact that no role has been assigned to the accused-appellant

Gulpawan Kaur and Ranjit Kaur in the FIR and in the statement of PW-1 and PW-2, the accused-appellants are stated to have Kirpan, otherwise also no injury is found on the deceased and injured which could be inflicted from Kirpan. The accused-appellants, being the ladies, are also entitled to the benefit of Section 437 Cr.P.C. The accused-appellant, Gulpawan Kaur, is a young lady with entire life ahead of her, whereas the accused-appellant, Ranjit Kaur, is nearly touching 60 years and no purpose will be served by keeping both the accused-appellants in jail during the pendency of the appeal. Therefore, their sentence is suspended till the pendency of the appeal.

33. The sentence awarded vide order dated 05.08.2022 is suspended till the pendency of appeal qua accused-appellant Banta Singh @ Beant Singh, Farookh and Rizwan, considering that their names are not figured in the FIR. Their involvement is revealed in the supplementary statement of the complainant. Moreover, no specific role has been assigned to both the accused-appellants in the testimony of injured witnesses PW-1 and PW-2. As a consequence thereof, the accused-appellants are released on bail.

34. There are specific findings against the accused-appellants Amanveer Singh, Karam Singh and Nabi Ahmad. The accused, Amanveer Singh, shot dead Jaspal Kaur on the spot and severely injured Jaspal Singh, who succumbed to injuries the next day in the hospital. The weapon of the offence has been recovered on the pointing out of accused-appellants Amanveer Singh and Karam Singh. The injured eye witness PW-2 Gurmeet Kaur had specifically named accused-appellants Amanveer Singh and Karam Singh shot at

deceased Jaspal Singh, whereas complainant Sharandeep Kaur, who is examined as PW-1 has also categorically stated that accused Amanveer Singh and his father Karam Singh shot at deceased Jaspal Singh. The name of accused-appellant Nabi Ahmad has also figured in the testimony of PW-1 and PW-2. There are specific findings qua accused-appellant Nabi Ahmad entered into the house of the complainant along with convict Amanveer Singh and Karam Singh. The accused-appellant Nabi Ahmad is involved in six cases of heinous nature registered at P.S. Bilaspur, District Rampur, whereas convict Amanveer Singh and Karam Singh are involved in two more cases each. Considering the macabre nature of the crime wherein two people were shot dead in broad daylight, it would be in the interest of justice to dismiss the application for suspension of sentence of the accused-appellants, namely Amanveer Singh, Karam Singh and Nabi Ahmad, consequently bail application of convict **Amanveer Singh, Karam Singh and Nabi Ahmad** are dismissed.

35. The accused-appellants- **Gurpawan Kaur, Ranjit Kaur, Banta @ Beant Singh, Rizwan and Frookh** be released on bail in the above case on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the Chief Judicial Magistrate concerned, subject to furnishing undertaking that they will cooperate in the hearing of the appeal.

35.1. Fine shall be deposited by the accused-appellants after eight weeks of their release.

35.2. On acceptance of bail bonds, the lower court shall transmit

photostat copies thereof to this Court for being kept on the record of this appeal.

35.3. List this appeal along with the paper book for the 'final hearing' in due course.

(2023) 11 ILRA 735
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.10.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 7437 of 2023

Raees & Ors. ...Appellants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellants:
 Sri Sanjay Singh

Counsel for the Opposite Parties:
 G.A., Sri Girish Tiwari

Criminal Law - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Sections 3(1)(r), 3(1)(s) – Code of Criminal Procedure, 1973 – Sections 227, 228 & 14-A(1) – Indian Penal Code, 1860 – Sections 147, 323, 342, 406, 420, 504 & 506 – Discharge Application – Framing of Charges – Criminal Breach of Trust – Cheating – SC/ST Atrocities

The appellants challenged the order dated 01.05.2023 passed by the Special Judge (SC/ST Act), Rampur, rejecting their discharge application under Section 227 Cr.P.C. in Special Case No. 30 of 2022, arising from Case Crime No. 18 of 2022, under Sections 147, 420, 406, 342, 323, 504, 506 I.P.C. and Sections 3(1)(r), 3(1)(s) of the SC/ST Act. The FIR, lodged by informant Smt. Geeta Katariya, alleged that appellant Raees fraudulently induced her to pay Rs. 17,10,000/- for a land sale that was not in his name, and on 09.11.2021, Raees and co-

appellants Jamshed, Smt. Priya, Smt. Parmeen, Anjum, and Afsar Hussain hurled caste-based abuses, assaulted, confined, and threatened her and her husband. The appellants argued that no money was transferred to their accounts, no fraudulent inducement occurred, they were unaware of the informant's caste, and no medical evidence supported the assault claim. The St. and informant contended that the FIR, witness St.ments under Section 161 Cr.P.C., and documents established a prima facie case. Held: (1) The appeal was allowed in part, modifying the trial court's order by setting aside the charge under Section 406 I.P.C. against Raees. (2) No offence under Section 406 I.P.C. was made out against Raees, as there was no entrustment of property, only payment for a land sale that was not executed. (3) A prima facie case was established against Raees for offences under Sections 147, 420, 342, 323, 504, 506 I.P.C. and Sections 3(1)(r), 3(1)(s) of the SC/ST Act, based on evidence of fraudulent inducement for payment of Rs. 17,10,000/- and caste-based abuses, assault, confinement, and threats, supported by the FIR and St.ments of the informant and witnesses (Mehmud Ali Khan, Kamran Khan, Nanhe, Ismail, Bilal). (4) A prima facie case was also established against Jamshed, Smt. Priya, Smt. Parmeen, Anjum, and Afsar Hussain under Sections 147, 342, 323, 504, 506 I.P.C. and Sections 3(1)(r), 3(1)(s) of the SC/ST Act for their role in the assault and caste-based abuses. (5) Under Section 227 Cr.P.C., the court must evaluate evidence for a prima facie case without conducting a roving inquiry, as per U.O.I. Vs Prafulla Kumar Samal, Dilawar Balu Kurane Vs St. of Maharashtra, Sajjan Kumar Vs CBI, and Dipakbhai Jagdishchandra Patel Vs St. of Gujarat. The trial court correctly rejected the discharge application, except for the Section 406 charge against Raees, as the evidence disclosed grave suspicion. (6) The impugned order was upheld with the modification that no charge under Section 406 I.P.C. be framed against Raees.

Case Law Cited:

1. U.O.I. Vs Prafulla Kumar Samal, (1979) 3 SCC 4

2. Dilawar Balu Kurane Vs St. of Mah., (2002) 2 SCC 135

3. Sajjan Kumar Vs C.B.I., (2010) 9 SCC 368

4. Dipakbhai Jagdishchandra Patel Vs St. of Guj., (2019) 16 SCC 547

5. St. of Bihar Vs Ramesh Singh, (1977) 4 SCC 39

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

Heard Sri Sanjay Singh, learned counsel for the appellants, Sri Girish Tiwari, learned counsel for the respondent no. 2 and learned A.G.A. for the State.

2. This criminal appeal has been filed u/s 14-A(1) of the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989, against order dated 01.05.2023 passed by Special Judge (SC/ST) (PA) Act, Rampur. By the impugned order, the trial court has rejected the discharge application u/s 227 Cr.P.C. filed by the appellants-accused.

3. It has been submitted by learned counsel for the appellants that by passing the impugned judgement and order, the trial court has committed a manifest error and has not considered the documentary and oral evidence filed with the charge-sheet and the arguments advanced on behalf of the appellants-accused. It has also been submitted that since no amount of money has been transferred in the account of appellants-accused nor any fraudulent or dishonest inducement has been made by them, therefore, offence u/s 406 or 420 I.P.C. is not made out. It has also been submitted that the appellants are illiterate persons and they had no knowledge about the caste of the informant/respondent no. 2,

Smt. Geeta Katariya, therefore, no offence u/s 3(1)(r), 3(1)(s) of SC/ST (PA) Act (hereinafter referred to as the 'Act No. 33 of 1989') against them is made out. It has also been submitted that there is no medical report regarding the injury report received by respondent no. 2 or any of her companion in the occurrence. Therefore, offence u/s 323 I.P.C. is not made out.

4. Per contra, learned A.G.A. for the State and learned counsel for respondent no. 2/informant have opposed the appeal and have stated that considering the averments made in the first information report and the statements of the witnesses recorded u/s 161 Cr.P.C. as well as documents produced with the charge, there is sufficient ground to frame charge against the appellants-accused.

5. The trial court directed to frame charges against the appellant-accused, Raees, in Special Case No. 30 of 2022, State of U.P. Vs. Raees and others arising out of Case Crime No. 18 of 2022 u/s 147, 420, 406, 342, 323, 504, 506 I.P.C. and 3(1)(r), 3(1)(s) of Act No. 33 of 1989 and against appellants-accused, Jamshed, Smt. Priya, Smt. Parmeen, Anjum, Afsar Hussain u/s 147, 342, 323, 504, 506 I.P.C. and 3(1)(r), 3(1)(s) of Act No. 33 of 1989, Police Station- Azeem Nagar, District- Rampur.

6. The prosecution case in brief is that informant, Smt. Geeta Katariya, wife of Tekchand Katariya, resident of village- Krishna Nagar, Badapur, District- Bijnor, submitted a written report on 20.01.2022 at concerned police station to the effect that she is engaged in the business of property dealing. In 2017, appellant-accused, Raees along with Islam son of Asgar visited her residence and on the pretext that he needed

money for the marriage of his sister, offered to sell his 7 bigha land situated in Aliganj. The bargain for the purchase of the land was settled for 15 lakhs per bigha. The informant paid Rs.1,00,000/- through her colleague, Kamran Khan. After 3-4 days, on the request of accused, Raees, he paid Raees money to purchase the vehicle, Bolero. The informant got Bolero purchased from Haldwani, payment whereof amounting to Rs.4 lakhs was made by Naved Khan from his account, two lakhs by Kamran Khan through ATM machine in the account of Mahindra Company and Rs.2,50,000/- was paid by Kamran Khan in cash. Thereafter, after 10-15 days, appellant-accused, Raees came with Islam and took Rs.1,10,000/- from the informant. On different dates on the direction of the informant, Shakhawat Hussain son of Fida Hussain and Nikhil Kumar Sharma alias Deepu son of Shiv Shankar Sharma paid Rs.2,00,000/-, Shakhawat Hussain aforesaid and Vilayat Hussain son of Fida Hussain paid Rs.3,00,000/- and by Vilayat Hussain aforesaid paid Rs.4,00,000/- to appellant-accused, Raees in the presence of Islam. Thus, she paid a total of about Rs.17,10,000/- to appellant-accused, Raees. Later on, it was transpired that the alleged property was not in the name of appellant-accused, Raees but in the name of his mother. The adjoining property was in the name of appellant-accused, Raees. The informant asked on different dates to appellant-accused, Raees to transfer his property in lieu of money paid by her but he procrastinated on one or the other pretext. The informant was engrossed in the medical treatment of her ailing husband for about one year. On 09.11.2021, she met appellant-accused, Raees at his residence with her husband and requested him to pay the money back. Raees alongwith co-

accused, Jamshed, Smt. Priya, Smt. Parmeen and two other unknown persons started hurling abuses and derogatory words against her about her being a member of SC community and threatened her to kill in presence of Mehmood Ali Khan and Asif. They started beating her with kicks and fists and threatened to kill her. They also confined her and husband in their house. Then, her husband saved her with the help of Mehmood Ali Khan and Asif, who were present on the spot. On the basis of her written report, first information report was lodged on 20.01.2022 at 18:05 o'clock. After investigation, charge-sheet against the appellant-accused, Raees u/s 147, 420, 406, 342, 323, 504, 506 I.P.C. and 3(1)(r), 3(1)(s) of Act No. 33 of 1989 and against appellants-accused, Jamshed, Smt. Priya, Smt. Parmeen, Anjum, Afsar Hussain u/s 147, 342, 323, 504, 506 I.P.C. and 3(1)(r), 3(1)(s) of Act No. 33 of 1989, was submitted in the court.

7. The statutory provisions regarding framing of charge in SC/ST cases is provided u/s 227 and 228 Cr.P.C. which is as follows :-

227. Discharge - *If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.*

228. Framing of charge - (1) *If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which -*

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

8. It is clear that the concerned Judge has to consider the statements u/s 161 Cr.P.C. mentioned in the case diary and all other documents submitted along with case diary and hear the arguments of learned counsel for the State and learned counsel for the defence/accused and if he finds that there is “no fresh ground” (emphasis supplied) for proceeding against the accused, he shall discharge the accused by recording reasons. If after such consideration and hearing as mentioned in Section 227 Cr.P.C., if the Judge is of the opinion that “there is ground for presuming” (emphasis supplied) that the accused has committed an offence, he will frame the charge against the accused in writing and proceed with the trial.

9. In **Union of India Vs. Prafulla Kumar Samal, 1989 (3) SCC 4**, the scope of Section 227 Cr.P.C. was considered. After adverting to various decisions, the Apex Court has enumerated the following

principles in paragraph no. 10 of the judgement :

(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

10. In the case of **Dilawar Balu Kurane Vs. State of Maharashtra, (2002) 2 SCC 135**, the principle enunciated in **Prafulla Kumar Samal (supra)** have been reiterated in paragraph nos. 12 and 14 :

12. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial (see Union of India v. Prafulla Kumar Samal [(1979) 3 SCC 4 : 1979 SCC (Cri) 609]).

14. We have perused the records and we agree with the above views

expressed by the High Court. We find that in the alleged trap no police agency was involved; the FIR was lodged after seven days; no incriminating articles were found in the possession of the accused and statements of witnesses were recorded by the police after ten months of the occurrence. We are, therefore, of the opinion that not to speak of grave suspicion against the accused, in fact the prosecution has not been able to throw any suspicion. We, therefore, hold that no prima facie case was made against the appellant.

11. In the case of **Sajjan Kumar Vs. Central Bureau of Investigation, (2010) 9 SCC 368**, on considering the various authorities about the scope of Section 227 and 228 Cr.P.C., the Apex Court laid down following principles in paragraph 21 of the judgement :-

21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the

trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

12. In the case of **Dipakbhai Jagdishchandra Patel Vs. State of Gujarat, (2019)** 16 SCC 547, the Apex Court in paragraph nos. 15 and 23 of its judgement has elaborately laid down the law relating to the framing of the charge and discharge which is as follows :-

15. We may profitably, in this regard, refer to the judgment of this Court in [State of Bihar v. Ramesh Singh, (1977) 4 SCC 39 : 1977 SCC (Cri) 533 : AIR 1977 SC 2018] wherein this Court has laid down the principles relating to framing of charge and discharge as follows: (SCC pp. 41-42, para 4)

“4. ... Reading Sections 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to

end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. ... If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227.”

23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the court is expected to do is, it does not act as a mere post office. The court must indeed sift the material before it. The

material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the court dons the mantle of the trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that the accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence.

13. Now, in the light of the above law laid down by the Apex Court, it has to be seen whether in the present case, there is sufficient ground to frame charge against the accused.

14. In the first information report, the informant has mentioned that the appellant-accused, Raees offered the informant to sell his 7 bigha land on the pretext that he needed money for marriage of her sister. As a consideration for selling the land, appellant-accused, Raees on different dates, obtained money in cash and through bank transfer from the informant as well as on her direction from her colleagues totalling Rs.17,10,000/-. On the repeated requests of

the informant/respondent no.2 to execute sale deed of the land in her name, he procrastinated on one or the other pretext. It was later found that the land proposed for sale was in the name of mother of appellant-accused, Raees. The accused's own land was situated adjacent to her mother's law. When the informant visited Raees's house with her husband, Tekchand Kataria, and requested him to pay the money back, Raees along with co-accused, Jamshed, Smt. Priya, Smt. Parmeen and two other unknown persons hurled abuses and derogatory words against her about her being a member of SC community and beat her with kicks and fists and threatened to kill her. They also confined her and husband in the house. Then, Mehmud Ali Khan and Asif, who were present on the spot, saved her with the help of her husband.

15. Following ingredients are required for the offence of criminal breach of trust punishable u/s 406 I.P.C. :-

(1) Entrusting any person with property or with any dominion over property;

(2) The person entrusted (a) dishonestly misappropriating or converting to his own use that property; or

(3) Dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation

(i) of any direction of law prescribing the mode in which such trust is to be discharged, or

(ii) of any legal contract made touching the discharge of such trust.

This offence consists of any one of four positive acts, namely, misappropriation, conversion, user, or disposal of property. Neither failure to account for breach of contract, however dishonest, is actually and by itself the offence of criminal breach of trust.

16. In the present case, no entrustment of any property or with any dominion over property was given to the accused persons though there is allegation of misappropriation of money of informant by the appellant-accused, Raees but that money was not entrusted to him by the informant but it was paid to the appellant-accused, Raees for the execution of sale deed of the land. Thus, there is no ground for framing of charge u/s 406 I.P.C. against appellant-accused, Raees.

17. In her statement recorded u/s 161 Cr.P.C., the informant has supported the averments made by her in the written report. In his statement recorded u/s 161 Cr.P.C, eye-witness, Mehmud Ali Khan has corroborated the statement of informant, Smt. Geeta Katariya. The prosecution witnesses, Kamran Khan son of Isteyak Khan, Nanhe son of Manga, Ismail son of Fakir and Bilal son of Nisar Hussain have also supported the prosecution case.

18. In the light of the aforesaid Apex Court judgements and from perusal of the first information report and the statements of informant and aforesaid witnesses recorded u/s 161 Cr.P.C., it is clear that, prima facie, through fraudulent and dishonest inducement, appellant-accused, Raees caused informant, Smt. Geeta Katariya to pay him Rs.17,10,000/- as price of land which was not in his name and notwithstanding the repeated requests of the informant, he did not transfer his land

in favour of the informant although he had obtained full payment for the land. Prima facie, there is sufficient evidence that when informant with her husband and companions/witnesses visited the house of appellant-accused, Raees and other appellants, they hurled abuses and derogatory words against the informant regarding her caste and they beat them with kicks and fists. They also threatened her to kill with intent to raise alarm to her.

19. On the basis of evidence on record, the trial court has rightly rejected the discharge application of the appellant-accused, Raees and directed framing of charges against him u/s 147, 420, 342, 323, 504, 506 I.P.C. and 3(1)(r), 3(1)(s) of Act No. 33 of 1989 but there is no ground to frame charge u/s 406 I.P.C. against appellant-accused, Raees.

20. The trial court has rightly rejected the discharge application of the appellants-accused, Jamshed, Smt. Priya, Smt. Parmeen, Anjum, Afsar Hussain and directed framing of charges against them u/s 147, 342, 323, 504, 506 I.P.C. and 3(1)(r), 3(1)(s) of Act No. 33 of 1989.

21. From the above discussion, it is clear that except the order regarding framing of charge u/s 406 I.P.C. against the appellant-accused, Raees, there is no illegality, irregularity or impropriety in the impugned order passed by the trial court.

22. Subject to aforesaid modification regarding framing of charge u/s 406 I.P.C. against the appellant-accused, Raees, there is no force in the appeal.

23. Accordingly, the appeal is **allowed in part.**

24. A copy of this judgment be sent back immediately to District Court

concerned for compliance and further necessary action.

(2023) 11 ILRA 744

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 05.10.2023

BEFORE

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

First Appeal From Order No. 1023 of 2008

**The New India Assurance Co. Ltd.,
Moradabad**

...Appellant

Versus

Sri Mohd. Aslam &Ors.

...Respondents

Counsel for the Appellant:

Sri S.C. Srivastava

Counsel for the Respondents:

Sri Mohd. Asim Zulfiquar, Sri Amit Kumar,
Sri Amit Kumar Verma, Sri R.K. Yadav

A. Civil Law -Employees' Compensation Act, 1923-Section 30- substantial question of law-Commissioner awarded compensation to the claimants for the death of their son, in the sum of ₹4,33,820/- and other incidental reliefs-the victim was aged 25 years-The victim suffered injuries during the course of employment, in consequence of which, he died- The claimants have been rendered without financial support, inasmuch the victim was the sole breadwinner of the family, whose life has extinguished in consequence of the accident-The claimants asked the owner to pay compensation, which he did not-They served the owner with a notice under Section 10 of the Act of 1923, but they received nothing towards compensation for the victim's untimely demise in the accident-The substantial question of law involved here has been formulated in the background of facts that the Employees' Compensation Commissioner has admittedly not issued a notice to the Employees' Compensation Commissioner at Begusarai, Bihar, where the accident happened-He has also not issued notice to the State Government concerned, the Government of

Bihar, the twin conditions to be mandatorily fulfilled in terms of the proviso to Section 21(1)(b) of the Act of 1923 by a non-jurisdictional Compensation Commissioner trying or processing, as the Statute says, a claim by an employee or his heirs for compensation under the Act of 1923- Therefore, The general rule about venue or jurisdiction of a Court trying a civil cause or proceedings akin to it is that the Court competent to try the action or undertake the proceedings is the one within the territorial jurisdiction of which the cause of action has arisen-Different Statutes, including the Code of Civil Procedure, 1908, extend the venue to other Courts, upon principles spelt out by the law-Here, the Statue, prior to its amendment by the Act of 1995, did not invest any other Compensation Commissioner, except for the one in whose area the accident took place and resulted in the injury- it is only subject to adherence with the conditions of the proviso to Section 21(1)(b) of the Act that extra territorial jurisdiction can be exercised by a Compensation Commissioner, and that appears to be the position of the law not at all to be doubted, considering the principles in Bharat Singh-The insurer ought to have then pleaded the facts stating what the territorial limits of jurisdiction of the Commissioner at Moradabad were and where the accident site was- No pleading in that regard was made-Held, requirement of law introduced by the proviso to Section 21(1)(b) of the Act of 1923 is not a matter of procedural irregularity, which can be ignored-It is an issue of jurisdiction, which goes to the root of the Commissioner's jurisdiction-Thus, the substantial question of law involved in this appeal has to be answered in the negative and the impugned judgment and award passed by the Employees' Compensation Commissioner set aside with a remand of the matter to the Compensation Commissioner for a decision de novo- Before processing the claim de novo the Compensation Commissioner shall strictly adhere to the requirements of the first proviso to Section 21(1)(b) of the Act of 1923.(Para 1 to 47)

The appeal is allowed. (E-6)

List of Cases cited:

1. Mayan Vs Mustafa & anr..

2. Bharat Singh Vs Mgt of New Delhi Tuberculosis Centre, New Delhi & ors.

3. Morgina Begum Vs MD, Hanuman Plantation Ltd.

4. New India Assr. Co. Ltd Vs Smt. Shadab & ors.

5. Bajaj Allianz Gen. Ins. Co. Ltd Vs Suman Devi & ors.

6. ICICI Lombard Gen. Ins. Co. Ltd. Vs Rakesh & anr.

7. M/s. Chawla Techno Cons. Ltd. & anr. Vs St. of U.P. & ors.

8. National Ins. Co. Ltd Vs Smt. Nirmala Devi & ors.

9. Guj. Mineral Dev. Corp. Vs Shri Brahmabhatt

10. Workmen of M/s. Firestone Tyre & Rubber Co. of India (P.) Ltd. Vs Mgmt & ors.

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

This appeal under Section 30 of the Employees' Compensation Act, 1923 is directed against the judgment and award of the Employees' Compensation Commissioner, Moradabad (then called the 'Workmen's Compensation Commissioner') dated 02.02.2008, awarding compensation to the claimants for the death of their son, in the sum of ₹4,33,820/- and other incidental reliefs.

2. This appeal was entertained by a Division Bench of this Court on 21.04.2008, though not formally admitted to hearing. The question that would tentatively be involved was also indicated in the order of the day, though not

formulated as such. The appeal was later on admitted to hearing vide order dated 09.12.2019, albeit without framing the question/questions involved.

3. On 24.02.2022, when the appeal came up, the following substantial question of law was framed :

Whether a Commissioner, seized of a claim in relation to an accident that has taken place in an area other than one over which he has jurisdiction, is entitled to try and determine the claim, without issuing notice to the Commissioner having jurisdiction and the State Government concerned in terms of the proviso to Section 21(1) of the Employee's Compensation Act, 1923?

4. The appeal has been heard on the aforesaid substantial question of law. Learned Counsel for the parties have addressed the Court on the issue, of course, in the background of the facts and evidence giving rise to the claim, very elaborately.

5. The claimants, Mohd. Aslam and Smt. Husn Ara, Aslam's wife, are the parents of Mohd. Salim *alias* Raja, said to be the victim of a fatal motor accident, that happened on 07.06.2005 at Begusarai, Bihar. The claimants are residents of Moradabad. They instituted Claim Petition No. 31 of 2007 before the Employees' Compensation Commissioner, Moradabad on 07.06.2007, with allegations that their son, Mohd. Salim *alias* Raja, was employed as a Cleaner by the owner of Vehicle No. HR 38 J/3735. Sarfaraz Khan was the owner of the vehicle and impleaded as opposite party No. 1 to the claim petition. He shall hereinafter be called 'the owner'.

6. According to the claimants, their son, Mohd. Salim alias Raja, who shall hereinafter be called 'the victim' was carrying a consignment of goods on board Vehicle No. HR 38 J/3735, with Rais Ahmad operating the vehicle as its driver. The victim was carrying the consignment according to the instructions of the owner on board the ill-fated vehicle. The vehicle had to deliver the consignment at a destination in the State of Bihar. The victim mounted the vehicle's tool box to recover some tools, perhaps, to fix some fault that had occurred on way, when he slipped and fell down onto the road, leading to injury to the head and other parts of his body. The driver immediately conveyed the victim the same day i.e. 07.06.2005 to a certain Shivam Nursing Home, managed by Dr. Ram Yatan Singh, situate at Begusarai, Bihar for necessary medical aid and reported the matter to the local police station at Begusarai, Bihar. During the course of treatment by Dr. Ram Yatan Singh, the claimants' son succumbed to his injuries on the following day i.e. 08.06.2005.

7. The owner would pay the victim salary in the sum of ₹4,200/- per month, besides a diet allowance. At the time of his demise, the victim was aged 25 years. The victim suffered injuries during the course of employment, in consequence of which, he died. The claimants have been rendered without financial support, inasmuch the victim was the sole breadwinner of the family, whose life has extinguished in consequence of the accident. The claimants find it difficult to sustain themselves and both of them are suffering of diseases. They do not have any other person as their support.

8. The claimants asked the owner to pay compensation, which he did not. They served the owner with a notice under Section 10 of the Act of 1923, but they received nothing towards compensation for the victim's untimely demise in the accident.

9. The ill-fated vehicle was insured with the New India Assurance Company Limited, represented by its Regional Manager, Regional Office, Civil Lines, Moradabad on the date and time of the accident. The insurance cover, bearing number 396248 was valid from 02.10.2004 to 01.10.2005. The Insurance Company aforesaid, who shall hereinafter be called 'the insurers' have been impleaded as opposite party No. 2 to the claim petition. The insurers are the appellants here. The claimants and the owner are both residents of Tehsil Sambal, Moradabad, and for the said reason, the Employees' Compensation Commissioner, Moradabad has jurisdiction to try the claim. The claimants have prayed that they be given compensation according to the provisions of the Act of 1923, which ought to be ordered from the date of the accident till realisation, with simple interest at the rate of 18% per annum.

10. The insurers contested the claim before the Employees' Compensation Commissioner and put in a written statement dated 23.07.2007. The insurers, in their written statement, generally denied the allegations in the claim petition, and pleaded their case, raising additional pleas. The case pleaded by the insurers is that the victim was not a Cleaner on board the ill-fated vehicle, nor the owner had ever issued any letter of appointment in his favour. It is said in the written statement that the claimants did not mention the date, month or year of the victim's appointment

in the claim petition, nor have they produced a copy of any salary certificate. The victim was not performing his duty on board the ill-fated vehicle. He never mounted the toolkit chamber to recover tools; also he did not sustain injuries to his head or other parts of the body in the claimed accident. It is said that if the victim was on duty, the claimants would have mentioned the date and time of the accident, also mentioning if it happened by night. It is emphasized that the time of accident is not mentioned at all in the claim petition. It is averred that for the claimants' failure to get a First Information Report relevant to the accident registered, the claim petition is fit to be rejected.

11. By way of an amendment incorporated on 03.10.2007, it was pleaded *vide* paragraph No. 18(a) of the insurers' written statement that upon arrival of the deceased's cadaver, an inquiry was undertaken by the insurers' surveyor, D. Kumar, who found that the victim's death certificate dated 08.06.2005 that the claimants had presented, was not issued by Shivam Nursing Home or Dr. Ram Jatan Yadav. It was a fabricated document, got up and presented by the claimants. After inquiry, it was also found that on 07.06.2005, no crime was registered at Police Station Begusarai relating to the accident. The written information that was presented, too was a got up document. It is the further case of the insurers that the claim petition is barred by Section 10 of the Act of 1923, inasmuch as it is provided there that the Employees' Compensation Commissioner shall not entertain any claim under the Act of 1923, unless notice of the accident has been given in the manner provided, as soon as practicable, after the event. It is averred that from a perusal of the assertions made in the claim petition,

the claimants never served a notice upon the insurers. The insurers have also raised a plea that the driver of the ill-fated vehicle did not possess a valid driving license, in accordance with the provisions of the Motor Vehicles Act, 1988. The driver and the victim are not entitled to any compensation, for the reason that the driver did not hold a valid driving license on the date and time of the accident. In the circumstances, the insurers have no liability to indemnify. The claim petition was urged to be rejected on the basis of the aforesaid pleas.

12. The owner of the ill-fated vehicle filed his written statement on 31.07.2007. The contents of paragraph Nos. 1 to 5 to the claim petition were admitted. In answer to paragraph No. 6 of the claim, it is averred that the victim was employed on a salary of Rs. 3500/- per month. It is accepted in paragraph No. 8 of the written statement that the victim died during the course of employment. It is pleaded in paragraph No. 13 that the claimants are not entitled to compensation. However, in case the Court is of opinion that the claimants are entitled, burden has to be shouldered by the insurers, because the owner's vehicle was insured on the date and time of the accident with the insurers, the policy being valid from 02.10.2004 to 01.10.2005. The insurance cover note is numbered as 396248, according to the owner.

13. In the additional pleas set out in the written statement on behalf of the owner, it is averred in paragraph No. 14 that the owner helped the claimants in every manner possible, but the claimants have not provided him with all the necessary documents, such as the ration card and others, on account of which, he

could not manage compensation to be paid by the insurers.

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

(i) Whether the claimants' son died during the course of employment on account of grievous injuries sustained in a motor accident?

(ii) Whether on the date of the accident i.e. 07.06.2005, vehicle No. HR 38J/3735 was insured with opposite party No. 2?

(iii) What was the salary received by the claimants' son at the time of the accident?

(iv) Whether the driver had a valid driving license at the time of the accident?

(v) Whether the claimants are entitled to any compensation? If yes, how much and from which opposite party?

15. Parties led evidence, both oral and documentary, of which there is eloquent mention in the impugned judgment passed by the Employees' Compensation Commissioner. There is no necessity to refer to that evidence, considering the substantial question of law, the answer to which would govern the fate of this appeal before this Court. Nevertheless, for the sake of record, it must be held that the issues were answered in favour of the claimants and the claim petition allowed, awarding compensation in the sum of ₹4,33,820/-, ordering the insurers to make it good. It was ordered that the

compensation be paid within 30 days, favouring the Deputy Labour Commissioner, Moradabad Region, Moradabad. It was also directed that in the event of non-compliance within the time allowed, recovery proceedings would be initiated without further notice. In addition, notice was issued to the owner on the issue of penalty.

16. This Court, at the time when the appeal was entertained on 21.04.2008, directed that no part of the compensation awarded shall be released in favour of the respondents. It is, thus, apparent that the sum of ₹4,33,820/- deposited with the Employees' Compensation Commissioner by the insurers vide cheque dated 26.03.2008 is lying in deposit with the said Commissioner.

17. Heard Mr. S.C. Srivastava, learned Counsel for the insurers and Mr. Mohd. Asim Zulfiquar, learned Counsel on behalf of the respondents.

18. Learned Counsel for the insurers submits that in the absence of a notice issued by the Compensation Commissioner at Moradabad to the Compensation Commissioner at Begusarai, within whose territorial jurisdiction the accident happened, the award cannot be sustained. He further submits that a notice was also required to be issued by the Employees' Compensation Commissioner, Moradabad to the State Government of the State where the accident occurred. In this connection, he has placed reliance upon the first proviso to Section 21(1)(b) of the Act of 1923. Mr. Srivastava impresses upon the Court that where a Compensation Commissioner, other than the one within whose jurisdiction the accident occurred, entertains and decides a claim, he can do so

after compliance with the first proviso; else, he would have no jurisdiction. He submits that but for compliance with the proviso to Section 21(1)(b), or for that matter, Section 21(1)(c) of the Act of 1923, the non-jurisdictional Commissioner does not possess jurisdiction to process and decide an employees' compensation claim. The failure, therefore, on the part of the Employees' Compensation Commissioner who is not the jurisdictional Commissioner to comply with the proviso to Section 21(1)(b) would vitiate the award. In support of the aforesaid contention of his, Mr. Srivastava has placed reliance upon the decision of a Division Bench of this Court in **ICICI Lombard General Insurance Company Limited v. Rakesh and another**².

19. Mr. Mohd. Asim Zulfiquar, learned Counsel for the claimants, on the other hand, submits that there is no plea raised before the Employees' Compensation Commissioner, Moradabad on behalf of the insurers or the owner that the Compensation Commissioner was mandated by law to issue notice to the jurisdictional Commissioner and the State Government concerned before processing the claim. Mr. Zulfiquar says that in the absence of this plea being canvassed before the Compensation Commissioner at Moradabad, it is not open to the insurers to urge for the first time in appeal before this Court that there was no adherence to the mandatory provisions of Section 21(1)(b) of the Act of 1923. He submits, in the alternative, that the Act of 1923 is a social welfare legislation that has, for its object, welfare of employees who are poor persons. He points out that the provision for a non-jurisdictional Commissioner to entertain and process the claim was brought in through Workmen's Compensation

(Amendment) Act, 1995 (amending Act No. 30 of 1995)³ vide Section 10 thereof, with effect from 01.10.1996. The object of this amendment was to ameliorate the hardships of poor workmen and employees that would be there if they were compelled to suit their claim before the Compensation Commissioner, where the accident happened.

20. Dilating on his submissions, Mr. Zulfiquar has submitted that given the socio-economic conditions of the labour class, to which the employees and workmen belong, they go away from home across large distances in search of work, particularly, in factories and other establishments. They have no cause to stay in that place, but their gainful engagement in the factory or other establishment. Once they meet with an accident, even if they survive it, and are not fit to work, they would have to go back home. If they die, their heirs and legal representatives are, of course, not at the place where an employee or workman might have toiled to secure his livelihood. Therefore, to insist, in these circumstances, that the claim would have to be instituted before the jurisdictional Commissioner, would virtually be depriving poor employees and workmen of their right to seek redress, the forum being venued at a station far away from where the claimant is domiciled. He submits that this would defeat the object of the Act of 1923. He submits, therefore, that once the plea of non issue of notice by the Commissioner at Moradabad to the jurisdictional Commissioner at Begusarai and the Government of Bihar was not raised before the Employees' Compensation Commissioner, it ought not to be permitted to be raised here, after claim has been determined on merits by the Moradabad Commissioner.

21. In support of his contention, Mr. Zulfiqar has placed reliance upon the decisions of the Supreme Court in **Mayan v. Mustafa and another**⁴, **Bharat Singh v. Management of New Delhi Tuberculosis Centre, New Delhi and others**⁵ and **Morgina Begum v. MD, Hanuman Plantation Limited**⁶, the decision of this Court in **New India Assurance Company Limited v. Smt. Shadab and others**⁷ and the decision of the Punjab and Haryana High Court in **Bajaj Allianz General Insurance Company Limited v. Suman Devi and others**⁸.

22. This Court has keenly considered the submissions advanced by learned Counsel for the parties.

23. There is not much issue on facts and this appeal after all, though a first appeal, is not an open appeal on both facts and law. It has to be determined solely upon the substantial question involved, of course, with reference to facts, in the context of which, it has been formulated. The substantial question of law involved here has been formulated in the background of facts that the Employees' Compensation Commissioner who has tried, or so to speak, employing the language of the Statute, processed the claim, has admittedly not issued a notice to the Employees' Compensation Commissioner at Begusarai, Bihar, where the accident happened on 07.06.2005. He has also not issued notice to the State Government concerned, that is to say, the Government of Bihar, the twin conditions to be mandatorily fulfilled in terms of the proviso to Section 21(1)(b) of the Act of 1923 by a non-jurisdictional Compensation Commissioner trying or processing, as the Statute says, a claim by an employee or his heirs for compensation under the Act of 1923. Therefore, the

substantial question, in the terms that it has been framed, has arisen. The general rule about venue or jurisdiction of a Court trying a civil cause or proceedings akin to it is that the Court competent to try the action or undertake the proceedings is the one within the territorial jurisdiction of which the cause of action has arisen. Different Statutes, including the Code of Civil Procedure, 1908, extend the venue to other Courts, upon principles spelt out by the law. Here, the Statute, prior to its amendment by the Act of 1995, did not invest any other Compensation Commissioner, except for the one in whose area the accident took place and resulted in the injury. There was, of course, some modification of the rule if the workman was employed on a seagoing vessel or a seaman. Section 21 of the Workmen's Compensation Act, 1923, as the Act was called prior to the alteration of its name by Act No. 45 of 2009, reads :

21. Venue of proceedings and transfer.-(1) Where any matter is under this Act to be done by or before a Commissioner, the same shall, subject to the provisions of this Act and to any rules made hereunder, be done by or before a Commissioner for the area in which the accident took place which resulted in the injury :

Provided that, where the workman is the master of a ship or a seaman any such matter may be done by or before a Commissioner for the area in which the owner or agent of the ship resides or carries on business.

24. Section 21(1), as amended by the Act No. 30 of 1995, reads :

21. Venue of proceedings and transfer.— (1) Where any matter is under this Act to be done by or before a Commissioner, the same shall, subject to the provisions of this Act and to any rules made hereunder, be done by or before the Commissioner for the area in which—

(a) the accident took place which resulted in the injury; or

(b) the [employee] or in case of his death, the dependant claiming the compensation ordinarily resides; or

(c) the employer has his registered office:

Provided that no matter shall be processed before or by a Commissioner, other than the Commissioner having jurisdiction over the area in which the accident took place, without his giving notice in the manner prescribed by the Central Government to the Commissioner having jurisdiction over the area and the State Government concerned:

Provided further that, where the employee, being the master of a ship or a seaman or the captain or a member of the crew of an aircraft or a employee in a motor vehicle or a company, meets with the accident outside India any such matter may be done by or before a Commissioner for the area in which the owner or agent of the ship, aircraft or motor vehicle resides or carries on business or the registered office of the company is situate, as the case may be.

25. In order to give effect to the provisions of the amended Section 21(1), the Employees' Compensation (Venue of

Proceedings) Rules, 1996 have been framed by the Central Government in exercise of power under Section 21(1) of the Act. Rule 3 of the Rules of 1996 reads :

3. Processing of an application -

(1) An application under section 19 or section 22 shall be processed before or by a Commissioner for the area in which-

(a) the accident took place which resulted in the injury; or

(b) the employees or in case of his death the dependants claiming the compensation ordinarily reside; or

(c) the employer has his registered office:

Provided that no matter shall be processed before or by a Commissioner other than the Commissioner having the jurisdiction over the area in which the accident took place without his giving notice in Form A to the Commissioner having jurisdiction over the area and the State Government concerned.

(2) The Commissioner under section 21(1)(b) or (c) may initiate proceedings afresh or he may continue the previous proceedings initiated under section 21(1)(a) as if the same or any of its part had been taken before him if he is satisfied that the interest of the parties shall not thereby be prejudiced.

26. A reading of the scheme of the Statute, as it originally stood prior to its amendment by Act No. 30 of 1995, spares not a shadow of doubt that the territorial jurisdiction to try or process, as the Statute calls it, a claim for compensation under the

Act, lay exclusively with the Compensation Commissioner for the area in which the accident took place. However, by amendment, in order to further the benevolent object of the social welfare legislation, the Statute has introduced enabling provisions that facilitate the employee to institute a claim petition before a Compensation Commissioner for another area, different from one where the accident happened.

27. *A fortiori* the amended provisions confer jurisdiction on other Compensation Commissioners as well, if an employee moves such Commissioner, invoking his jurisdiction in terms of Section 21(1)(b) or Section 21(1)(c) of the Act of 1923. The object behind introduction of this change in the Act, as it originally stood, is obvious. We have mentioned it hereinbefore and need not recapitulate in all its details. It is to facilitate a poor workman or employee suiting his claim at a venue of his convenience. But, the provision that enables the workman to approach a Compensation Commissioner, other than the one for the area where the accident happened, mandates that before the jurisdiction of a Commissioner other than the jurisdictional Commissioner is invoked, the Commissioner, who is approached under Section 21(1)(b) or 21(1)(c) of the Act, must adhere to the mandatory conditions for assuming jurisdiction in the matter spelt out by the proviso to Section 21(1)(b), or for that matter, 21(1)(c). The conditions are that the Commissioner, who has been approached to process a claim other than the one in whose area the accident has taken place, must give notice to the Commissioner having jurisdiction over the area in which the accident took place and also to the State Government concerned. Both these notices are to be

given in the manner prescribed by the Central Government.

28. It has to be noted here that the first proviso to Section 21(1) (b) and 21(1)(c) is cast in prohibitive words. It says that "*No matter shall be processed before or by the Commissioner other than the Commissioner having jurisdiction over the area in which the accident took place, without giving notice....*" to quote the words employed by the Statute. The words clearly show that so far as the Commissioner within whose area the accident has taken place is concerned, the right of the claimant is as untrammelled as the jurisdiction of the Commissioner to process the claim. The jurisdiction of any other Commissioner, that is to say, other than the one within whose area the accident took place, is forbidden by law, unless notice in the manner prescribed is served upon the jurisdictional Commissioner and the State Government concerned. The service of notice in accordance with the first proviso to Section 21(1)(b), or for that matter, 21(1)(c) of the Act of 1923 then becomes a jurisdictional fact. A non-jurisdictional Commissioner is invested with jurisdiction not just upon receiving a claim with regard to an accident that took place beyond his area, but, upon service of notice, as mandated by the first proviso to Section 21(1) (b) or 21(1) (c) of the Act. The presentation of a claim to a non-jurisdictional Commissioner is a state of things where he may proceed to assume jurisdiction, after he issues notice in the manner prescribed by the Central Government to the jurisdictional Commissioner for the area where the accident occurred, as well as the State Government concerned; if he does not do that, a non-jurisdictional Commissioner has

no jurisdiction to proceed, notwithstanding the state of things on which he may act.

29. Rule 3 of the Rules of 1996, in particular, Rule 3(1), reinforces the aforesaid construction of the proviso to Section 21(1)(b) and 21(1)(c) of the Act of 1923. It prescribes a form, to wit, Form A to the Rules, in which notice has to be given by the non-jurisdictional Commissioner to the one who has jurisdiction over the area where the accident took place and the State Government concerned.

30. In **ICICI Lombard General Insurance Company Limited v. Rakesh and another** (*supra*) relied upon by the learned Counsel for the insurers, it was held by their Lordships of the Division Bench of this Court :

4. We have considered the pros and cons. We are of the view that there are two situations, i.e., judicial authority inherently lacks the jurisdiction and having jurisdiction not complied with legal formalities. If the Commissioner completely lacks jurisdiction then the entire exercise subsequent thereto will render futile and no proceeding can be proceeded without such notice but when the Court having jurisdiction did not discharge obligation/s required to be done procedurally then an appropriate order at an appropriate stage can be passed but depending upon the facts and circumstances of each case. In this particular case no such point has been raised by the appellant preliminary or substantially before the court of Commissioner. The Commissioner has proceeded on merit, delivered a judgment and passed an order giving compensation to the claimant on account of injury. It is for

the first time before the appellate court, the appellant has taken the point. Although the point can be taken at the appellate stage but one should be diligent before the court of first instance at the time of framing issues and leading evidences. The objects and reasons of Workmen's Compensation Act, 1923 is to provide compensation to certain classes of workmen or their dependants on account of injury caused by the accident. Therefore, it is a beneficial piece of legislation. In the case of beneficial piece of legislation, law is little tilted in favour of the beneficiaries. Hence, the requirement for the Court is to determine the course of payment as natural and refusal, if any, as unnatural. One of such reason of refusal is extortion of money by practising fraud upon the Court. To plug the loophole, law has provided the parameter to avoid double benefit. The requirement of law is that the Commissioner who is going to pass an order having jurisdiction over the residence of the claimant has to have knowledge or information about proceeding, if any, before the Commissioner in whose jurisdiction accident took place. Therefore, non-discharge of such duty by the Commissioner is definitely an acute procedural irregularity but the same cannot be construed as inherent lack of jurisdiction. On the basis of the ratio of Ramchandra Keshav (*supra*), it is expected that the judiciary must be much more careful since judicial accuracy gives correct message to the society.

31. The Division Bench in **Rakesh** has taken note of the other object of providing for notice to be given to the jurisdictional Commissioner. It is to avoid fraud being practised by the claimant, simultaneously presenting, prosecuting and realising for the same accident compensation before two fora. This is

certainly one of the objects behind the requirement to serve a notice upon the jurisdictional Commissioner. But, to the understanding of this Court, that is not relevant to the validity of the exercise of jurisdiction by the non-jurisdictional Commissioner. As already stated, the non jurisdictional Commissioner acquires jurisdiction only upon the fulfilment of the conditions mentioned in the proviso to Section 21(1)(b) or 21(1)(c) of the Act of 1923. Else, he does not have it.

32. For the same reason, the failure to raise this plea before the Compensation Commissioner may be blameworthy conduct on the insurers' part, that may entitle the claimant to be compensated in costs, but being a jurisdictional plea, pure and simple, and one not involving any mixed question of fact and law, it can be permitted to be raised at the appellate stage, without doubt. It is, after all, a plea of jurisdiction that goes to the root of the matter. In this connection, reference may be made to the decision of the Karnataka High Court in **National Insurance Company v. B. Ramaswamy and another**¹⁰ where it was observed :

6. From the records, it is seen that the accident had occurred in Andhra Pradesh, the injured was treated at Andhra Pradesh and that the police complaint was lodged there. The single circumstance that claimants have shown their address at Bellary in lodging the claim petition would certainly raise a clear doubt as to the Commissioner for Workmen's Compensation who would have jurisdiction to adjudicate the claim. This is an aspect, which goes to the very jurisdiction of the Commissioner for the Workmen's Compensation for entertaining the claim petition. The legislature in its wisdom has

prescribed under Section 21 of the Act, that the first requirement of the Commissioner for Workmen's Compensation is to ascertain that the claim would not lie before any other Commissioner and if it is possible that claim would be within the jurisdiction of some other Commissioner, that a notice should be issued to such other Commissioner, before processing the claim. This exercise is necessary obviously in order to avoid dual claims. It is apparent from the record that no such notice has been issued and this procedure is a mandatory requirement, which has been apparently overlooked. Therefore, in the absence of a notice, in the first instance, by the Commissioner for Workmen's Compensation, Bellary to the Commissioner for Workmen's Compensation, Kurnool, the same was not capable of being processed in the first instance.

7. The second circumstance, that the claimants claimed as labourers in spite of their advanced age and that the vehicle involved was moving inter-State and the improbability of loaders being carried from Madhya Pradesh to Karnataka, being a glaring circumstance, it is difficult to envisage the manner in which the Commissioner has proceeded to entertain and allow the claims. Hence, the very jurisdiction of the Commissioner having been questioned, the embargo placed on the defence that may be set up by the insurance company and the grounds on which an appeal can be filed, could not come in the way of the insurance company raising a substantial question of law touching upon the jurisdiction of the Commissioner to entertain the claim petition. In this light of the matter, I hold that appeals deserve to be allowed.

33. This position of law was adumbrated by a learned Single Judge of this Court in **M/s. Chawla Techno Construction Ltd. and another v. State of U.P. and others**¹¹. In **Chawla Techno Construction** (*supra*) it was observed :

9. A bare perusal of provisions quoted above would go to show that under Section 21 sub Rule (1) has been incorporated in respect of Venue of the proceedings and transfer of the proceedings. Section 21 started that where any matter under the Act is to be done by or before a Commissioner the same shall, subject to the provisions of this Act and to any rules made hereunder be done by or before the Commissioner for the area in which (a) accident took place which resulted in the injury or (b) the workman or in case of his death the dependent claiming the compensation ordinarily resides or (c) the employer has his registered office. This particular section proviso has been provided that no matter shall be processed before or by a Commissioner other than the Commissioner having jurisdiction over the area which is the accident took place, without his giving notice in the manner prescribed by the Central Government to the Commissioner having jurisdiction over the area and the State Government concerned. Workmen's Compensation (Venue of Proceedings) Rules 1996 Form and in exercise of power provided under sub section (1) of Section 21 Central Government provides that an application under Section 19 or Section 21 shall be processed before or by a Commissioner for the area in which accident took place which resulted in injury, the workman or in case of his death the dependent claiming the compensation ordinarily resides or (c) the employer has his registered office. This particular proviso by providing that no

matter shall be possessed before the Commissioner then Commissioner having jurisdiction over the area in which accident took place without his giving notice in Form-A to the Commissioner having jurisdiction over the area and the State Government concerned. Sub-section 3 of Section 21 further provided that Commissioner under sub Section (1)(b) and (c) may initiate proceedings afresh or he may continue the previous proceedings initiated under Section 21 (1) (a) as if the same or any of its part had been taken before him if he satisfied that the interest of the parties shall not be prejudiced. Thus as per this Rule orderly it is the Commissioner having jurisdiction over the area in which the accident has taken place has the authority to proceed however after giving notice in Form A to the Commissioner having jurisdiction in whose area workmen or the dependent in case death claiming the compensation ordinarily resides or the employer has his registered.

10. Now touch stone of the provisions quoted above fact of the case is to be seen that undisputed position is that accident has taken place at Delhi and petitioner has no permanent abode at Delhi and after accident petitioner has shifted his native place at Allahabad and thus, petitioner by all means can be treated as permanent to ordinarily resides in the district Allahabad and has authority to move an application at Allahabad in that even moving of application at Allahabad it self enjoined upon the Commissioner Workmen to send information to the Commissioner of the State having jurisdiction over the area State government concerned namely at Delhi.

11. In the present case original record has been produced before Workmen

Compensation Commissioner and Sri Shaliesh Kumar, Assistant Labour Commissioner was present in the Court and made statement that at no point of time any notice or information on Form A was given to the Commissioner having jurisdiction having over the area and the State Government whereas factual position is clear then net effect of the same is that workmen had no authority or jurisdiction to process the application without giving notice in Form A, Commissioner of the State concerned. Thus process of application itself was fertile exercise and has no consequence and no action taken pursuant thereto consequences would not be consequent and as Commissioner would lacking territorial jurisdiction to deal with the matter in term of the provision as contained under proviso of Section 21 of the aforementioned Act and provisions of the Rule 3 of the Rules.

34. The same view has been endorsed in **National Insurance Company Limited v. Smt. Nirmala Devi and others**¹², a Bench decision of this Court, where it is remarked :

5. According to us, enabling provision does not disassociate itself from the mandatory part of the Act to avoid possibility of double benefit. Under normal circumstances place of accident got basic jurisdiction to attract because immediately after accident lodging F.I.R. in the local police station and medical treatment etc. from the local hospital are associated with the incident. Therefore, there should be a process of scrutiny about filing of application at the place of accident before proceeding with the application on merit by the Court of Commissioner having jurisdiction over the place of the residence of the claimant/s. Although Mr. Tandon

contended that there is a difference between inherent lack of jurisdiction and irregular application of jurisdiction which is otherwise curable, we are of view that there are three distinct parts available for the Court to adjudicate a matter. Firstly the Court will entertain, then the Court will try and ultimately the Court will determine. There is no dispute that the Court of Commissioner has jurisdiction to entertain and determine but before determination at the time of trying the same, the statutorily adopted process has to be followed strictly.

35. In view of this consistent authority, there is little doubt about the view that this Court has taken that the Compensation Commissioner, other than the jurisdictional Commissioner within whose area the accident took place, cannot determine a claim without complying with the first proviso to Section 21(1)(b) of the Act of 1923. In the decision of the Supreme Court relied upon by Mr. Mohd. Asim Zulfiquar in **Mustafa** (*supra*), the point was never raised if the Compensation Commissioner, other than the one having jurisdiction over the area where the accident took place, could assume jurisdiction and decide without adhering to the mandatory procedure of giving notice envisaged by the first proviso to Section 21(1)(b) of the Act of 1923. All that was decided was that by virtue of Section 21(1)(b) of the Act, a Compensation Commissioner, other than the jurisdictional Commissioner, could also entertain and decide a claim. Therefore, the decision of their Lordships of the Supreme Court in **Mustafa** is of little assistance to the claimants.

36. The other decision relied upon by Mr. Zulfiquar is the one in **Bharat Singh** (*supra*) where the issue was about retrospective operation of Section 17 of

the Industrial Disputes Act, 1947¹³. In **Bharat Singh** it was observed :

11. In interpretation of statutes, courts have steered clear of the rigid stand of looking into the words of the section alone but have attempted to make the object of the enactment effective and to render its benefits into the person in whose favour it is made. The legislators are entrusted with the task of only making laws. Interpretation has to come from the courts. Section 17-B on its terms does not say that it would bind awards passed before the date when it came into force. The respondents' contention is that a section which imposes an obligation for the first time, cannot be made retrospective. Such sections should always be considered prospective. In our view, if this submission is accepted, we will be defeating the very purpose for which this section has been enacted. It is here that the court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the court's duty to discern the intention in the context of the background in which a particular section is enacted. Once such an intention is ascertained the courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the court to give such a construction to a statute as would promote the purpose or object of the Act. A

construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would leave to injustice should always be avoided. This section was intended to benefit the workmen in certain cases. It would be doing injustice to the section if we were to say that it would not apply to awards passed a day or two before it came into force.

16. According to the respondents' counsel, these two decisions clearly cover the question involved in this appeal also. We feel that this submission cannot be accepted for more than one reason. Section 11-A, confers a jurisdiction on the Labour Court, Tribunal or National Tribunal to act in a particular manner which jurisdiction it did not have prior to the coming into force of Section 11-A. This is the reason why this Court held that Section 11-A cannot apply to proceedings before it came into force. The conferment of a new jurisdiction can take effect only prospectively except when a contrary intention appears on the face of the statute. Section 11-A plainly indicates its prospective operation. This is made clear in the proviso to the section when it says "provided that in any proceeding under this section". This can only mean something relatable to a stage after the section came into being. That is not the case with Section 17-B. Here it is not the conferment of a new jurisdiction but the codification in statutory form of a right available to the workmen to get back wages when certain given conditions are satisfied. There are no words in the section to compel the court to hold that it cannot operate retrospectively. Before Section 17-B was introduced there was no bar for courts for awarding wages. Of course the workmen

had no right to claim it. This section recognizes such a right. To construe it in a manner detrimental to workmen would be to defeat its object.

37. The principle spoken of in *Bharat Singh*, to the understanding of this Court, would work just the other way. Their Lordships have not at all suggested placing a construction upon the terms of a welfare statute contrary to its plain meaning. Of course, if the intendment of the legislature is different from the literal meaning or the object of legislation defeated by a literal construction, effect has to be given to the intendment in case of such statutes. What is important to note in *Bharat Singh* is the distinction between the acceptance of some retrospective operation for Section 17B of the Act of 1947, but not so for Section 11A which was held to be prospective in **Gujarat Mineral Development Corporation v. Shri Brahmhatt¹⁴ and Workmen of M/s. Firestone Tyre and Rubber Co. of India (P.) Ltd. v. Management and others¹⁵**. A reading of paragraph No. 16 of the report in *Bharat Singh* makes it evident that Section 17B was given retrospective operation because the provision did not confer a new jurisdiction on the Court, but the codification of a jurisdiction that the Court already exercised by directing payment of backwages etc. By contrast, the jurisdiction under Section 11A was absolutely a new jurisdiction conferred upon a Labour Court or Tribunal, which never existed before. Therefore, Section 11A, according to the plain words of the Statute, was held to apply prospectively, though both provisions were introduced through amendment in the same statute, which was a welfare legislation meant for the benefit of workmen or employees.

38. To this Court's understanding, the principle in *Bharat Singh* works against what is contended on behalf of the claimants here. What is in question here is not at all the codification of an existing right that an employee or workman had before Act 30 of 1995 introduced the right by amendment to Section 21(1) of the Act of 1923. It is the investiture of jurisdiction in the Compensation Commissioner of another area and beyond his jurisdiction, no doubt, to facilitate the employee, but for the first time, by virtue of the amended statute. It is difficult, therefore, to interpret a provision of this kind in a manner different from what the plain words of the Statute say. Here, there is no question of a retrospective pitted against the prospective operation of the amended statute. It is about, if at all, the extra territorial jurisdiction conferred upon a non-jurisdictional Commissioner appointed under the Act of 1923, that can be exercised in adherence to the provisions of the Statute, under which it is conferred.

39. This Court has opined that it is only subject to adherence with the conditions of the proviso to Section 21(1)(b) of the Act that extra territorial jurisdiction can be exercised by a Compensation Commissioner, and that appears to be the position of the law not at all to be doubted, considering the principles in *Bharat Singh*.

40. The other Authority, wherein Mr. Zulfiquar has reposed faith, is *Morgina Begum (supra)*. In the said decision, their Lordships of the Supreme Court, after consideration of the provisions of Section 21(1)(b) of the Act of 1923, held that the Compensation Commissioner at Tejpur had jurisdiction in the matter, though the accident took place within the area of the

Compensation Commissioner, Nagaon. The following words in paragraph No. 11 of the report in **Morgina Begum** are very relevant :

11. Learned counsel for the respondent submitted that simply by saying that they are residing at Tezpur is not enough to prove their statement but they should produce documents to show that in fact they are residing at Tezpur. We see no reason to agree with the learned counsel for the respondent when there is a clear statement by both the claimants that they started residing at Tezpur after the death of their son. If the respondent wanted to prove that they were deposing falsely, he should have cross-examined these witnesses and challenged their testimony in the witness box on this point, which has not been done. In the present case, we are satisfied that the statement of the deceased's father and mother is trustworthy that they are ordinarily residing at Tezpur, and hence the Commissioner, Workmen's Compensation, Tezpur has jurisdiction to entertain the claim petition. **The Commissioner, Tezpur has also given notice to the Commissioner, Workmen's Compensation, Nagaon as well as the State Government in compliance with the proviso to Section 21(1) of the Act.**

(emphasis by Court)

41. The facts in **Morgina Begum** show that the proviso to Section 21(1)(b) of the Act of 1923 was duly complied with by the Compensation Commissioner at Tezpur, giving notice to the jurisdictional Compensation Commissioner, Nagaon and also to the State Government. Therefore, the principle in **Morgina Begum** is not at all the one that would be applicable here.

42. Learned Counsel for the claimants has relied upon the decision of a learned Single Judge of this Court in **New India Assurance Company Limited v. Smt. Shadab and others** (*supra*). He has drawn attention of this Court to the following remarks in **Smt. Shadab** :

12. Similarly, in respect of objection raised during the course of argument in the present appeal based on reading of Section 21 of the Act, it is seen, no pleading had been made by the insurer, either that the Commissioner, Ghaziabad did not have territorial jurisdiction because the accident did not occur within his territorial area or that the Commissioner, Ghaziabad could not proceed with the claim petition because he had not issued any prior notice to other Commissioner. Therefore, neither there the stage nor the occasion arose to frame an issue in respect of the territorial jurisdiction of the Commissioner, Ghaziabad.

13. For the insurer appellant to raise such an objection, it ought to have specifically pleaded facts necessary for such issue to arise. The insurer ought to have then pleaded the facts stating what the territorial limits of jurisdiction of the Commissioner at Ghaziabad were and where the accident site was. No pleading in that regard was made.

43. The learned Judge has repelled the contention based on non-adherence to the proviso to Section 21(1)(b) of the Act of 1923, because the plea, like the present case, was never raised before the Compensation Commissioner. We are afraid that we cannot agree with the said principle, and for good reason. It appears that the remarks of the Division Bench in **Rakesh** were not brought to the notice of

his Lordship, where it is said that although the point can be taken at the appellate stage, one should be diligent before the Court of first instance. The decision of the learned Single Judge, therefore, rendered in **Smt. Shadab**, to that extent, appears to be per incuriam.

44. In the decision of the Punjab and Haryana High Court in **Smt. Suman Devi** (*supra*), the remarks of the Court certainly seem to favour what Mr. Zulfiquar urges. It is observed in **Smt. Suman Devi** :

5. Sub-clauses (b) & (c) of Section 21(1) of the Act further provides that the Commissioner shall have the jurisdiction for the area in which the employee or in case of his death, the dependent claiming the compensation ordinarily resides; or the employer has his registered office. Therefore, it cannot be said that the Commissioner at Nuh had no jurisdiction as such, if the claimants-dependents are ordinarily residing in the area of Nuh. The only argument available with the appellant is that since the proviso to Section 21(1) of the Act provides that if the Commissioner, other than the Commissioner having jurisdiction over the area in which the accident took place, has to give a notice in the manner prescribed by the Central Government to the Commissioner having jurisdiction over the area and to the State Government concerned. It is pleaded that no notice was given by the Commissioner at Nuh to the Commissioner having jurisdiction over the area in which the accident took place. The said proviso is only procedural to ensure that the Commissioner of the concerned jurisdiction has also notice that the another Commissioner has taken cognizance of the issue and if the Commissioner at Nuh has not followed the aforesaid procedure, the

claimants cannot be prejudiced for any such irregularity, which has taken place.

(emphasis by Court)

45. We are in respectful disagreement with the view expressed by the Punjab and Haryana High Court in **Smt. Suman Devi**, for reason that requirement of law introduced by the proviso to Section 21(1)(b) of the Act of 1923 is not a matter of procedural irregularity, which can be ignored. It is an issue of jurisdiction, which goes to the root of the Commissioner's jurisdiction.

46. In view of what this Court has said hereinabove, the substantial question of law involved in this appeal has to be **answered in the negative**.

47. The result is that this appeal shall stand **allowed** and the impugned judgment and award passed by the Employees' Compensation Commissioner set aside with a remand of the matter to the Compensation Commissioner for a decision de novo. Before processing the claim de novo the Compensation Commissioner shall strictly adhere to the requirements of the first proviso to Section 21(1)(b) of the Act of 1923.

48. It is also clarified that it shall be open to all parties, which includes the claimants, the owner and the insurers to lead evidence afresh before the Compensation Commissioner in the manner indicated. It is also ordered that the Employees' Compensation Commissioner, Moradabad shall ensure compliance with the provisions of Section 21(1)(b) of the Act of 1923 within a month of receipt of this judgment and endeavour to process the claim within three months thereafter, in

accordance with law after hearing all parties. The deposit made before the Employees' Compensation Commissioner under Section 30 of the Act by the insurers shall be refunded forthwith.

49. Costs easy.

(2023) 11 ILRA 761
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2023

BEFORE

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

First Appeal From Order No. 1849 of 2003

Smt. Shashi Bala & Ors. ...Appellants
Versus
Sri Pradeep Singh & Ors. ...Respondents

Counsel for the Appellants:

Sri Ram Singh, Sri M.P. Sarraf

Counsel for the Respondents:

Sri Om Prakash Mishra, Sri B.P. Verma

(A) Tort Law - The Motor Vehicles Act, 1988 - Section 173 - claimants' appeal , The Code of Civil Procedure, 1908 - Order XLI Rule 27 - Production of additional evidence in Appellate Court - Composite Negligence - In a case of composite negligence, the claimants are entitled to proceed against both or any one of the joint tortfeasers and recover the entire compensation from one of them as the liability is joint and several - site plan is suggestive of the fact, but not at all conclusive on the point - In a case relating to motor accident claims, the claimants are not required to prove the case as it is required to be done in a criminal trial.(Para -42, 44)

Claimants pursuing a case of composite negligence - where deceased was a pillion rider - entitled to recover entire compensation from

both or any one of the joint tortfeasers - liability joint and several -Tribunal concluded - Jagdish Babu not same man as Jagdish Prasad - who died in a motorcycle accident on 28.03.2003 - Tribunal's Findings on Truck Driver and Motorcycle Accident - Truck driver not negligent - Both truck driver and motorcycle rider negligent -

Site plan suggests head-on collision in middle of road -Tribunal found no other evidence to support the claim - except for his wives testimony - Tribunal dealt with evidence like a Criminal tribunal. **(Para -21, 40, 42, 44)**

HELD: - No justification for the Tribunal to have gone into the question of the negligence vis-à-vis the claimants at all. Tribunal's answers to other issues, particularly Issues Nos. 4 and 5, to be manifest errors of law, except for the validity of the insurance policy, as their findings are based on the same issue as Issue No.1.. Tribunal, now competent under the 1988 Act, must proceed with the petition de novo, excluding the findings on Issue No.3. Impugned judgment and award passed by MACT set aside. Matter remitted to competent Tribunal to allow parties to lead further evidence and decide claim petition within six months.**(Para - 43, 45, 47, 48)**

Appeal partly allowed. (E-7)

LIST OF CASES CITED:-

1. Khenyei Vs N.I.A. Co. Ltd., (2015) 9 SCC 273
2. Kusum Lata & ors. Vs Satbir & ors. , (2011) 3 SCC 646

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

This is a claimants' appeal under Section 173 of the Motor Vehicles Act, 1988. The appellants, who are four in number, are the widow and the minor children of the late Jagdish Prasad, the victim of a fatal motor accident. The appellants shall hereinafter be called the 'claimants' unless an individual or different

reference is necessitated by the context. Respondent No.1 to this appeal, Pratap Singh, is the owner of the offending vehicle, a truck bearing Registration No. HR 38-E-6399. Ram Chandra is the driver (respondent No. 2 here) of the offending vehicle whereas respondent No. 3, the Divisional Manager, National Insurance Company Ltd., Samad Road, Aligarh, are the insurers. Respondent Nos. 1, 2 and 3 shall hereinafter be referred to as the driver, the owner and the insurers in that order.

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

Jagdish Prasad *alias* Jagdish Babu son of the late Munshi Lal, resident of Mohalla Abul Fazal, Town Jalali, Police Station Harduaganj, District Aligarh was a medical practitioner aged about 40 years. He was a R.M.P. (Registered Medical Practitioner) doctor and would earn a sum of ₹10,000/- per mensem from his practice. He was practising medicine at Jalali for the past 22 years. On the 23rd March, 2001, at 11:00 O' Clock in the morning hours, Jagdish Prasad was proceeding from his in-laws' place located in Village Karsan to Etah, riding pillion on a motorcycle, bearing Registration No. U.P. 75 B-4037. The motorcycle was being ridden at a slow speed by one Neeraj Kumar son of Siyaram. It was moving on one side of the road. As the motorcycle reached a Village called Nagla Kisi on the Awagarh-Etah road, a truck bearing Registration No. HR 38-E-6399 of Tata approached from the opposite direction, driven rashly and negligently. It went to the wrong side of the road and hit the ill-fated motorcycle. In consequence of the impact, both the rider and the pillion sustained grievous injuries. Neeraj Kumar died on way to the hospital, whereas Jagdish Prasad, who had sustained

grievous head injuries was taken to the J.N. Medical College Hospital, Aligarh for treatment. He died during treatment on 28.03.2001 at 5:00 O'Clock in the morning.

3. The claimants, accordingly, petitioned the Tribunal praying that they may be awarded compensation in the sum of ₹20,57,000/-.

4. Upon notice being issued to the opposite parties to the claim petition, that is to say, the owner, driver and the insurers, the insurers appeared and put in their written statement on 01.12.2001. The claimants' case was generally denied. In the additional pleas, it was averred that unless a valid insurance policy and the driver's license, besides other papers relating to the offending vehicle were produced, the insurers were not liable to pay any compensation. It was also pleaded that the insurers had no personal knowledge about the accident. It was averred that the insurers and the owner of the ill-fated motorcycle were not made parties to the claim petition and, therefore, the claim was bad for non-joinder of the necessary parties.

5. The owner did not file any written statement.

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

1. Whether on 22.3.2001 at about 11 o'clock Jagdish Prasad, son of Munshi Lal, resident of Mohalla Abul Fazal Jalali, P.S. Harduaganj, was riding pillion on Motorcycle bearing Registration No. UP75B-4037 along with Neeraj, son of Siyaram, proceeding from Karsan to Etah and when they reached Awagarh road near

village Kisi, Truck bearing No.HR 38 E 6399 driven by its driver at a high speed and negligently hit the motorcycle, in consequence whereof, Jagdish Prasad sustained grievous injury and died on 28.3.2001?

2. Whether on the date of the accident, drivers of both the vehicles had valid driving licences?

3. Whether on the date of the accident, both the vehicles had a valid insurance policy?

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

5. Relief, if any, to which the claimants are entitled?

7. The Tribunal has decided Issue No. 1, holding that it was not proved that Jagdish Prasad, who died on 28.03.2001 at the J.N. Medical College Hospital, Aligarh was the same man as Jagdish Babu, the deceased who had sustained injuries in the accident on 22.03.2001 on the Awagarh-Etah Road, near Nagla Kisi, involving the offending truck. It was also held that the negligence of the truck driver in the accident was not proved, because the site-plan shows that the accident occurred in the middle of the road. The inference about lack of exclusive negligence of the driver was also based on the fact that it was opined by the Tribunal that the ill-fated motorcycle had two pillion riders, which is an offence under the Act of 1988. The Tribunal, therefore, held that the driver and the rider of the motorcycle had contributed to the accident. Thus, Issue No. 1 was decided against the claimants.

8. The Tribunal answered Issue No. 2 in the negative, holding that the driving license of both the driver and the rider of the motorcycle were not proved, because none of the parties have filed these documents.

9. Issue No. 3 has been answered in the manner that the cover note issued by the insurers showed that the offending truck had a valid and effective insurance policy in its favour on the date of the accident.

10. Issue Nos. 4 and 5 were dealt with together. It was opined that Jagdish Prasad, the deceased who died in consequence of injuries at the J.N. Medical College Hospital, Aligarh was not proven to be the same man who had sustained these injuries in the accident on 22.03.2001 while riding pillion on the motorcycle on the Awagarh-Etah Road near Nagla Kisi, where the accident happened. It was held that in this view of the matter, the claimants are not entitled to any compensation.

11 . It was also held to dispel the claimants' doubts, as the Tribunal has chosen to say, that Jagdish Prasad, a photostat copy of whose death certificate had been filed on record and Jagdish Babu, a resident of Mathura, who had got himself registered as a private medical practitioner, are not proven to be the same person. There are other remarks that the income of Jagdish Prasad is not proved, because his occupation is not established.

12. The Tribunal, on the foot of these findings, ordered the claim petition to be dismissed with costs of ₹1,000 payable by the claimants to the insurers.

13. Aggrieved, this appeal has been preferred by the claimants.

14. During the course of hearing before this Court, an application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 was moved on behalf of the claimants, seeking to admit to record additional evidence. The claimants, through this application, proposed to bring on record a certified copy of the judgment and award dated 05.06.2004 passed by the Motor Accident Claims Tribunal/Special Judge (S.C./S.T. (P.A.) Act), Etah in Motor Accident Claims Petition No. 139 of 2001. It is a claim relating to the same accident as the one giving rise to the present appeal. This Court, vide order dated 24.11.2022, allowed the said application and admitted the judgment and award passed in M.A.C.P. No. 139 of 2001 by the Tribunal at Etah to record. Under the orders of this Court, it was marked as Exhibit-1 on 26.11.2002.

15. Heard Mr. Ram Singh, learned Counsel for the claimants, Mr. B.P. Verma, learned Counsel appearing on behalf of the driver and Mr. Om Prakash Mishra, learned Counsel appearing on behalf of the insurers.

16. It is argued by Mr. Ram Singh that the Tribunal has gone askew in holding that Jagdish Prasad and Jagdish Babu were two different persons, and that the identity of the victim of the accident as the claimant's husband Jagdish Babu, who died at J.N. Medical College Hospital, Aligarh on 28.03.2001 is not established. He says that the identity of the deceased as Jagdish Prasad alias Jagdish Babu is well established by the testimony of P.W.1., Smt. Shashi Bala, his widow and one of the claimants. It is particularly argued that there is no plea taken in the written statement filed on behalf of the insurers that the deceased, Jagdish Prasad, who died

at Aligarh is a person different from the one who met with the accident at the Agra-Awarah Road. It is particularly emphasized that in her testimony, P.W.1, Smt. Shashi Bala has proved her husband's death, saying that her husband's name is Jagdish Prasad, who was also called Jagdish Babu. She has referred to the postmortem report relating to the Jagdish Prasad son of Munshi Lal as well as the death certificate regarding Jagdish Prasad son of Munshi Lal, resident of Jalali, who was admitted to the J.N. Medical College Hospital, Aligarh on 22.03.2001, and died during treatment on 28.03.2001, to show that, in fact, the victim was Smt. Shashi Bala's husband and the minor claimants' father, who died as a result of the accident on 28.03.2001. It is, particularly, emphasized that the evidence of P.W.2, Chhotey Singh son of Raghuveer Singh, who was also a pillion rider, was also an eye-witness of the accident, whose testimony cannot be ignored, as done by the Tribunal.

17. Learned Counsel has also referred to the charge-sheet filed by the Police, where the driver has been challaned with remarks that in consequence of his rash and negligent driving, two men died, to wit, Niresh and Jagdish. It is particularly submitted by Mr. Ram Singh that the Tribunal's approach is not only hypertechnical, but also one that has dwelt upon trivial details to ignore far more glaring evidence, that strongly supports the claimants' case, not only about the accident, the driver's negligence, but also about the identity of the deceased Jagdish Prasad alias Jagish Babu. It is argued by Mr. Ram Singh that the approach in a motor accident claim to be adopted by the Tribunal, cannot be that of a Criminal Court, as the learned Judge in the Tribunal

seems to have done. It is emphasized that the Tribunal is not bound by strict rules of pleadings or evidence. It has to evaluate the evidence wholesomely. There is not the slightest doubt that the deceased Jagdish Prasad *alias* Jagdish Babu perished in the motor accident and he was one and the same man of whom the claimants are the dependants, being his family.

18. It is also argued that the Act of 1988 is a beneficial piece of legislation, and, therefore, while dealing with compensation cases, once the occurrence of the accident has been established, the Tribunal's role would be to make a just award. The issue about identity of the deceased, Mr. Ram Singh says, is a figment of imagination of the Judge in Tribunal, with none of the parties on the either side questioning it.

19. Learned Counsel appearing for the insurers and the driver Mr. Om Prakash Mishra and Mr. B.P. Verma, on the other hand, are unanimous in saying that the Tribunal has done a correct evaluation of the evidence on record to find so much of contradiction in evidence that the deceased's identity is not at all established as the victim of the accident, that happened on 22.03.2001 on the Awagarh-Etah Road. Mr. Mishra appearing for the insurers urged that according to the claim petition, the motorcycle was driven by Neeraj (Niresh Kumar) and the deceased Jagdish Prasad *alias* Jagdish Babu was riding pillion, when the accident happened. Niresh Kumar died on way to the hospital. The deceased Jagdish Prasad *alias* Jagdish Babu received serious injuries and was admitted to the J.N. Medical College Hospital, Aligarh for treatment. The death certificate of Jagdish Prasad *alias* Jagdish Babu issued by the J.N. Medical College Hospital, Aligarh

shows that he was admitted on 22.03.2001 at 03:00 p.m. P.W.2, Chhotey Singh, who is an eye-witness of the accident and also said to be riding pillion in breach of conditions of the insurance policy and the Act of 1988, has said that the deceased was rushed to the District Hospital, Etah for treatment, but the death certificate issued by the J.N. Medical College Hospital, Aligarh shows that the deceased was admitted on 22.03.2001 directly, without any referral. It is emphasized that the claimants failed to produce any medical certificate of medical aid provided by the District Hospital, Etah. It is also emphasized that the identity of Jagdish Babu is highly doubtful. He has died in some other accident, but falsely shown to be the victim of the accident involving the vehicle covered by the insurance policy, that the insurers have issued.

20. I have considered rival submissions advanced on behalf of the parties.

21. The Tribunal has recorded the most wholesome finding, deciding Issue No. 1. The first part of the issue that the Tribunal has considered is if Jagdish Prasad, who died at the J.N. Medical College Hospital, Aligarh on 28.03.2003 at 05:00 a.m. was the same man as Jagdish Babu, Smt. Shashi Bala's husband and the three other minor claimants' father. The Tribunal has concluded that Jagdish Babu, who is said to have met with an accident on Awagarh-Etah road on 22.03.2001, while riding pillion on the ill-fated motorcycle, and who was a private doctor registered with the Private Medical Practitioners' Association of India, was a different man from Jagdish Prasad, who died at the J.N. Medical College Hospital, Aligarh on 28.03.2001. To reach this conclusion, the

Tribunal has opined that there is no other evidence about the fact that Jagdish Babu and Jagdish Prasad are one and the same man, except the testimony of Smt. Shashi Bala, claimant No. 1. It is remarked that there is no documentary evidence to prove the fact about the identity of the deceased as the victim of the fatal accident.

22. This Court must say that in order to conclude that Jagdish Prasad, son of Munshi Lal and Jagdish Babu, Smt. Shashi Bala's husband are two different persons, the Tribunal has strained logic to reach a conclusion that is contrary to convincing evidence that has been led on behalf of the claimants to prove that the man called Jagdish Prasad, who died at the J.N. Medical College Hospital, Aligarh during treatment on 28.03.2001, was the same person Jagdish Babu, in whose favour, the Private Medical Practitioners' Association has issued a registration certificate, and who died in the accident near Nagla Kisi on 22.03.2001 in the motor accident.

23. There is this further remark by the Tribunal that the claimants have not proved as to which of the two Jagdishs' wife and children they are. In order to reach this conclusion, the Tribunal has referred to the postmortem report relating to Jagdish Prasad, where his age is recorded as 40 years. The learned Judge has then referred to the statement of P.W.1, Smt. Shashi Bala to say that she has not disclosed when she was married, but claimed the age of her elder daughter to be 12 years. The Tribunal has noted that according to the claim petition, Jagdish Prasad was practising medicine at Jalali for the last 22 years.

24. The learned Judge of the Tribunal has then taken note of the testimony of P.W.2, Chhotey Singh on the issue of the

deceased's identity. Chhotey Singh was also riding pillion on the ill-fated vehicle. The Tribunal has remarked that according to this witness, the persons who had gathered at the site of the accident carried them to the District Hospital, Etah and got this witness and Jagdish Prasad admitted. Jagdish Prasad was referred to the J.N. Medical College Hospital, Aligarh. The Tribunal has then taken note of the fact that the First Information Report of the incident was lodged on 22.03.2001, by the brother of the deceased rider of the motorcycle, Niresh Kumar, who had reported that by the time he took his brother to the District Hospital, Etah, his brother had died, whereas the other injured were being treated. This report was lodged at 14:05 hours at Police Station Kotwali Dehat, Etah, that is to say at 02:05 p.m. The Tribunal has remarked that in the death certificate relating to Jagdish Prasad issued by the J.N. Medical College Hospital, Aligarh, the time of his admission has been recorded as 03:00 p.m. on 22.03.2001. It is said by the Tribunal that there is no certificate of any treatment of Jagdish Prasad relating to the District Hospital, Etah, which would show if he had indeed received any head injury. It is also observed that the report was lodged at Police Station Kotwali Dehat at 02:05 p.m. on 22.03.2001, whereas Jagdish Prasad was shown to have been admitted to the J.N. Medical College Hospital, Aligarh, the same day at 03:00 p.m., hardly 45 minutes later. It is remarked that considering the geographical distance between the Police Station at Etah and the J.N. Medical College Hospital at Aligarh, the claimants' story is rendered suspicious and without any evidence to dispel that suspicion.

25. Adopting this line of reasoning, the Tribunal has observed that whether the

deceased Jagdish Prasad and Dr. Jagdish Babu, whose private medical practitioner's certificate has been filed on record, are one and the same man or two different persons, is to be seen, amongst others, by the fact that Jagdish Babu's age is not mentioned on the registration certificate and his residence shown to be that of District Mathura, whereas there is no evidence to show that Jagdish Prasad practised at Mathura in the name of Jagdish Babu earlier. It is then observed that this certificate has been issued on 13.06.1980 and it mentions also that the applicant (Jagdish) has been practising as a doctor for the past five years. According to the Tribunal, these contents of the certificate show that Jagdish Babu, in whose name the certificate of registration has been issued, would have been practising on 22.03.2001, the date of the accident, for at least 26-27 years. However, the age of the deceased was 40 years. The Tribunal has remarked that on reckoning the age of the man, in whose favour the certificate of registration was issued, if he were the same man who died in the accident, he must have commenced practise at the age of 13-14 years, which the laws of India do not permit. It is a position that is impossible to accept.

26. It is also observed by the Tribunal that the death certificate issued by the J.N. Medical College Hospital, of which a photostat copy has been produced, shows that the dead body was handed over to the Police of Police Station Civil Lines, Aligarh, and after the postmortem too, the dead body was handed over to the Police. According to the Tribunal, the chances are that Jagdish Prasad died within the local limits of Police Station Civil Lines, Aligarh on account of head injuries sustained in some accident there and was, therefore,

admitted to the J.N. Medical College Hospital, Aligarh. He died later on, on 28.03.2001.

27. The Tribunal goes on to observe that the claimant, which is an apparent reference to Smt. Shashi Bala, has not examined her brother, who gave her information about the accident as a witness, nor the brother's son, who got the First Information Report registered. It is, again, observed with regard to the certificate of registration issued by the Private Medical Practitioners' Association of India in the name of Jagdish Babu, showing him to be a resident of Mathura, that the document is not above suspicion. The Tribunal has concluded that the claimants have failed to prove by the evidence that Jagdish Prasad and Jagdish Babu, the deceased are one and the same man and further that Jagdish Prasad, who had received head injuries on 22.03.2001 and died on 28.03.2001 at 3:00 p.m. at the J.N. Medical College Hospital, had received those injuries on 22.03.2001 at 11:00 a.m. in the accident, near Nagla Kisi.

28. There is no case at all in the written statement on behalf of the Insurers, disputing the identity of the deceased, Jagdish Prasad alias Jagdish Babu. The grounds on which the Tribunal has proceeded to hold that Jagdish Babu and Jagdish Prasad are two different persons, to say the least, border on perversity. There was absolutely no reason for the Tribunal to have inferred from the certificate of registration dated 13th June, 1980 issued by the Private Medical Practitioner Association of India, in favour of Dr. Jagdish Babu that the deceased's age did not coalesce with that of the man described as Dr. Jagdish Babu in the certificate of registration issued by the said Association.

29. For one, the Private Medical Practitioner Association of India is not a statutory or professional body of doctors, conferring some kind of a right to practise medicine under the law upon its members. The document that is on record at Page No.62 of the paper-book, bearing Paper No.17-C2, ex facie shows that it is some kind of a registered private body, may be under the Societies Registration Act, sans legal authority to certify a doctor's practise or affect his right. Unnecessary emphasis, therefore, has been laid by the Tribunal upon reckoning Dr. Jagdish Babu's age with reference to the said certificate. In her cross-examination, P.W.1 Smt. Shashi Bala has said that :

मैं नहीं जानती कि वह एलोपैथिक डाक्टर थे या होमियोपैथिक डाक्टर थे। भाई के कम्पाउण्डरी करते थे। बाद में डाक्टरी करने लगे। मेरे पति इंजेक्शन तथा दवा भी देते थे।

30. P.W.3, Jagdish Prasad in his examination has testified as follows :

मृतक डा० जगदीश प्रसाद उर्फ जगदीश बाबू जो जगदीश बाबू के नाम से जानते थे। दुर्घटना से पहिले जलाली के तिराहे बस स्टैण्ड के पास उनकी डाक्टरी की दुकान थी। मैं अपने परिवार वालो के लिए दवा उन्ही के यहां से ले जाता था। कस्बा जलाली तथा आसपास के लोग आते जाते थे। भीड़ लगी रहती थी। इनकी डाक्टरी की दुकान बहुत सालों पुरानी थी।

31. In his cross-examination, this witness has further said :

मृतक को जगदीश प्रसाद व जगदीश बाबू के नाम से जानते थे।

32. Likewise, P.W.1 Shashi Bala in her examination-in-chief has said :

मेरे पति का नाम जगदीश प्रसाद था जिनको जगदीश बाबू भी कहते थे।

33. About the last mentioned fact in her testimony by P.W.1 that her husband's name was Jagdish Prasad, who was also known as Jagdish Babu, this witness has not been contradicted at all in her cross-examination. It is apparent from the evidence aforesaid that Jagdish Prasad was also known as Jagdish Babu.

34. So far as the certificate of registration from the Private Medical Practitioner Association of India, describing the deceased as Jagdish Babu, is concerned, it is, as already said, not a certificate issued by any statutory body or authority that the mention of the deceased's name there would carry any authenticity about it. It is also to be understood that the deceased was apparently some kind of a quack, practicing medicine in the township of Jalali.

35. Judicial notice can be taken of the fact that in small towns and villages, one does come across a large number of persons unauthorizedly practising medicine without a formal degree. There are repeat crack downs to prevent such unauthorized practice of medicine by the Government and their agencies, but still in remote areas, small towns and villages, quacks command medical practice and are trusted by the ingorant. The testimony of the deceased's wife, Smt. Shashi Bala, P.W.1, clearly shows that the deceased earlier worked as a compounder with his brother and then commenced practising medicine. Surprisingly, the Tribunal has noticed this evidence, but not drawn the obvious conclusion. Given these circumstances, there was no necessity at all for the Tribunal to have gone on an age calculation exercise, based on the certificate of registration of a private doctors association to determine the period of prior practice

mentioned in it and the number of years of practice credited to the deceased, comparing it with his age and hold that the deceased Jagdish Prasad, who died at the J.N. Medical College Hospital, Aligarh, was a man different from Dr. Jagdish Babu, the victim of the accident. The Tribunal has apparently ignored from consideration the consistent testimony of P.W.1 and P.W.3 that Jagdish Prasad was also called Jagdish Babu. The parentage of both men is the same. It is commonplace for a man to be referred to by his formal name, and another name as well. Calling some man, apparently well placed in life, with a 'Babu' added to his name, is also a practice in vogue in this part of the country.

36. The fact that Dr. Jagdish Babu has been mentioned in the certificate of registration issued by the Private Medical Practitioner Association of India has been given undue weight by the learned Judge in the Tribunal, because that certificate does not come from a statutory or formal professional body, where precision about name of the member ought to be expected.

37. The Tribunal has also doubted the identity of the victim of the accident and the man who died at the J.N. Medical College Hospital, Aligarh on 28.03.2001, because of the geographical distance between Police Station at Etah, where the accident was reported and the J.N. Medical College Hospital at Aligarh. This too is based on a misreading of evidence. According to the claimants, their witnesses as also the FIR, the accident happened at 11:00 a.m. It is true that the FIR about it was lodged at Police Station Kotwali Dehat, Etah at 2:05 p.m. on 22.03.2001, but that is no reference point to gauge time that would be taken for the deceased to be conveyed to the J.N. Medical College

Hospital, Aligarh. The FIR mentions that the victims were taken to the District Hospital, Etah. It has figured in the evidence of P.W.2, Chhotey Singh that Jagdish Prasad was referred from the District Hospital, Etah to the J.N. Medical College Hospital, Aligarh. There is no mention of the fact in all this testimony that at what time, Jagdish Prasad was referred by the hospital at Etah to Aligarh. Therefore, there is no basis for the Tribunal to have held that the distance between Police Station Kotwali Dehat, Etah and the Medical College at Aligarh could not be covered between 2.05 p.m. and 3.00 p.m. There is nothing to show in the evidence that Jagdish Prasad was at the Police Station till the FIR was registered. Logically as well, Jagdish Prasad was critically injured and would have been rushed to Hospital and not to the Police Station. The finding of the Tribunal, therefore, based on gauging of the time required to travel between Etah and Aligarh in order to disbelieve the victim's identity is based on flawed reasoning.

38. The Tribunal has also doubted the identity of the man, who died at the J.N. Medical College Hospital, Aligarh on ground that there is no document of treatment or reference relating to Jagdish Prasad from the District Hospital, Etah, where he was admittedly taken in the first instance for medical aid. The Tribunal has thought that once in the evidence it has figured that Jagdish Prasad was referred from the District Hospital, Etah to the J.N. Medical College Hospital, Aligarh, there ought to have been a letter of reference, whereas there is none. The approach of the Tribunal, apart from being hairsplitting and not in keeping with inquisitorial jurisdiction that the Tribunal exercises in judging a motor accident claim, is flawed,

because in the emergency of a motor accident victim, one can expect the doctors at the District Hospital, Etah, to have quickly shunted the victim to the higher centre at Aligarh, without formally admitting him, administering some treatment and writing a letter of reference. There is no question put to the claimants' witnesses in this regard. Therefore, absence of documents of treatment or referral from the District Hospital, Etah are hardly of consequence. The Tribunal has most of all erred in disbelieving the testimony of Chhotey Singh, who was an extra man on the pillion. The Tribunal has committed a manifest error in opining that the presence of this witness on the scene of accident is doubtful, because, there is no injury report produced with regard to him, and his name does not figure in the list of witnesses, carried in the charge-sheet relative to the accident. In the testimony of P.W.2, Chhotey Singh, it is said in his cross-examination at the instance of the Insurers :

मुझे भी दुर्घटना में चोट आई थी लेकिन थोड़ी देर में ही मुझे होश आ गया था।

यह कहना गलत है कि मैं घटना के समय मौजूद नहीं था। और झूठी गवाही दे रहा हूँ।

39 . There is no reason to disbelieve that Chhotey Singh was not an extra-pillion on the ill-fated motorcycle, merely because his name does not figure in the list of witnesses that the Police have filed as part of the charge-sheet. As to the injury reports, Chhotey Singh was not confronted with the question at all as to why there was no document relating to injuries sustained by him. Rather, this witness has said that he did receive injuries, but regained consciousness in a short while. It is suggestive that his injuries were not serious at all and he might not have received any

kind of formal treatment at a Hospital, about which there may be record.

40. The Tribunal has also remarked that the truck driver was either not negligent or both the truck driver and the rider of the motorcycle were, because the site plan shows that the accident was a head-on collision in the middle of the road. The site plan is suggestive of the fact, but not at all conclusive on the point. There is an eye-witness account of one of the pillion riders, P.W.2 Chhotey Singh, where in the examination-in-chief, it is said :

मोटर साईकिल नीरज कुमार चला रहे थे। गांव किसी के पास पहुंचे तब सामने से एक ट्रक संख्या एच०आर०38ई-6399 ने तेजी व लापरवाही के साथ मोटर साईकिल में टक्कर मार दी। मोटर साईकिल बहुत धीमी गति से कच्चे पटरी पर थी। ट्रक वाले ने गलत Side में आकर टक्कर मार दी। मेरे भी चोट आई थी। ट्रक चालक व क्लीनर ट्रक छोड़कर भाग गये थे।

41 . There is no question put to this witness in the cross-examination on behalf of the Insurers that may suggest that the rider of the motorcycle was also equally negligent.

42. Quite apart, the fact as to which of the drivers of the two vehicles were guilty of negligence and in what proportion, so far as the claimants are concerned, the deceased being a pillion rider, is quite irrelevant. It is so because for the claimants, it is a case of composite negligence. It is well settled that in a case of composite negligence, the claimants are entitled to proceed against both or any one of the joint tortfeasers and recover the entire compensation from one of them as the liability is joint and several. Reference in this regard may be made in the decision in **Khenyei v. New India Assurance Co. Ltd.**³, where it is held:

20. This Court in *Challa Upendra Rao* [(2004) 8 SCC 517 : 2005 SCC (Cri) 357] and *Nanjappan* [(2004) 13 SCC 224 : 2005 SCC (Cri) 148] 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.

21. The same analogy can be applied to the instant cases as the liability of the joint tortfeasor 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—trailer-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 the claimant to recover from the owner of the trailer-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 tortfeasor 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.

22. What emerges from the aforesaid discussion is as follows:

22.1. In the case of composite negligence, the plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire

compensation as liability of joint tortfeasors is joint and several.

22.2. In the case of composite negligence, apportionment of compensation between two tortfeasors vis-à-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

22.3. In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/Tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of the payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/extent of their negligence has been determined by the court/Tribunal, in the main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

22.4. It would not be appropriate for the court/Tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award.

43. There is, therefore, no justification for the Tribunal to have gone into the question of the negligence vis-à-vis the claimants at all.

44. There is another aspect, which has been noted by this Court earlier also. The approach that the learned Judge in the Tribunal has adopted is one that a criminal Court would do while judging the prosecution case, which they have to prove beyond reasonable doubt. That cannot be the approach of a Motor Accident Claims Tribunal judging an accident claim under the Act of 1988. The jurisdiction is inquisitorial and the law, under which the Tribunal has to judge, is a social welfare legislation. The object of the Statute is to ameliorate the hardship of the unfortunate victims of motor accidents. The way, the Tribunal has dealt with evidence, is indeed one as if it were a criminal trial with the claimants being required to establish it by the criminal standard. In this regard, reference may be made to the decision of the Supreme Court in **Kusum Lata and others v. Satbir and others**⁴, where it is observed :

9. There is no reason why the Tribunal and the High Court would ignore the otherwise reliable evidence of Dheeraj Kumar. In fact, no cogent reason has been assigned either by the Tribunal or by the High Court for discarding the evidence of Dheeraj Kumar. The so-called reason that as the name of Dheeraj Kumar was not mentioned in the FIR, so it was not possible for Dheeraj Kumar to see the incident, is not a proper assessment of the fact situation in this case. It is well known that in a case relating to motor accident claims, the claimants are not required to prove the case as it is required to be done in a criminal trial. The Court must keep this distinction in mind.

45. Except for the finding on Issue No.3, as regards the validity of the insurance policy, this Court is of opinion

that the Tribunal has committed manifest errors of law in answering the other issues, particularly so as its findings on Issues Nos.4 and 5 have been rendered under the shadow of all that it has found on Issue No.1.

46. So far as Issue No.2 is concerned, this Court thinks that if the matter has to go back to the Tribunal, the parties should have further opportunity to establish the factum whether the driver of the offending truck and the rider of the motorcycle indeed held valid driving licenses.

47. In the opinion of this Court, the Tribunal, now competent under the Act of 1988, must try the petition de novo except for the findings on Issue No.3, which shall not be disturbed.

48. In the result, this appeal **succeeds** and shall stand **allowed in part**. The impugned judgment and award dated 05.05.2003 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No. 5, Aligarh is hereby **set aside**, with a remit of the matter to the Tribunal now competent under the Act of 1988 to try and decide such claim petitions. The Tribunal, before whom this matter now comes up, shall afford parties opportunity to lead further evidence on all such issues, where they seek to do so. The evidence, already recorded, shall be read. The Tribunal shall endeavour and decide the claim petition afresh in accordance with law, bearing in mind the guidance in this judgment, within six months' next from the date of receipt of a certified copy of this order.

49. Costs of this appeal shall abide by the event in the Tribunal.

(2023) 11 ILRA 773
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2023

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE VINOD DIWAKAR, J.

Second Appeal No. 623 of 2022

Garima Singh ...Appellant
Versus
Pratima Singh & Anr. ...Respondents

Counsel for the Appellant:
Sri Ram Kishore Pandey

Counsel for the Respondents:
Sri Prem Singh, Sri Ghanshyam Dwivedi

**Civil Law - Hindu Marriage Act, 1955 –
Section 11 – Family Courts Act, 1984 –
Section 7 – Right of First Wife to File
Petition for Declaring Second Marriage
Null and Void – Interpretation of “Either
Party Thereto” – Whether First Wife Can
Seek Declaration of Second Marriage as
Void under Section 11.**

Held: The first wife is entitled to file a petition under Section 11 of the Hindu Marriage Act, 1955, to declare her husband's second marriage, solemnized during the subsistence of the first marriage, as null and void. The phrase "either party thereto" in Section 11, when interpreted harmoniously with Section 7 of the Family Courts Act, 1984, and in light of the social welfare objectives of both statutes, includes the first wife as an aggrieved party entitled to seek such relief. A restrictive interpretation limiting the remedy to the parties of the second marriage would defeat the purpose of the Hindu Marriage Act, which aims to eradicate polygamy and protect the rights of legally wedded wives. The Family Courts Act, 1984, consolidates jurisdiction over matrimonial disputes, enabling the first wife to seek a

declaration of nullity in a family court. The principle of beneficial construction supports a broader interpretation to ensure justice and uphold the Act's intent. The earlier precedent in *Lakshmi Ammal Vs Ramaswami Naicker* (AIR 1960 Mad 6) and similar rulings, which restricted the remedy to parties of the void marriage, are not applicable post-enactment of the Family Courts Act, 1984, as they fail to align with the Act's objectives of promoting social justice and protecting women's rights.

Appeal dismissed.

Case Law Discussed:

1. Lakshmi Ammal Vs Ramaswami Naicker (AIR 1960 Mad 6) – Distinguished.
2. Amar Lal Goru Vs Vijayabai (AIR 1959 Madh Pra 400) – Distinguished.
3. Kedar Nath Gupta Vs Sm. Suprava (AIR 1963 Pat 311) – Distinguished.
4. Harmohan Senapati Vs Smt. Kamla Kumari Senapati (AIR 1979 Ori 51) – Distinguished.
5. Smt. Sheel Wati Vs Smt. Ram Nandani (1980 AWC 575) – Distinguished.
6. Birendra Bikram Singh Vs Kamala Devi (1994 SCC Online All 258) – Distinguished.
7. Smt. Ram Pyari Vs Dharam Das (1983 SCC Online All 294) – Relied on.
8. Balram Yadav Vs Fulmaniya Yadav (2016 SCC Online Chh 207) – Relied on.
9. Badshah Vs Urmila Badshah Godse (2014) 1 SCC 188 – Relied on.
10. A-G Vs HRH Prince Ernest Augustus of Hanover [1957] AC 436 – Referred.
11. Bourne (Inspector of Taxes) Vs Norwich Crematorium Ltd. [1967] 2 All ER 576 – Referred.

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard Shri Ram Kishore Pandey, learned counsel for the defendant/appellant and Shri Ghanshyam Dwivedi, learned counsel for the plaintiff/respondent no.1.

2. Before we advert to the question of law raised in the instant first appeal by Smt. Garima Singh- the second wife, it would be convenient to have a bird's eye view of the facts of the case.

3. Succinctly, the facts of the case are that on 06.05.2002, Smt. Pratima Singh married Raghvendra Singh in accordance with Hindu rites and ceremonies. Owing to certain matrimonial disputes, Raghvendra Singh filed a Matrimonial Case No.24 of 2012 titled as Raghvendra Singh Vs. Smt. Pratima Singh under Section 13 of the Hindu Marriage Act, 1955, before the court of Principal Judge, Family Court, Chitrakoot, for dissolution of marriage. In the aforesaid matrimonial case, Smt. Pratima Singh filed a counter-claim under section 9 of the Hindu Marriage Act, 1955, for restitution of conjugal rites. The Matrimonial Case No.24 was rejected, and the counter-claim filed by Smt. Pratima Singh was allowed with the direction to Raghvendra Singh to bring Smt. Pratima Singh to his house within one month from the date of order to perform matrimonial obligation.

4. Meanwhile, Smt. Pratima Singh learnt that Raghvendra Singh married Smt. Garima Singh and two children are born out of that wedlock, namely, Akshay Singh and Anaya Pratap Singh. It is also revealed that Shri Raj Narayan Singh- her father-in-law - had registered a will deed on 16.2.2018 in favour of Smt. Garima Singh and her two children and bequeathed all his

movable and immovable properties in their names and got recorded her name as the wife of Raghvendra Singh in the family register.

5. That aggrieved by the same, Smt. Pratima Singh- the first wife - filed a Criminal Complaint No.8 of 2019, under Sections 494, 495, 496 I.P.C., before the court of competent jurisdiction at Mau, District Chitrakoot titled as Smt. Pratima Singh Vs. Raghvendra Singh and another, and the same is pending trial.

6. The first wife had also challenged the registered will deed dated 16.2.2018 in Original Suit No.037 of 2019 titled as Pratima Singh Vs. Garima Singh before the learned Civil Judge, Mau. The suit was dismissed ex-parte vide judgement and order dated 12.2.2022.

7. The first wife being aggrieved by the solemnization of a second marriage by her husband with Smt. Garima Singh, during her lifetime, filed a Matrimonial Case No.97 of 2020 before the family court, under section 11 of the Hindu Marriage Act, 1955, to declare the second marriage as null and void being performed in contravention of section 5 of the Hindu Marriage Act, 1955.

8. During the pendency of this case, Shri Raghvendra Singh died on 10.1.2021. The second wife was also made respondent in the case, and she took a preliminary objection that the first wife couldn't file a case under section 11 of the Hindu Marriage Act, 1955 against her husband and second wife. The learned Principal Judge, Family Court decided the preliminary objection in favour of the first wife and listed the matter for recording of evidence.

9. The learned Principal Judge, Family Court construed the word “*either party thereto*” mentioned in section 11 of the Hindu Marriage Act, 1955 in the light of the surrounding text and declared that the first wife can file a suit of declaration of the second marriage as illegal and void.

10. Aggrieved by the same, the second wife preferred the instant first appeal before this Court with the plea that the first wife could not file a case under section 11 of the Hindu Marriage Act, 1955 against the second wife and her husband.

11. To buttress his argument, learned counsel for the second wife - the appellant herein, has placed reliance in the case ***Lakshmi Ammal Vs. Ramaswami Naicker and another***¹; ***Amar Lal Goru Vs. Vijayabai, Pusa Singroda***²; ***Kedar Nath Gupta Vs. Sm. Suprava***³; ***Harmohan Senapati Vs. Smt. Kamla Kumari Senapati and another***⁴; ***Smt. Sheel Wati Vs. Smt. Ram Nandan***⁵; and ***Birendra Bikram Singh and others Vs. Kamala Dev***⁶.

12. Shri Ram Kishor Pandey, learned counsel for the second wife, has primarily relied upon the *Lakshmi Ammal* (supra), in which the learned single judge of the Madras High Court had dismissed the appeal filed by Lakshmi Ammal- the first wife, against the order of the learned District Judge, as not maintainable under sections 11 & 17 of the Hindu Marriage Act, 1955, for declaring the marriage of her husband Ramaswami Naicker with Krishnammal- the second wife, as void and illegal.

13. The facts of *Lakshmi Ammal* (supra) case are similar to the facts of the instant appeal; for the sake of illustration,

relevant facts of that case are extracted herein as:

“Lakshmi Ammal, the appellant, was admittedly the legally wedded wife of Ramaswami Naicker. She had no children. Ramaswami Naicker married the second respondent, Krishnammal, as his second wife after Act XXV of 1955 had come into operation. Lakshmi Ammal wanted to get this marriage of her husband with Krishnammal declared void and illegal under S. 17 of the Act by filing this application under S. 11. Both the respondents contended that she had no right to file an application under S. 11, as she was not “a party to the second marriage” sought to be declared illegal and void. Accepting this contention, the learned District Judge dismissed the petition with costs.”

14. The learned single judge of the Madras High Court dismissed the appeal filed by the first wife and acquired a strict construction to the phrase “*either party thereto*” and held that section 11 of the Hindu Marriage Act, 1955, can only apply to those two persons who are entered into the marriage. The Court was of the view that “*either party thereto*” would mean two persons, namely, the actual parties to the marriage, as any marriage requires only two parties and no third party. The relevant part of the judgment dated 29.10.1958 is extracted herein below:

“The phrase is “either party thereto”. That can only mean two persons, namely, the actual parties to the second marriage—Ramaswami Naicker and Krishnammal. Any marriage requires only two parties and no third party. It will be contrary to sense and commonsense alike to bring in a co-wife, co-husband,

concubine, keep etc., on the ground that they also perform much the same functions as the husband and wife, the parties to the void marriage. The fact is that the law does not take facts to mean the same things. Thus, a concubine may, for many purposes, no doubt, serve the purpose of a wife but will not be a wife-in-law. So too, a co-wife cannot become "a wife under the second marriage," for she is already a wife under the first marriage and cannot be married again to her husband, at any rate, without the intervention of a divorce and cessation of marriage for some time. The void second marriage was only between Krishnammal and Ramaswami Naicker, and the phrase "either party thereto" in S. 11 can only apply to those two persons, and not to the appellant Lakshmi Ammal, the first wife, or to any others."

15. By placing reliance upon the inference arrived at by the learned single judge of Madras High Court, the learned single judges of various High Courts have taken similar view. It would be apt and fair to discuss, in brief, the findings of various High Courts on the question of maintainability of an application under section 11 of the Hindu Marriage Act, 1955, by the first wife against the second wife and husband to apply equality jurisprudence in social context judging.

16. The rationality of the learned single judge in the *Lakshmi Ammal (supra)* case has been adopted by the single bench of this Court in *Amarlal Goru Vs. Vijayabai, Pusa Singroda, Misc. (First) Appeal No.98 of 1957*, which was decided on 11.2.1959. The learned single judge has observed as follows:

"The respondent as a previously married wife of the appellant No.1 Amarlal

was entitled under section 10 of that Act only to a decree for judicial separation so far as she was concerned. She could not prefer any application to have the marriage between the appellants declared void under section 11. That section can be invoked by only those persons who are party to a marriage as would clearly appear from the words "either party thereto" used therein. The relief of declaring a marriage void has been intentionally confined to the parties to the marriage, and it is not open to any other person to make an application under section 11. It is true that the marriage between the appellants was contrary to the provisions in section 5 of the Act and was, therefore, invalid, but that is not the point in the case. The real question is whether any third party has a right to file an application under section 11 to declare the marriage null and void. The language used in that section admits of no doubt that the right cannot be exercised by anyone except the parties to the marriage, which is challenged. Under these circumstances, it was not open to the Court to declare the marriage between the appellants null and void."

17. The division bench of the Patna High Court in *Kedar Nath Gupta (supra)* case has also relied on the judgment of *Lakshmi Ammal (supra)* case and observed as follows:

"It was, therefore, conceded at the bar that, if the marriage of the appellant with Radharani took place on the 26th April 1957, it would be null and void. The question, however, is whether the Court was competent to grant a declaration under S. 11 on a petition presented by the first wife of the appellant. According to S. 11, the petition must be presented by "either party" to the marriage solemnized

after the commencement of the Act. It is plain, therefore, that such a petition can be entertained only if it is made by either of the two parties to the marriage. This was the view expressed by a Single Judge of the Madhya Pradesh High Court in Amartal Gour v. Aijayabai, AIR 1959 Madh Pra 400 and a Single Judge of the Madras High Court in Lakshmi Ammai v. Ramaswami Naicker, AIR 1960 Mad 6; and we are of the opinion that this is the correct view. Hence, in the instant case, only the appellant or his second wife, who were the parties to the marriage in question, could file such a petition; and as the first wife, Suprava Gupta (the respondent) was not a party to this marriage, she was not entitled to present a petition under Section 11."

18. The learned single judge of Orrisa High Court has also taken a consistent view in **Harmohan Senpati (supra)** case and observed as follows:

"The aforesaid view of mine is fortified by the decisions of the Allahabad High Court, Andhra Pradesh High Court, Madras High Court, Patna High Court and Madhya Pradesh High Court. In Jokhan Prasad Shuklav. Lakshmi Devi, ILR (1973) 2 All 853, has been held that a suit filed by the previous wife for a declaration that the second marriage of her husband was null and void is not barred by Section 19 of the Act. 'Either party thereto' clearly means either party to the marriage sought to be declared null and void. A petition by a person who is not a party to the marriage sought to be declared null and void will not lie under S. 11; reliance has been placed on the case reported in Lakshmi Ammal v. Ramaswarni Naicker, AIR 1960 Mad 6.

A Division Bench of the Patna Court in Kedar Nath Gupta v. Sm. Supraya,

AIR 1963 Pat 311, has also held that a petition for the annulment of second marriage under Section 11 of the can be presented only by the husband or his second wife, who were the parties to the marriage in question and the first who is not a party to the second marriage, is not entitled to present such petition under the Act. She may seek her remedy, if any, under the general law. In this case, the decision reported in Lakshmi Ammal's case (supra) has also been followed. A decision of the Madhya Pradesh High Court in Amarlal Goru v. Vijayabai, AIR 1959 Madh Pra 400, which is on the very same point, has also been followed by the Patna High Court."

19. The learned single judge of this Court in **Smt. Sheel Wati (supra)** case, by relying upon earlier judgments, has taken a consistent view and observed as below:

"I have, therefore, no hesitation in reiterating the view expressed by me in the referring order dated 27th September, 1979, for the reasons given therein and the further reasons given hereinabove, that marriage though null and void for contravening any of the conditions prescribed, by clauses (i), (iv) and (v) of Section 5 of the Act, has yet to be regarded a subsisting fact, and in that sense it cannot be said to be wholly non est in law, or a nullity, so long as it is not declared to be null and void by a decree of Nullity of the District Court on a petition presented by either party thereto against the other party to the marriage. No third person can treat the marriage to be void or have it adjudged to be null and void in any other suit or proceeding unless it has, already been declared to be so by a decree of Nullity of a District Court in accordance with the procedure prescribed by and under the Act; the only exceptions being the case where

the aggrieved spouse of the first marriage on account of whose being living the second marriage is void, prosecutes the other spouse for being punished for bigamy under Section 406 or 495 of the Penal Code, 1860, read with Section 17 of the Hindu Marriage Act; or the case where the aggrieved spouse prosecutes the guilty spouse for a contravention, of clauses (iv) and (v) of Section 5 under Section 18(b) of the Act."

20. The learned single judge of this Court again relied upon the findings of **Lakshmi Ammal (supra)** case in **Birendra Bikram Singh (supra)** case and observed as follows:

"In the case of Smt. Aina Devi v. Bachan Singh reported in AIR 1980 All 174 it was held:

"Section 11 specifically enables either party to the marriage to have it declared null and void by a decree of nullity against the other party. Section 11 does not confine the right to present a petition thereunder to the aggrieved party alone. On the other hand, it expressly confers the right to sue on either party to a marriage which contravenes any of the conditions of clauses (i), (iv) and (v) of Section 5".

It was also held; "the petitioner, having proved by positive evidence that the first respondent already had a married wife living in the person of respondent 2 was entitled to a decree declaring it as null and void. It could not be said that the petitioner was taking any advantage of her own wrong, for the petitioner's allegation that she was already married thrice before had been denied by the first respondent, which meant that even if it were a fact that the

petitioner had three husbands of previous marriages living when the first respondent married her, the first respondent was not at all aggrieved by that fact."

In the case of Lakshmi Ammal v. Ramaswami Naicker (sic) and another. It was held;

"The phrase "either party thereto" can only mean two persons namely, the actual parties to the marriage. Any marriage requires only two parties, and no third party. It will be contrary to sense and commonsense alike to bring in a co-wife, co-husband, concubine, keep, etc., on the ground that they also perform much the same functions, as the husband and wife, the parties to the void marriage. A co-wife cannot become "a wife, under the second marriage" for she is already a wife under first marriage, and cannot be married again to her husband, at any rate without the intervention of a divorce and cessation of marriage for some time. Hence the first wife cannot apply under Section 11 for declaring the marriage of the second wife as void under Section 17. The first wife is however not left remediless. She can file a suit, under the ordinary law, for a declaration that the marriage of her husband with the second wife is illegal and void, under Act XXV of 1955. The law, in its wisdom, has given a preferential treatment to the husband and wife vitally affected, and that comes under "Proper classification" cannot be called an "illegal discrimination offending Art. 14 of the Constitution, or any other Articles of the Constitution."

21. Whereas, Shri Ghanshyam Dwivedi, learned counsel for the first wife, respondent herein, relying upon **Smt. Ram Pyari Vs. Dharam Das and others**⁷ and

Balram Yadav Vs. Fulmaniya Yadav⁸, submits that in **Smt. Ram Pyari (supra)** case, a co-ordinate bench of this Court considered the issue that evolved in **Lakshmi Ammal (supra)** case, as was consistently followed, pre-enactment of the Family Courts Act, 1984. Thereafter, it took a different view and held that the second wife can also file a case under section 11 of the Hindu Marriage Act, 1955, even a third party to the marriage can also approach to the Court for declaring the marriage as illegal and void when they are affected with the marriage until it is barred by statute. One may at once bring a suit of one's choice, and not only the first wife but also anyone who is affected by the marriage performed in contravention of sub-section (i), (iv) & (v) of section 5 of the Hindu Marriage Act, 1955 would be entitled to bring a civil suit. The relevant portion of the judgment is extracted herein below:

“At this place it appears relevant to refer to the distinction between a void and voidable marriage. We have noted above that section 12 of the Hindu Marriage Act deals with cases where a marriage is void at the option of either party thereto. Its object is to lay down that until avoided, a voidable marriage should be regarded as good for all purposes. It also lays down the circumstances under which a marriage shall be held to be voidable and annulled by a decree of nullity. Sections 11 and 17 deal with void marriages. Under section 17 a person committing breach of Clauses (i), (iv) and (v) of Section 5 after the commencement of the Hindu Marriage Act is liable to be punished under Sections 494 and 495 of the Penal Code. It is true that the two sections deal with and lay down that the marriages performed in contravention of the clauses

referred to above would be void, but it would be folly to think that the legislature has enacted two provisions for the same purpose. Section 11 declares a marriage to be void, whereas Section 17 makes a party contravening Clauses (i), (iv) and (v) of Section 5 liable to punishment. These two sections, however, cannot be read as confining the rights only of the parties to a void marriage. There is a distinction between a void and voidable marriage. A void marriage is regarded as non-existent or as never having taken place. Both parties could so treat it to it without the existence of any decree annulling the said marriage.

A marriage is void where there is bigamy, consanguinity or within the degrees of prohibited relationship. In these cases, the Court will regard the marriage as never having taken place and no status of matrimony as ever having been conferred. Consequently, the parties, never having been husband and wife, either is competent to be called against the other. Consent of the parties performing the marriage in breach of Clause (i) of Section 5 cannot validate it. Such is not the position in case of a voidable marriage. A voidable marriage is regarded as valid and subsisting unless a competent Court annuls it until the decree of nullity is obtained in accordance with Hindu Marriage Act. The lis remains binding. So long as there is no decree, they will live and die as married persons with all the incidents attached to that estate. The expression 'void means null, ineffectual, having no force or binding effect. Since a marriage performed in contravention of Clauses (i), (iv) and (v) of Section 5 is void, it is incapable of being cured or ratified.

Precisely, for the above reason, it has been recognized by the Courts that a third party can bring a suit in a Civil Court for its annulment even after their death. If this is not held, the third party's rights would be seriously prejudiced without having any right to seek redress in a Court of law. As stated above, the case of a voidable marriage stands on a different footing. The right given to annulment of marriage is confined to the parties.

In Twenty v. Twenty (1946) 1 All ER 564, it has been held:

"Where the marriage is void ab initio, any person who has got any interest in the matter can challenge the marriage by filing a regular civil suit for the declaration that the marriage is a nullity. Such a marriage is no marriage at all and any spouse can ignore such a marriage".

In R. v. Algar (1953) 2 All ER 1381, a distinction between a void and voidable marriage has been brought about, and it has been laid down that a void marriage has no existence in the eye of the law. Therefore, our view is that where a marriage is bigamous, the marriage is regarded as null and void from the very beginning. The Law Commission, while considering the question of amending Section 11 observed:

"The Hindu Marriage Act is a piece of matrimonial law, and decrees of nullity, contemplated by it, are decrees passed by matrimonial Courts. Fundamentally, matrimonial Courts have concern only with the marital rights of the parties to the marriage (and incidentally with the rights of the children) but with nothing else. A petition for a decree of nullity in respect of a void or a voidable

marriage can be made only by either the husband or the wife. It would not be appropriate to provide that a petition for the purpose can be made by a stranger to the marriage. A third party (for example, a person interested in the estate of either the husband or the wife) can certainly question the validity of their marriage in a civil suit and obtain a finding, or he may even bring a suit for a declaration that the marriage was void. But such a decree made by a civil court will not be a decree of nullity, as contemplated by matrimonial law."

22. Before adjudication of the question of law, it would be appropriate to recite the undisputed facts that emerged between the parties. The brief facts are as follows:

22.1 On 5.5.2006, Smt. Pratima Singh solemnized marriage with late Raghvendra Singh as per Hindu rites and ceremonies.

22.2 Raghvendra Singh married Garima Singh during the lifetime of his first wife, and two son's were born out of the said wedlock.

22.3 Owing to certain matrimonial differences, Raghvendra Singh filed a suit for dissolution of marriage under Section 13 of the Hindu Marriage Act, 1955, against his first wife, Smt. Pratima Singh. The Principal Judge, Family Court, vide judgment and order dated 24.3.2018 dismissed the Matrimonial Case No.24 of 2012, and allowed the petition filed by the first wife under section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights with a direction to bring his wife within one month from the date of order besides other directions.

22.4 Raj Narain Singh- father of Raghvendra Singh- executed a registered will deed dated 16.2.2018 in favour of his grandsons and their mother, Smt. Garima Singh, and also got registered the name of Smt. Garima Singh as the wife of Raghvendra Singh in the family register.

22.5 The first wife challenged the said will deed dated 16.2.2018 in Original Suit No.037 of 2019 titled as Pratima Singh Vs. Garima Singh before the Civil Judge (Junior Division), Mau, Chitrakoot, which was dismissed ex-parte vide judgment and decree dated 12.2.2020.

23. Finding a conflict between the judgment of the division bench of the Patna High Court in *Kedar Nath Gupta (supra)* case and a co-ordinate bench of this Court in *Smt. Ram Pyari (supra)* case, the legal question has arisen before us, post-enactment of the Family Courts Act, 1984. That legal issue is formulated as follows:

"Whether the first wife is entitled to file a case under sections 11 & 17 of the Hindu Marriage Act, 1955, for declaring her husband's marriage with another woman, as null and void?

24. Learned counsel for the appellant- the second wife- heavily relied upon the series of judgments and ratio culled out in *Lakshmi Ammal (supra)* case and buttressed his argument by stating that the phrase "either party thereto" strictly means two persons who are actual parties to the second marriage - Raghvendra Singh and Smt. Garima Singh only. But he fairly submits that the first wife's legitimate children would acquire some rights, and their shares in the property may be affected by the children born out from the second wife, which are considered to be legitimate.

The legislature as has extracted the summary remedy of an application under section 11 of the Hindu Marriage Act, 1955, to the actual parties to the void marriage so that a third party may not have interfered harassingly by taking advantage of this cheap remedy of an application. He further submits that the first wife had been given the remedy to apply for divorce or judicial separation by taking rescue of sections 5, 11 & 17 of the Hindu Marriage Act, (XXV) of 1955, and further could file a declaratory suit for declaring the second marriage, as null and void.

25. *Per contra*, learned counsel for the first wife, respondent herein, submits that the Hindu Marriage Act, 1955, is a social welfare legislation and the rule of restrictive interpretation would not be made applicable in the interpretation of the phrase "either party thereto" for deciding the first wife's right as accrued under section 11 of the Hindu Marriage Act, 1955 to declare the second marriage as illegal and void. He further submits that after the enactment of the Family Courts Act, 1984, all the suits and petitions pending before the civil courts shall be tried and dealt with in accordance with the provisions of the Family Courts Act, 1984 and further invited our attention to section 7 of the Family Courts Act, 1984. The relevant portion of section 7 of the Family Courts Act, 1984, is extracted herein under:

"7. Jurisdiction.- (1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in

respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed for the purposes of exercising such jurisdiction under such law, to be a district court, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.”

26. Before advertng to the contentions raised by the learned counsel for the parties, it is judicious to deal with the statement of objects and reasons for enacting the Family Courts Act, 1984. In its 59th report (1974), the Law Commission stressed that in dealing with disputes concerning the family, the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure. The courts continue to deal with family disputes in the same manner as other civil matters, and the same adversary approach prevails. Therefore, the need was felt in the public interest to establish Family Courts for the speedy settlement of family disputes.

27. The objective of the Act is to provide for the establishment of family courts to settle family disputes and matters related to marriage, divorce, custody, guardianship, maintenance and other familial issues in a more efficient and

specialized manner and thereby the Family Courts Act, 1984 came into existence.

28. The key objectives of enacting the Family Courts Act, 1984 would include; (i). Simplification and expeditious resolution; (ii). Family courts are designed to handle exclusively family- related matters; (iii). Promotion of conciliation; (iv). Protection of womens' rights; (v). The welfare of children; (vi). Accessibility and affordability; and (vii) Quick and effective disposal of cases.

29. The Hindu Marriage Act, 1955 is a social and welfare legislation, and it has to be interpreted in a manner that advances the object of the legislation. It intends to bring about social reforms. It is a settled principle of the interpretation that this Court cannot interpret socially beneficial legislation on the basis as if the words therein are cast in stone. The Supreme Court has time and again cautioned the courts to adopt a purposive approach while dealing with the interpretation of statutes related to social welfare pragmatically and practically. Section 11 of the Hindu Marriage, Act provides that:

“11. Void marriages.- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto (against the other party), be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.”

30. Before coming to the statutory interpretation of the phrase “either party thereto” used in section 11 of the Hindu Marriage Act, 1955, it is instructive to place reliance on the Hon'ble Supreme

Court in ***Badshah Vs. Urmila Badshah Godse*** 9 the Court has observed as under:

"Of late, in this very direction, it is emphasized that the Courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as a mere "adversarial approach" may not be very appropriate. There are a number of social justice legislations giving special protection and benefits to vulnerable groups in society. Prof. Madhava Menon describes it eloquently:

"It is, therefore, respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social- economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process operates to the disadvantage of the weaker party. In such a situation, the judge has to be sensitive to the inequalities of the parties involved and positively inclined to the weaker party if the imbalance were not to result in the miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."

31. The legislature's intention is to be gathered from the words they employ. The Court should give restrictive meaning only to the words used in the statutes to avoid absurd results and hardships. However, the rule of strict construction says that while interpreting even penal statutes, the judge

should adopt that meaning which confers the benefit of the doubt to the accused.

32. The meaning of the statutory term can be gathered from its associated words. A word or phrase in an enactment must always be construed in the light of the surrounding text. As Lord Simmonds said in *A-G v. HRH Prince Ernest Augustus of Hanover*¹⁰, words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. Or as Stamp J. put it in *Bourne (Inspector of Taxes) v. Norwich Crematorium Ltd.*¹¹ The relevant part is extracted as:

“English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning you have assigned to them as separate words.”

33. Where a string of words is followed by a general expression that applies to the first and the other words and to the last, that expression is not limited to the last but applies to all. It is a rule in the construction of the statute that if particular words are followed on those which are more general, the more general word shall receive a confined construction, as what is first mentioned must be supposed to have been chiefly in the contemplation of the legislature.

34. In English, the word “*either*”, when used as a determiner, generally signifies two choices or possibilities. According to the Cambridge dictionary, the noun that follows “*either*” should be a familiar countable noun. The phrase “*either*

party thereto” commonly refers to one of the parties involved in a contract or legal agreement. By combining all the elements, “*either party thereto*” can be understood as “*one of the parties to that contract or legal agreement.*” This interpretation clarifies the specific role of one of the parties in the context of the mentioned statute or provision.

35. The Court's primary objective is to achieve the intended effect and interpretation of the enactment, considering the aims and objectives of the Act. By employing these various interpretative tools, the Court can arrive at a well-reasoned and comprehensive understanding of the phrase “*either party thereto*” within the specific context of the statute.

36. Among its various objectives, the Family Courts Act, 1984, was primarily enacted to streamline the culmination of proceedings initiated under the Hindu Marriage Act, 1955 effectively and efficiently under one umbrella. If two statutes are enacted with the purpose of supporting and collaborating with each other to achieve a common objective, the courts should primarily adopt a harmonious and purposive rule of construction to aid in interpreting the statutes, including the words and phrases used therein. Recognizing that words possess a dynamic nature rather than being fixed, the Court should embrace a dynamic approach that upholds the validity and intent of the legislation or scheme. Statutory interpretation is an exercise wherein the Court must discern the contextual meaning conveyed by the words in question.

37. The term “*either party thereto*” shall be interpreted in harmony with “*against the other party*”. The inclusion of

the phrase "*against the other party*" was intended to provide a clear and purposeful understanding of the section's scope. The provision aims to ensure that anyone aggrieved by the solemnization of a second marriage has the option to file a suit in the family court, aligning with the objectives for which the Family Courts Act, 1984, was established. The underlying intention behind enacting the Family Courts Act, 1984 was to consolidate all litigation pertaining to marital disputes, including matters related to marriage, divorce, custody, guardianship, property partition, maintenance, and other familial suits, under one comprehensive platform. This consolidation was aimed at facilitating the efficient resolution of such cases.

38. The earlier judgments, either by the single bench or by the coordinate benches of the High Courts, have derived their strength from the interpretation given effect to the phrase "either party thereto" from the *Lakshmi Ammal (supra)* case. The findings of the learned single judge could be summarised as follows:

38.1 The learned single judge was of the view that the phrase "*either party thereto*" in section 11 can only apply to those two persons who were party to the marriage and not to the first wife or any others.

38.2 The second view taken by the learned single judge has been based on the premise that if the first wife had not been given a right to file an application under section 11 of the Act, she would otherwise not have lacked remediless. Under ordinary law, she can file a suit for a declaration of her husband's marriage with the second wife as illegal and void under Act (XXV) of 1955. She must pursue the

costlier remedy of filing a suit under ordinary law.

38.3 Further, the Court was of the view that there is nothing extraordinary or illegal in this. Nor is the principle of equal law and equality before the law, guaranteed under Article 14 of the Constitution, effected. The legislature has restricted the summary remedy of an application under section 11 to the actual parties to the void marriage so that third party may not interfere harassingly by taking advantage of this cheap remedy of an application.

39. Through a comprehensive examination of the objectives laid out in both the Hindu Marriage Act, 1955, and the Family Courts Act, 1984, it becomes evident that the former endeavour to foster social stability, safeguard individual rights, and promote the well-being of families. To effectively realize these noble goals, the Court must embrace a pragmatic and harmonious interpretation of the provisions within the Acts. This approach harmoniously blends legal principles with the ever-evolving dynamics of contemporary society, thereby ensuring equitable and impartial resolutions for all parties involved. By striking this delicate balance, the Court can uphold the spirit of the laws while adapting to the changing needs and complexities of modern times.

40. Pragmatic construction entails a practical and realistic interpretation of the law, taking into account the actual implications and consequences of its provisions. On the other hand, harmonious construction involves interpreting different provisions in a manner that aligns with the overarching purpose and spirit of the legislation. Courts aim to reconcile conflicting provisions, thereby avoiding

contradictions and ensuring coherence within the legal framework. By adopting a dynamic approach, the Act can adapt and evolve over time while staying true to its fundamental principles. This allows it to effectively address the diverse and ever-changing needs of contemporary society. As India's societal landscape continues to evolve, the pragmatic and harmonious construction of the Act will remain crucial in achieving its underlying objectives efficiently. Embracing these interpretative methodologies will help in crafting just and relevant legal outcomes that uphold the Act's intended goals amidst the dynamic complexities of the modern era.

41. The Court must endeavour to develop a pragmatic and practical solution that effectively minimizes societal conflict while promoting harmonization of societal values with compassion and affordability. Unfortunately, the learned single judge failed to acknowledge a significant rationale behind the enactment of the Hindu Marriage Act, 1955, which was to eliminate the prevalent practice of polygamy in Indian society. Additionally, the Act aimed to establish a systematic mechanism to address such issues in a consistent and efficient manner. Recognising the historical context and objectives behind the enactment, the Court should strive to interpret and apply the law in a manner that upholds the Act's intent of eradicating polygamy while offering a fair and uniform resolution to related matters. By doing so, the Court can play a vital role in fostering social cohesion and promoting values that align with the principles of compassion and affordability for all parties involved.

42. The provisions of the Family Courts Act, 1984, as discussed earlier,

establish family courts specifically to handle jurisdiction related to matrimonial disputes. Section 7 of the Family Courts Act outlines the jurisdiction exercisable by district courts or other subordinate civil courts for suits and proceedings referred to in the Explanation. This provision should be interpreted harmoniously in conjunction with the phrase "either party thereto" used in section 11 of the Hindu Marriage Act, 1955.

43. The phrase "*either party thereto*" draws meaning from the Explanation provided in section 7 of the Family Courts Act. Moreover, when examining the surrounding text and context, it becomes evident that the intention is to give full effect to and interpret the Act purposefully. The remedy proposed by a learned single judge in the *Lakshmi Ammal (supra)* case, which is more expensive and time-consuming, has lost its efficacy over time, especially after the enactment of the Family Courts Act in 1984.

44. The narrow interpretation given to the phrase "*either party thereto*" should not apply in cases where provisions of social welfare legislation are invoked. Such a restrictive interpretation would affect the principle of equal protection of laws and equality before the law, guaranteed under Article 14 of the Constitution. It would also negatively impact the rights of the first wife, as guaranteed under Article 14 and the provisions of the Family Courts Act, 1984.

45. If the first wife is deprived of seeking a remedy under Section 11 of the Hindu Marriage Act, it would defeat the very purpose and intent of the Act. The protection offered to legally wedded wives under sections 5, 11, and 12 of the Hindu

Marriage Act would become insignificant in such a scenario.

46. Even if the meaning of the phrase "*either party thereto*" is considered to be unclear or ambiguous, the principle of beneficial construction should be applied to determine its intent. There is no justification for interpreting section 11 in a way that restricts its scope or narrows down its meaning. The purpose of granting a decree of nullity is to identify flaws in the marriage and subsequently declare it as void.

47. In the process of beneficial construction, the Court should lean towards an interpretation that serves the interests of justice and aligns with the broader objectives of the law. By doing so, the Court can ensure that the remedies available under section 11 are not unduly limited, and individuals seeking relief are not unjustly deprived of their rights. The ultimate aim of granting a decree of nullity is to annul a marriage that is found to be invalid from its inception, effectively treating it as if it never existed. Therefore, it is essential to interpret the relevant provisions in a manner that facilitates a fair and just outcome for the parties involved.

48. In conclusion, we uphold the family court's decision, which grants the first wife, the respondent in this case, the right to file an application under section 11 of the Hindu Marriage Act. This application seeks the declaration of the second marriage as illegal and void. The Court affirms the validity of the impugned ruling, allowing the first wife to pursue legal recourse to nullify the second marriage on the grounds of its

illegality. Accordingly, appeal is dismissed.

(2023) 11 ILRA 787
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.11.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Habeas Corpus Writ Petition No. 337 of 2023

Mahesh (Minor) @ Kiran ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Dadu Ram Shukla (D.R. Shukla0, Manoj Kumar Singh

Counsel for the Respondents:

G.A.

A. Criminal Law -Constitution of India,1950-Article 226 - Indian Penal Code,1860-Section 363- The F.I.R., which was lodged by none other than the father of the detenu, no allegation of illegal detention of the detenu by respondent no.4 has been made-Now after more than one year, while filing writ petition through the mother of the detenu, for the first time, it has been alleged that the detenu has been kidnapped at the behest of respondent no.4- This is a clear case of improvement and changing the prosecution story so that the case of Habeas Corpus may be made-The Writ in the nature of Habeas Corpus cannot be issued in a routine and casual manner. The writ of Habeas Corpus is festinum remedium and unless there is a clear case established by the petitioner prima facie to show that the detenu is in illegal confinement no writ of Habeas Corpus can be issued. A Writ of Habeas Corpus cannot be issued in respect of any and every missing person more so when no named person is alleged to be responsible in the F.I.R. for the illegal detention of the person for whose production a writ is to be issued. The petitioner has failed to establish prima facie case of unlawful detention of her daughter. A Writ of

Habeas Corpus cannot be issued by this Court for tracing out a missing person particularly when the F.I.R. of missing has already been lodged more than one year back by the father of the detenu where there is no allegation of illegal detention.

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Home Secy (Pris.) & ors.. Vs H. Nilofer Nisha (2020) 14 SCC 161
2. UOI Vs Yumnam Anand M. @ Bocha @ Kora @ Suraj & anr.. (2007) 10 SCC 190
3. Nimananda Biswal Vs St. of Ori. & ors.. WPCRL No.124 of 2023

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

1. Supplementary Affidavit filed by learned counsel for the petitioner is taken on record.

2. This petition has been filed by the detenu through her next friend Smt. Meena @ Kiran (mother of the detenu) praying for issuance of a writ in the nature of Habeas Corpus directing the respondents to produce the corpus of the child/detenu forthwith.

3. Heard learned counsel for the petitioner as well as Shri Alok Tewari, learned A.G.A. for respondent nos. 1 to 3.

4. Notices to respondent no.4 is dispensed with in view of the proposed order.

5. Learned counsel for the petitioner has submitted that the detenu is missing since 25.6.2022 at 4.00 pm to 6.00 pm from Mohalla Shakti Nagar, Police Station Gazipur, Lucknow. He submits that some

scuffle took place between the child and respondent no.4 and on the very next day the child became missing, hence, an application was moved at Police station Gazipur. Thus it is apprehended by the petitioner that the detenu has been kidnapped by respondent no.4.

6. It has been further submitted that an F.I.R. under Section 363 Indian Penal Code regarding missing of the detenu was registered as F.I.R. No.326 of 2022 under Section 363 I.P.C., Police Station Gazipur, District Lucknow. It is alleged in the F.I.R. by the complainant Ramtej, who is the husband of the deponent of this petition, that his son Mahesh, aged about 9 years went missing from yesterday between 4.00 pm to 6.00 pm. He used to drink shikanji for the last two months and he had developed some relationship with shikanji seller and he was last seen on the shikanji shop. No allegation in the F.I.R. whatsoever has been made against the respondent no.4 regarding illegal detention. Pamphlet regarding the missing of the detenu have been pasted in the local area of the Police Station Gazipur one of which pamphlet is also on record. Nothing except missing of the detenu has been mentioned in the F.I.R. as well as in the pamphlet. The F.I.R. was lodged on 27.6.2022. Now the writ petition is filed after more than one year i.e. on 17.10.2023 by the mother on behalf of the detenu by making improvement in the prosecution case alleging that Mahesh appears to have been kidnapped by unknown miscreants at the behest of respondent no.4. Still no clear statement has been made by the deponent in this petition that the detenu has been illegally detained by respondent no.4. The facts pleaded in the writ petition are definite improvement from a story of the prosecution in the F.I.R. which has been

alleged by none other than father of the detenu.

7. Learned counsel for the petitioner has relied on a judgement of the Hon'ble Supreme Court in the case of *Home Secretary (Prison) and others vs. H.Nilofer Nisha reported in 2020(14) SCC 161*.

8. Learned A.G.A. for the respondent State, on the basis of instructions received, which is taken on record, has submitted that the investigation was started immediately after lodging of the F.I.R. for search of the missing child/detenu. DCRB has been informed and posters have been pasted at the public places. The investigation is going on. Search operations are also going on. Information regarding missing has been given in various newspapers and broadcast in All India Radio and Doordarshan still the missing persons has not been recovered. During investigation one dead body has been received and his clothes and the DNA samples have been sent for Forensic Science Laboratory for the testing.

9. It is further submitted by learned A.G.A. that it is clear from perusal of the F.I.R. that it is a case of missing and F.I.R. was rightly lodged by the father of the detenu. After more than one year since the deponent of this petition being the mother is not satisfied with the investigation by making improvement in the prosecution story has alleged that at the behest of respondent no.4 some unknown miscreants have kidnapped the detenu. He submits that where missing report has been lodged the petition of Habeas Corpus will not lie. In support of his contention learned A.G.A. has placed reliance on a judgment of High Court of Orissa at Cuttack passed in WPCRL No.124 of 2023 Nimananda Biswal versus State of Odisha & others.

10. Perused the record.

11. It is not disputed that earlier an F.I.R. was lodged by the father of the detenu which was registered as Case Crime No.326 of 2022 under Section 363 Indian Penal Code Police Station Gazipur, District Lucknow against unknown persons on 27.6.2022. While lodging the F.I.R. no allegation against respondent no.4 has been leveled by the complainant that he has kidnapped the detenu rather a simple missing F.I.R. was lodged and consequently the investigation started which is still pending. The information regarding missing of the detenu has been given to various new channels newspapers and pamphlets have been pasted across the city. However, no success has been gained by the police. It appears that in utter frustration and being annoyed by the investigation the petition has been filed by changing the prosecution story for the first time after more than one year by the deponent.

12. The law for issuance of Habeas Corpus is settled. The petitioner has to show as the condition precedent prima facie that the detenu is in unlawful detention before it prays the court for issuing the prerogative writ.

13. In the case of *Union of India Vs. Yumnam Anand M. alias Bocha alias Kora alias Suraj and another* reported in (2007) 10 Supreme Court Cases 190, Hon'ble Supreme Court held that though it is a writ of right, it is not a writ of course and the applicant must show a prima facie case of his unlawful detention. Paragraph 7 of the judgement is reproduced as under:-

"7. Article 21 of the Constitution having declared that no person shall be

deprived of life and liberty except in accordance with the procedure established by law, a machinery was definitely needed to examine the question of illegal detention with utmost promptitude. The writ of habeas corpus is a device of this nature. Blackstone called it "the great and efficacious writ in all manner of illegal confinement". The writ has been described as a writ of right which is grantable ex debito justitiae. Though a writ of right, it is not a writ of course. The applicant must show a prima facie case of his unlawful detention. Once, however, he shows such a cause and the return is not good and sufficient, he is entitled to this writ as of right."

14. This Court has taken notice of the fact that in the F.I.R., which was lodged by none other than the father of the detenu, no allegation of illegal detention of the detenue by respondent no.4 has been made. Now after more than one year, while filing writ petition through the mother of the detenue, for the first time, it has been alleged that the detenu has been kidnapped at the behest of respondent no.4. This is a clear case of improvement and changing the prosecution story so that the case of Habeas Corpus may be made.

15. So far as case of Home Secretary (Prison) and others (surpa) relied upon by learned counsel for the petitioner is concerned in support of his arguments, a perusal of the said judgement shows that the writ petition was filed by the detenue seeking release from the prison at the strength of some government order issued by the State government for premature release of convicted persons. The facts of this case are quite peculiar and do not apply to this case at all. Rather it has been held in this case by Hon'ble Supreme Court that

before issuing any writ of Habeas Corpus this Court must come to the conclusion that the detenu is under detention without any authority of law.

16. The Writ in the nature of Habeas Corpus cannot be issued in a routine and casual manner. The writ of Habeas Corpus is festinum remedium and unless there is a clear case established by the petitioner prima facie to show that the detenue is in illegal confinement no writ of Habeas Corpus can be issued. A Writ of Habeas Corpus cannot be issued in respect of any and every missing person more so when no named person is alleged to be responsible in the F.I.R. for the illegal detention of the person for whose production a writ is to be issued. The petitioner has failed to establish prima facie case of unlawful detention of her daughter. A Writ of Habeas Corpus cannot be issued by this Court for tracing out a missing person particularly when the F.I.R. of missing has already been lodged more than one year back by the father of the detenue where there is no allegation of illegal detention.

17. On due consideration of the law laid down by Hon'ble Supreme Court in the case of Nimananda Biswal (supra), Union of India Vs. Yumnam Anand M. alias Bocha alias Kora alias Suraj(supra) as well as Home Secretary (Prisons) and others Vs. H. Nilofer Nisha reported in (2020) 14 Supreme Court Cases 161, I am of the view that writ of Habeas Corpus cannot be issued in respect of missing person more so when no named person is alleged to be responsible in the F.I.R. for the illegal detention of the person for whose production a writ is sought to be issued.

18. Accordingly, a writ in the nature of Habeas Corpus fails and is accordingly dismissed.

(2023) 11 ILRA 791
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Habeas Corpus Writ Petition No. 1051 of 2022

Danish		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:

Sri Uttam Kumar, Sri Nitin Sharma

Counsel for the Respondents:

G.A., A.S.G.I., Sri Alok Ranjan Mishra

A. Criminal Law -Constitution of India,1950 - Indian Penal Code,1860-Sections 147, 148, 149, 298, 352, 324, 308 & 504 - Criminal Law Amendment Act, 2013- Section 7 -The present case is only a case of simply 'law and order' and would not fall within the ambit of 'public order'- The facts of the case that 2-3 boys after consuming the snacks from a street vendor going to home and were intercepted by few hooligans of a particular community, who allegedly assaulted them by sword, knife and iron rod, but fact remains that all the injured persons have sustained "simple injuries with a haematoma" over the head of injured- Thereafter the action of the police came into play whereby they have magnified the small incident into manifold using all sort of hyperboles and exaggerating the incident using their horses of imagination. The deployment of the police and the hours consumed by them would not going to convert the tone, texture and tenor of the case- no material on record to arrive at the satisfaction that detenu is in jail and his custody is imperative to prevent him from any activity or eventuality recorded u/s 3(2) of National Security Act-No subjective satisfaction while passing the detention order or extension order was recorded by the District

Magistrate-The District Magistrate neither in the order nor in his grounds of detention have provided any cogent reason attracting the public order- Detention period is not enumerated in the detention order and the same has been extended without there being any ground or cogent reason- The satisfaction recorded by the appropriate government regarding the detenu is absolutely ill-founded and based on malicious analysis of the facts-The impugned detention order is being passed only to frustrate the order of bail passed in favour of petitioner by the learned Session Judge- Thus, The detention order deserves to be revoked as State of U.P. as well as Central Government have failed to decide quintessentially the representation submitted by the detenu.(Para 1 to 24)

B. The breach of public order involves a degree of disturbance and it affects upon the life of the community in a locality which determines whether the disturbance amounts only to breach of law and order and not a public order. The difference between two concepts is in only one degree. An act affecting law and order may not necessarily also affect the public order and an act which might be prejudicial to public order may not affect the security of the State. Public order is synonymous with public safety and tranquillity and it is the absence of any disorder involving breaches of local significance in contradiction to national upheavals, such as revolution, civil strife, war, affecting the security of the State. (Para 22)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Subhash Bhandari Vs DM, Lko. (1987) 4 AIR SCC 685
2. Ramveer Jatav Vs St. Of U.P. & ors. (1987) AIR SC 63
3. Rekha Vs St. Of T.N. thru Secy to Govt. (2011) 5 AIR SCC 244
4. Mrs. T. Devaki Vs Govt Of T.N. & ors. (1990) AIR SC 1086
5. Dr. Ram Manohar Lohia Vs St. of Bih. & ors. (1966) AIR SC 740

6. Mahboob Vs UOI & 5 Ors (2019) 7ADJ 650 :HABC No.3895 of 2018 Kanu Biswas Vs St. of W.B. (1972) 3 SCC 831

7. St. of U.P. & anr. Vs Sanjai Pratap Gupta @ Pappu & ors. (2004) 8 SCC 591

8. Rakesh Kumar Vs Superintt. of Jail, Farrukhabad (2006) 9 ADJ 454 (All) (DB)

9. Sajid Vs St. of U.P. & ors. (2015) ACC 888

10. Lalit Gupta Vs St. of U.P. & ors. (2021) 5 ALJ 323

11. Ram Sewak Vs St. of U.P. & ors. in HABC No.30758 of 2021

(Delivered by Hon'ble Rahul Chaturvedi, J.
&
Hon'ble Mohd. Azhar Husain Idrisi, J.)

(1). Heard Shri Nitin Sharma, Shri Uttam Kumar, learned counsel for petitioner and Shri Ghanshyam Kumar, learned A.G.A.-I for the State of U.P. as well as Shri Alok Ranjan Mishra, learned counsel for Union of India.

(2). Pleadings have been exchanged between the parties and the matter is ripe for final submission. Perused the records and the written submissions advanced by respective counsels in support of their pleadings and arguments.

(3). By filing the instant Habeas Corpus Writ Petition the petitioner is invoking the powers of Article 226 of the Constitution of India, with the prayer, to issue a writ, order or direction in the nature of Habeas Corpus directing the respondent authorities to produce the detenu-petitioner Danish son of Jameel Ahmad before this Court so that he may be set at liberty forthwith unless wanted in some other case. In addition to this a writ, order or direction

in the nature of certiorari quashing the Order (No.05/J.A./N.S.A./2022) dated 06.09.2022 (Annexure No.7 to the writ petition) passed by the District Magistrate/Restraining Authority, Kanpur Nagar (respondent no.3) as approved by the State Government and the Advisory Board, which was later on extended from time to time.

(4). Before appreciating the legal submissions advanced by the respective counsels, it is desirable to give a bird's eye view to the factual aspects of the case:-

FACTUAL MATRIX :

(5). An F.I.R. was lodged by one Pratham s/o Mohar Singh on 15.7.2022 at 22.41 hours for the incident said to have taken place around 20.00 hours on the same date, which was registered as Case Crime No.342 of 2022, u/s 147, 148, 149, 298, 352, 324, 308, 504 I.P.C. and Section 7 of Criminal Law Amendment Act, against as many as 16 named persons, including the petitioner Danish, and 50 other unknown persons. The prosecution story mentioned in the F.I.R. in brief is, that the informant Pratham s/o Mohar Singh resident of Mohalla Pant Nagar, Police Station Bilhaur, Kanpur Nagar on 15.7.2022 around 08.00 in the evening, he along with his brother Rahul after having snacks from the roadside snack vendor, were coming back to their home. When they reached adjacent to Dr. Rahman's residence, on five motorcycle Shadan s/o Naseem, Mohd. Zaid s/o Mohd. Hasim resident of Rajiv Nagar and Kasib Khan, Danish Khan, Hasim Khan, Tamil Khan, Jahid Khan, Kamil Khan, Daud Khan, Shahnawaj Khan, Arbaz Khan, Sohail Khan, Babu Khan, Arif Khan, Asif Khan s/o Tauhid Khan, Hasim Qurashi s/o Ramzan and 50 unknown

persons, raising religious slogans and filthy abuses, assaulted the informant as well as his brother by sword, knife and butt of Tamancha.

In this criminal transaction, the assailants have sliced the neck of informant's brother Rahul and caused injuries to the informant. As a result of this attack, the entire locality was gripped into a severe panic and a charged atmosphere full of turmoil and upheaval.

On this factual matrix, the F.I.R. was got registered against 16 named and 50 unknown persons, whereby the petitioner Danish is named at serial no.4. Interestingly, only the names of accused persons have been mentioned without giving their parentage or their respective addresses.

(6). From the aforesaid, it is clear that this F.I.R. came into existence in the month of July, 2022. Needless to mention here that in June, 2022 city of Kanpur and Allahabad of the State of Uttar Pradesh have witnessed a severe communal tension on the eve of Nupur Sharma's statement. It seems that the local police was extra vigilant and they tried to give colour to every minor scuffle as a result of communal disharmony and tension. In this process, the police have roped in 16 named persons who all belonging to a particular community, without naming their parentage and their addresses. This explicitly shows a typical '*modus operandi*' of local police so that they may teach a bitter lesson to a particular community, argued by learned counsel for petitioner.

(7). The petitioner was arrested on 20.7.2022 in connection with above case crime number and was released on bail by

the learned District & Session Judge, Ramabai Nagar, Kanpur Dehat while allowing his Bail Application No.2127 of 2022 vide order dated 29.8.2022.

From the bail order, it is culled out that the injured Rahul has sustained only two injuries which are simple in nature, whereas the informant Pratham has received four injuries and yet another injured Sandip has also sustained two injuries on his person. According to N.C.C.T. Scan report of injured Rahul, there is haematoma found over his head. Fact remains, that the medical reports of Pratham, Rahul and Sandip indicates that none of these injured have sustained any life threatening injuries over their person. In fact, there was scuffle between the two groups which has been given colour to communal tension and disharmony by the police, and therefore, the petitioner was granted bail by the learned Sessions Judge.

(8). In order to justify the conduct local police, as a last resort, after getting a green signal from the higher police authorities, the In-charge Inspector, Police Station Bilhaur, Kanpur Outer have prepared an undated report addressed to S.P. Kanpur Outer for initiating the proceeding 3(2) of National Security Act, 1980. It is urged by learned counsel for petitioner that a small incident of two groups of course belonging to different communities was magnified by manifolds by local police and the In-charge Inspector have prepared a detailed report mentioning therein that "after holding a detailed investigation" the police have submitted a charge sheet against 12 named accused persons, including the petitioner Danish u/s 147/148/149/298/352/ 324/307/504/34 I.P.C. and Section 7 of Criminal Law Amendment Act and submitted its report

on 30.8.2022 for initiating the proceedings u/s 3(2) of National Security Act only against Danish. We have perused this report of the In-charge Inspector (annexed as Annexure-3 to the petition). The salient features of the said report is quoted herein below :

“उक्त लोक व्यवस्था छिन्न-भिन्न करने वाली घटना की खबर न्यूज चैनलों में प्रसारित होने से घटनास्थल तथा उसके आसपास के क्षेत्रों में भय का माहौल पैदा हो गया। आम जनता में असुरक्षा की भावना पैदा हो गयी। सामान्य जन-जीवन अस्त व्यस्त हो गया। जनपद तथा प्रदेश स्तर पर इस साम्प्रदायिक घटना की विभिन्न माध्यमों से चारो तरफ चर्चा होने लगी। इस वीभत्स घटना से घटनास्थल के आस-पास के क्षेत्रों में आवागमन ठप्प हो गया तथा सामान्य जन जीवन अस्त व्यस्त हो गया। घटनास्थल व आस-पास के क्षेत्रों में लोक व्यवस्था पूरी तरह छिन्न-भिन्न हो गयी। जिसे संभालने के लिए जनपद फर्रुखाबाद, इटावा, कन्नौज, कानपुर कमिश्नरेट, कानपुर आउटर के विभिन्न थाना क्षेत्रों से भारी पुलिस बल तैनात किया गया। शासन-प्रशासन के काफी अथक प्रयास के पश्चात आम जन-जीवन सामान्य हो पाया एवं लोक व्यवस्था सामान्य हो पायी। दिनांक 16.07.2022 समय 10.18 बजे तत्कालीन प्रभारी निरीक्षक अरविन्द सिंह सिसौदिया द्वारा देखरेख शान्ति सुरक्षा व्यवस्था व रोकथाम जुर्म जरायम के उपरान्त रो०आम में अंकित किया गया कि घटनास्थल पर पुलिस बल के साथ पहुंचा तो अभियुक्त व उनके साथीगणों द्वारा कारित की गयी, घटना से कस्बा बिल्हौर व आसपास की लोक व्यवस्था भंग होकर यातायात व आवागमन बंद हो गया लोगों द्वारा अपने घर के दरवाजों को बंद कर लिया गया। दुकानों के शटर आदि बंद होकर बाजार की लोक व्यवस्था छिन्न भिन्न हो गयी तथा आवागमन यातायात बंद हो गया जिसकी सूचना उच्चाधिकारीगण को दी गयी। विभिन्न थानों एवं जनपदों की पुलिस फोर्स को लोक व्यवस्था को पुनः सुचारू रूप से बनाये रखने के लिये लगाया गया पुलिस बल को कस्बा के विभिन्न मोहल्लों सड़कों, तिराहे, चौराहे, प्रतिष्ठान आदि स्थानों पर लगाया गया। उपरोक्त भंग हुई लोक व्यवस्था को पुनः सामान्य बनाये जाने हेतु पुलिस महानिरीक्षक कानपुर रेंज कानपुर, आयुक्त कानपुर रेंज कानपुर जिलाधिकारी कानपुर, पुलिस अधीक्षक कानपुर आउटर, अपर पुलिस अधीक्षक, क्षेत्राधिकारी बिल्हौर व अन्य क्षेत्राधिकारी गण के सहयोग से करीब 11 घंटे में भंग हुई लोक व्यवस्था को सामान्य स्थिति में कराया गया। विभिन्न स्थानों पर ड्यूटियां लगायीं गयी। जिसका उल्लेख दिनांक 16/07/22 समय 10.18 बजे

रो०आम प्र०सं० 63 पर थाना बिल्हौर कानपुर आउटर में किया गया। संलग्नक सं०-03 रो०आम की प्रति पेज सं०-52

घटनास्थल तथा उसके आस-पास के क्षेत्रों में लोक व्यवस्था बहाली हेतु तथा वादी मुकदमा के घर, पंतनगर मोहल्ले, आवागमन बहाली हेतु दिनांक 16.07.2022 से वर्तमान तक पुलिस बल लगाया गया, जिसका उल्लेख थाना बिल्हौर के रो०आम दिनांक 15/07/2022 से वर्तमान तक रो०आम में किया गया है। संलग्नक सं०-4 विभिन्न तिथियों की थाने की जी०डी० व अन्य थानों की जी०डी० पेज सं०-53-250”

“विवेचक द्वारा वादी मुकदमा प्रथम एवं चुटहिल राहुल, प्रथम, संदीप, संजय का बयान लिया गया तथा चश्मदीद साक्षियों का बयान भी अंकित किया गया। वादी मुकदमा ने अपने बयान में प्रथम सूचना रिपोर्ट का समर्थन किया। ”

“चुटहिल राहुल ने अपने बयान में बताया कि साहब दिनांक 15.07.2022 को मैं अपने भाई प्रथम व अपने जीजा श्यामजीत उर्फ शिवजीत के साथ कस्बे में छुन्ना की दुकान पर फिंगर चिप्स खाने गया था। फिंगर चिप्स खाकर लौटते समय डॉ० रहमान वाली गली में कस्बे का दानिश, जैद, शहनवाज, शादान के साथ करीब 10-15 लोग थे जिनके हाथ में सरिया, डंडा लिए हुए थे मुझे देखकर कहने लगे कि यही राहुल है इसको मारकर गिरा दो आज कोई भी हिन्दू बचकर नहीं जायेगा और बिना कुछ पूछे जांचे मेरे ऊपर हमला कर दिये तथा सरिया, डंडा लात घूसों से मुझे मारते रहे मैं बेहोश हो गया मुझे इसके बाद कोई जानकारी नहीं है जब मुझे होश आया तो मैंने अपने आप को अस्पताल में पाया। साहब जो देखा वहीं बताया मेरा अभी इलाज चल रहा है मैं अभी पूरी तरह ठीक नहीं हूँ, और मुझे अभी भी इन लोगों से भय व खतरा है। साहब यही मेरा बयान है। संलग्नक 09 पेज संख्या-420”

(9). The police reports, mainly relied upon the local electronic and print media reports whereby, various local news channels and local newspapers have published the news items making the small incident between two groups as sensational and exaggerating the same manifolds and thereafter giving a colour of communal

disharmony and communal tension. In the said report, the In-charge Inspector has quoted the headlines of newspapers 'Dainik Jagaran', 'Hindustan', 'Amar Ujala', 'My City Reporter' etc. to establish their case, that this was a spark, which could have led to a communal disharmony and tension in the locality and the police have to struggle a lot for eleven hours to calm down the situation.

(10). Shri Nitin Sharma, learned counsel for petitioner has drawn attention of the Court to the injury report of injured persons, indicating that all of them have sustained simple injuries over their person and except a small haematoma over the head of injured Rahul, none of the injured persons have sustained any grievous or life threatening injury over their person, but the local police as a matter of extra cautious have tried to give a colour of communal disharmony to an incident of minor marpeet and scuffle between two groups. It is further urged by learned counsel for petitioner that this action on the part of the police is an outcome of communal tension in Kanpur Nagar on 3rd June, 2022 which was erupted after the statement of Nupur Sharma's statement. Thereafter, the local police was extraordinarily on their toes and bent upon to give colour to every small situation/incident of law and order as a disruption of 'Public Order'.

(11). The matter was referred to the Circle Officer, Bilhaur, Kanpur Outer; Additional S.P., Kanpur Outer and S.P., Kanpur Outer mentioning therein that though the petitioner was admitted on bail by the learned Sessions Judge, Kanpur Dehat but remaining procedure is under the pipeline and if he comes out from jail, he would again indulge into such offence, and therefore, his detention u/s 3 of the

National Security Act is desirable and warranted. After receiving undated report, by In-charge Inspector, P.S.-Bilhaur, Kanpur Nagar, the S.P., Kanpur Outer on 3.9.2022 has blindly dittoed and put his seal of approval endorsing the proposed action u/s 3 of the National Security Act against the petitioner. On 3.9.2022 a letter was addressed to the District Magistrate, Kanpur Nagar, which, on the face of it transpires to be a 'carbon copy' of undated report given by the In-charge Inspector, Police Station Bilhaur, Kanpur Outer. There is complete non application of mind and rather this is a reiteration of exact words and phrases used by him. It is contended by learned counsel for petitioner, that this is not the spirit of the law to blindly reiterate the report of a subordinate.

(12). Soon after receipt of the communication from the S.P., Kanpur Outer, on 6.9.2022 the District Magistrate, Kanpur Nagar without wasting time blindly relying upon it, have passed an order u/s 3(3) of the National Security Act, which reads thus :

“चूँकि जनपद कानपुर नगर के जिला मजिस्ट्रेट के रूप में मेरा समाधान हो गया है कि श्री दानिश पुत्र जमील अहमद निवासी राजीव नगर कस्बा व थाना बिल्हौर जनपद कानपुर नगर उम्र 30 वर्ष को किसी भी ऐसी रीति में कार्यवाही करने से रोकने के उद्देश्य से जो कि लोक व्यवस्था के अनुरक्षण के प्रतिकूल है, ऐसा आदेश देना आवश्यक है।

अतएव राष्ट्रीय सुरक्षा अधिनियम 1980 (अधि०सं० 65/1980) की धारा 3 की उपधारा (3) द्वारा प्रदत्त अधिकारों का प्रयोग करके मैं एतद द्वारा यह निर्देश देता हूँ कि श्री दानिश पुत्र जमील अहमद निवासी राजीव नगर कस्बा व थाना बिल्हौर जनपद कानपुर नगर उम्र 30 वर्ष को उक्त अधिनियम की धारा 3 की उपधारा (2) के अधीन जिला कारागार कानपुर देहात में साधारण श्रेणी के बंदी के रूप में उक्त कारागार के अधीक्षक की अभिरक्षा में निरूद्ध किया जाये।

आज दिनांक 06-9-22 को मेरे हस्ताक्षर एवं मुहर से यह आदेश जारी किया गया।

संख्या: 05/जे०ए०/एन०एस०ए०/2022

दिनांक: 06-09-2022

(विशाख जी)

जिला मजिस्ट्रेट/निरोधक प्राधिकारी,
कानपुर नगर”

(13). The Court lays its hands to the order passed by the District Magistrate dated 6.9.2022 accompanied by a detailed order regarding the satisfaction of the District Magistrate/Detaining Authority, in which he mentioned that :

“मैंने निरुद्धी के औचित्य के सम्बन्ध में प्रभारी निरीक्षक बिल्हौर के प्रस्ताव व पुलिस अधीक्षक कानपुर आउटर, अपर पुलिस अधीक्षक कानपुर आउटर क्षेत्राधिकारी, बिल्हौर कानपुर आउटर की संस्तुतियों से युक्त आख्या का पूर्ण मनोयोग सहित गंभीरता से स्वतन्त्र एवं, न्यायिक मस्तिष्क का प्रयोग करते हुए अध्ययन, परिशीलन एवं मनन किया। संलग्नक संख्या (i), ए,बी,सी पेज सं० 01-19”

(14). Contention raised by learned counsel for petitioner, is that from the perusal of aforesaid, apparently it has come out that the District Magistrate while passing the alleged detention order under the National Security Act has never applied his own independent mind and discretion which he ought to have, but fact remains, that while passing detailed order not a single word has been added by the District Magistrate in it, rather it is a carbon copy of earlier orders by the local police officials.

Secondly, it has contended by learned counsel for petitioner that as per Section 13 of the National Security Act the

maximum period for which a person may be detained pursuant to any detention order, which has to confirm u/s 12 of the National Security Act, shall be of 12 months from the date of detention. Thus, on the strength of aforesaid mandatory provision, it is urged by the learned counsel for petitioner that the order must spell out the proposed period of detention in it, but in absence of this, the entire order of detention gets vitiated and the petitioner may be set at liberty on this score alone.

It is also contended by learned counsel for petitioner that the petitioner Danish had sent a detailed representation against the detention order u/s 3(3) of National Security Act dated 6.9.2022, annexed as Annexure-8 to the petition, on 16.9.2022, but it appears that same was also set at naught by the higher executive authorities.

(15). It is contended by learned counsel for petitioner that while passing the detention order, the petitioner was branded as an extremely arrogant, anti-social, provocative and dangerous to the communal harmony and his free roaming could be detrimental to society at large and there is eminent threat to adversely affect the public order. Learned counsel for petitioner has refuted the unfounded allegation of branding the petitioner as threat to the society at large. It is urged by learned counsel for petitioner that this is nothing but a handi-work of local police who wanted to show his ‘good work’ by falsely implicating the petitioner applying the provisions of draconian law. It is further urged by learned counsel for petitioner that at the best, it could be said that it is a case of ‘law and order’ and by no stretch of imagination, it could be said that the petitioner was never involved in any

activity which could be said to be detrimental to the 'public order'. There is no justifiable or bona fide reason or ground for detention of poor petitioner under Section 3(2) of the National Security Act and there are no ingredients to attract this serious provision of the National Security Act in the present facts of case.

(16). It is submitted by learned counsel for petitioner that petitioner is completely an innocent young lad, having not a single criminal case to his credit, despite that, he has been branded as potential threat to the society in a colourable exercise of power vested in the local police. The local police mischievously magnified the small case to manifolds and after using the hyperboles and on that basis the police have kept the petitioner for an unspecified time into jail. There are number of procedural fallacies, according to petitioner's counsel, which touches the core issue of detention. Petitioner is a young lad of 30 years and has engaged himself in two-wheeler mechanic job. As per the allegations made in the F.I.R. that the only sin of petitioner is that he is Muslim by community and the local police horrified by the previous month's incident at Kanpur, rather misusing their powers booked the innocent persons by applying the serious provisions of National Security Act.

(17). Shri Alok Ranjan Mishra, learned counsel for Union of India has filed his counter affidavit as well as written submission. The Court has an occasion to peruse the counter affidavit sworn by Ms. Meena Sharma, Under Secretary, Ministry of Home, Union of India, New Delhi. In the counter affidavit, learned counsel for Union of India has tried to justify the action of the police by making a submission that the

action was necessary to detain the petitioner under the National Security Act in order to maintain public peace and order so that the public tranquillity shall be maintained at all cost. Learned counsel for Union of India also submitted that the District Magistrate too has recorded his satisfaction while passing final order of detention u/s 3(3) of the National Security Act against the petitioner. From the various reports made by the police, it is apparent that the general tempo of life was under serious threat and the people at large in the area was horrified by any untoward incident, therefore, huge number of police personnel were deployed by summoning them from adjacent districts to maintain peace and tranquillity. The Police after making great deal and effort and after struggling eleven hours time, then only, any how they have succeeded in establishing the peace and tranquillity in the area. Not only this, the police was remained there on the spot for a long period, so as to ensure the public peace and tranquillity. The District Magistrate while passing the order have focused mainly on the credentials of petitioner that he is a man of criminal mentality and there is every likelihood that he would again indulge into same type of criminal offensive, if he is set at liberty and would endanger the "public order". It is not a case of "law and order" but where equilibrium of the society got disturbed and the tempo of life came under the immense threat, then in order to bring the normality in the life, it is desirable that such person shall be booked as a preventive measure. The pleading that petitioner has got no criminal antecedents is irrelevant considering the impact of alleged crime on the tempo of life in the locality. In this regard, to buttress his contention, learned counsel for Union of India has cited number of authorities namely, (i) *Kanu*

Biswas vs. The State of West Bengal, 1972 3 SCC 831; (ii) State of U.P. and another vs. Sanjai Pratap Gupta @ Pappu and others, (2004) 8 SCC 591; (iii) Rakesh Kumar vs. Superintendent of Jail, Farrukhabad, 2006 (9) ADJ 454 (All) (DB); Sajid vs. State of U.P. and others, (2015) ACC 888; Lalit Gupta vs. State of U.P. and others; (2021) 5 ALJ 323 and Ram Sewak vs. State of U.P. and others in Habeas Corpus Writ Petition No.30758 of 2021 decided on 14.9.2022.

(18). Learned A.G.A. too has filed counter affidavit on behalf of respondent no.1, 3 and 4, sworn by Shri Sabhapati Bind, Under Secretary, Home (Confidential Department), U.P. Civil Secretariat, Lucknow; Vishak Ganapathy Iyar, District Magistrate, Kanpur Nagar and Shashikant Singh, Senior Superintend, Central Jail, Naini, Prayagraj. In their respective affidavits, annexing the original orders of Advisory Board dated 21st October, 2022, confirming the order of detention by the District Magistrate dated 6.9.2022 and thereafter in the counter affidavit filed by the District Magistrate, he too tried to justify the action of his predecessor, in which he has admitted that the sponsoring authority In-charge Inspector, P.S. Bilhaur, Kanpur Outer has given an undated report to the S.P. Kanpur Outer through the Circle Officer recommending to initiate the proceeding against the petitioner under the National Security Act. The petitioner is a chargesheeted accused in Case Crime No.342 of 2022 and while he was in jail he also extended threats to the informant of the case, for which a Case Crime No.421 of 2022 u/s 504, 506 I.P.C. was registered. According to the District Magistrate, Kanpur Nagar the petitioner is a potential threat to the peace and tranquillity of the

society at large and thus it is desirable to keep him in jail for the period prescribed.

LEGAL DISCUSSION :

(19). We have heard the submissions advanced by learned counsel for petitioner as well as learned counsel for respondents with rapt attention. Shri Nitin Sharma, learned counsel for petitioner in sum and substance has raised the following points for consideration :

(i) The instant case relates to 'law and order' and not 'public order'.

(ii) There is no material on record to arrive at the satisfaction that detenu Danish is in jail and his custody is imperative to prevent him from any activity or eventuality recorded u/s 3(2) of National Security Act.

(iii) No subjective satisfaction while passing the detention order or extension order was recorded by the District Magistrate. The District Magistrate neither in the order nor in his grounds of detention have provided any cogent reason attracting the public order.

(iv) Detention period is not enumerated in the detention order and the same has been extended without there being any ground or cogent reason. No ground or reasoning attached to the detention order.

(v) The satisfaction recorded by the appropriate government regarding the detenu Danish is absolutely ill-founded and based on malicious analysis of the facts.

(vi) The impugned detention order is being passed only to frustrate the

order of bail passed in favour of petitioner by the learned Sessions Judge, Ramabai Nagar, Kanpur Dehat dated 29.8.2022.

(vii) The detention order of petitioner Danish deserves to be revoked as State of U.P. as well as Central Government have failed to decide quintessentially the representation submitted by the detenu.

(20). Learned counsel for petitioner while drawing attention of the Court to the legal authorities has relied upon the judgment of this Court in **Mahboob vs Union of India and 5 others in Habeas Corpus Writ Petition No.3895 of 2018 dated 5.4.2019 reported in 2019 (7) ADJ 650**. While referring to the established pronouncement of Hon'ble Apex Court, it is urged by learned counsel that the subjective satisfaction is imperative and to be recorded by the detaining authority keeping in view the legal parameters as established by consistent law in this regard which has been completely overlooked. In fact the present case is of 'law and order' and no iota of 'public order' is involved in it. The detaining authority has simply dittoed the recommendation of the sponsoring authority without any application of mind and he has blindly put a seal of approval over it.

(21). Learned counsel for petitioner has laid much emphasis to the effect that the present case is only a case of simply 'law and order' and would not fall within the ambit of 'public order'. The facts of the case that 2-3 boys after consuming the snacks from a street vendor going to home and were intercepted by few hooligans of a particular community, who allegedly assaulted them by sword, knife and iron rod, but fact remains that all the injured

persons have sustained "simple injuries with a haematoma" over the head of injured Rahul.

Thereafter the action of the police came into play whereby they have magnified the small incident into manifold using all sort of hyperboles and exaggerating the incident using their horses of imagination. The deployment of the police and the hours consumed by them would not going to convert the tone, texture and tenor of the case.

In fact this is not a documentary factum that the police were summoned from nearby police stations/districts and they were deployed for eleven hours. This is not the litmus test for any incident that the police was deployed for eleven hours, nor its publicity in newspapers would determine the nature and gravity of offence.

(22). In the case of **Mahboob vs Union of India** (supra) the Division Bench of this Court has throws much light on the issue at hand while referring the authorities of Hon'ble Apex Court, therefore, at this juncture it would be apt to quote the relevant portion of this judgment, as under :

"(11). Much has been contended by the counsel for the petitioner to the effect that the present is a case of only simple "law and order" and will not fall within the category of "public order". The questions of "law and order" and "public order" have been engaging the attention of the Court since time immemorial. A perusal of relevant case law in this regard would show that "public order" indicates something more than "law and order". The breach of public order involves a degree of disturbance and it affects upon the life of the community in a locality which

determines whether the disturbance amounts only to breach of law and order and not a public order. The difference between two concepts is in only one degree. An act affecting law and order may not necessarily also affect the public order and an act which might be prejudicial to public order may not affect the security of the State. Public order is synonymous with public safety and tranquillity and it is the absence of any disorder involving breaches of local significance in contradiction to national upheavals, such as revolution, civil strife, war, affecting the security of the State.

(12). In **Dr. Ram Manohar Lohia vs State of Bihar and others, 1966 AIR 740**, it has been held by the Apex Court that any contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. It was observed that offences against "law and order", "public order" and "security of the State" are demarcated on the basis of the gravity. It is the degree of disturbance and its affect upon the life of the community in a locality which determines whether the disturbance amounts only to breach of law and order though in the grounds of detention, the detaining authority had stated that by committing this offence in public, the detenu created a sense of alarm, scare and a feeling of insecurity in the minds of the public of the area and thereby acted in a manner prejudicial to the maintenance of public order which affected the even tempo of life of the community, but in fact it was a solitary case of robbery, it was held that mere citation of these words in the order of detention is more in the nature of a ritual rather than with any significance to the content of the matter. Thus a solitary instance of robbery as

mentioned in the grounds of detention is not relevant for sustaining the order of detention for the purpose of preventing the detenu from acting in any manner prejudicial to the maintenance of public order.

(13). The determining test in all such cases is "the act leads to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of society undisturbed." The expression "law and order", "public order" and "security of the State" are distinct concepts though always not separate. Every public order if disturbed, must lead to public disorder but every breach of the peace does not lead to public disorder. For example, when two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. (**Dr. Ram Manohar Lohia vs State of Bihar and others, AIR 1966 SC 740**).

(14). In **Mrs. T. Devaki vs Government Of Tamil Nadu and others, reported in AIR 1990 SC 1086**, the Apex Court has held that single incident of murderous assault on the Minister in a public place was prejudicial to the maintenance of public order. Any disorderly behaviour of a person in the public or commission of a criminal offence is bound to some extent affect the peace prevailing in the locality and it may also

affect law and order problem but the same need not affect maintenance of public order. The incident did not and could not affect public peace and tranquillity nor it had potential to create a sense of alarm and insecurity in the locality. The solitary incident as alleged in the ground of detention is not relevant for sustaining the order of detention for the purpose of preventing the petitioner from acting in a manner prejudicial to the maintenance of public order.

(15). *Learned counsel for the petitioner has further submitted that this is a solitary case and thus, there was no occasion for the detaining authority to have passed the preventive detention order. Reliance has been placed in this regard on the judgment of the Apex Court rendered in the case of **Rekha vs State Of Tamilnadu through Secretary to Government, reported in AIR 2011 (5) SCC 244**, wherein the Apex Court has held that if recourse to criminal proceedings would be sufficient to deal with alleged prejudicial activities, then the detention order would be illegal. Even If a person is liable to be tried in a criminal court for commission of a criminal offence or is actually being so tried, but the ordinary criminal law (IPC or the penal statutes) will not able to deal with this situation, then and only then, the preventive detention law be taken recourse to.*

(17). *Reference may also be made to a judgment of the Apex Court rendered in the case of **Ramveer Jatav vs State Of U.P. and others reported in AIR 1987 SC 63**, wherein the Apex Court has observed that it is difficult to infer from the solitary ground set out in the grounds of detention that the act alleged to have been committed by the petitioner would have disturbed*

public order as distinct from law and order or that one single act committed by the petitioner was of such a character that it could reasonably be inferred by the detaining authority that if not detained, he would be likely to indulge in such activity in future.

(18). *Reliance has also been placed on another judgment of the Apex Court rendered in the case of **Subhash Bhandari vs District Magistrate Lucknow, reported in AIR 1987 (4) SCC 685**.*

(19). *Thus, in view of the aforesaid facts and circumstances of the case and consistent legal position as enumerated above, we set aside the impugned detention order dated 19.9.2018 passed by the District Magistrate, Muzaffar Nagar, respondent no.3, as approved by the State Government on 1.11.2018 and all consequential orders by means of which the period of detention was extended from time to time.*

(20). *The writ petition is allowed. The petitioner, if not wanted in any other case, shall be released from custody forthwith in accordance with law after due communication of this order to the authorities concerned, once again in accordance with law."*

(23). *Keeping in view the totality of circumstances and the guidelines set up by the Hon'ble Apex Court as well as this Court in aforementioned cases, we set aside the impugned Order (No.05/J.A./N.S.A./2022) dated 06.09.2022 (Annexure No.7 to the writ petition) passed by the District Magistrate/Restraining Authority, Kanpur Nagar (respondent no.3) as approved by the State Government and the Advisory Board, as well as subsequent*

orders whereby detention of the petitioner has been extended time to time.

(24). The instant Habeas Corpus Writ Petition is ALLOWED. The petitioner, if not wanted in any other case, shall be released from custody forthwith in accordance with law after due communication of this order to the authorities concerned.

(25). No orders with regard to cost.

(2023) 11 ILRA 802
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.10.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Matters Under Article 227 No. 4547 of
 2023(Criminal)

Prashant Chaudhary **...Petitioner**
Versus
Ritesh Kumar Singh. **...Respondent**

Counsel for the Petitioner:

Sri Saroj Kumar Yadav

Counsel for the Respondent:

Sri Gyanendra Prakash Srivastava, Sri
 Chandan Kumar Mishra

Civil Law - Negotiable Instrument Act, 1881-Section138 - complaint clearly St.d that the notice was sent through a registered post and that it was never returned to the complainant- complaint discloses a date of service of notice- date of the receipt of notice is very much important - not necessary that any particular date as regard receipt of demand notice should mandatorily be mentioned in the complaint itself.

Petition dismissed. (E-9)

Cases cited:

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

2. Dashrathbhai Trikambhai Patel Vs Hitesh Mahendrabhai Patel & anr.; 2022 (4) Civil Court Cases 279 (S.C.)

3. Deepak Kumar & anr. Vs St. of U.P. & anr.; 2007 (2) Civil Court Cases 467 (Allahabad)

4. Ajeet Seeds Ltd.Vs K. Gopala Krishnaiah; (2014) 12 SCC 685

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

1. Heard Sri Saroj Kumar Yadav, learned counsel for the petitioner, Sri Chandan Kumar Mishra, Advocate holding brief for Sri Gyanendra Prakash Srivastava, learned counsel for the respondent.

2. By means of this petition, the petitioner has challenged the order dated 10.12.2020 passed by the Court of Metropolitan Magistrate, Kanpur Nagar in complaint case no. 82 of 2020 (Ritesh Kumar Singh vs. Panki Indane Gas Service through Prashant Chaudhary) filed under section 138 of the Negotiable Instruments Act, 1881, whereby the petitioner was summoned to face trial for an offence under section 138 of the Negotiable Instruments Act and also the order dated 20.01.2023 passed in Criminal Revision No. 29 of 2023 (Panki Indane Gas Service through Prashant Chaudhary vs. Ritesh Kumar Singh and Another), whereby the order of the trial court was affirmed.

3. The relevant facts are as below:-

The respondent-Ritesh Kumar Singh filed a complaint under section 138 read with section 142 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the N.I. Act"), with the allegation

that during business transactions between the two sides, an amount of Rs. 12,50,000/- became due on him. As part payment thereof, the opposite party issued a cheque. The cheque was returned to the complainant without encashment with the remark that 'Debit not Allowed'. The complainant, therefore, issued a demand notice within time by registered post. The opposite party did not repay the amount within 15 days of its service, therefore, he filed a complaint.

4. The submission of the petitioner is that there is nothing to suggest that demand notice was served on him, therefore, the essential ingredients for taking cognizance under section 138 of the N.I. Act were missing. It is further submitted that the amount, which fell due on him, was already paid by him, therefore, the summoning order is bad in law.

5. I went through the complaint, other papers which include a copy of the cheque, a copy of return memo given by the Bank and a copy of the notice. From the papers on record, it is revealed that cheque was dishonored on 07.11.2019. Notice was sent on 19.11.2019 through registered post and that no payment was made till 07.11.2019. The complaint was filed on 03.01.2020. The learned trial court, on the basis of the above, passed the order of summoning.

6. I also went through the order of the revisional court. The contentions which have been raised before this court were also raised before the revisional court. The revisional court dealt with each one of the objections/contentions raised by the revisionist and gave findings in para nos. 8, 9, 10 and 11 of the order. Learned revisional court observed that when a registered notice has been sent, there shall

be a presumption, unless otherwise shown, that the notice was served in usual course. The revisional court referred to the judgment of Supreme Court in ***C.C. Alavi Haji vs. Palapetty Muhammed*, (2007) 6 SCC 555.**

7. The only point which has been specifically and vehemently pressed before this court is that it was nowhere written in the complaint as to when the notice was served on the accused. It is further argued that no evidence has been given to demonstrate that notice was served on a particular date. The contention is that where no particular date of service of notice has been disclosed, the time period of 15 days cannot be presumed to run from some unknown day and therefore the cognizance could not be taken.

8. The petitioner has referred to a judgment of the Supreme Court in ***Dashrathbhai Trikambhai Patel vs. Hitesh Mahendrabhai Patel and Another*; 2022 (4) Civil Court Cases 279 (S.C.)** and a judgment of Allahabad High Court in ***Deepak Kumar and Another vs. State of U.P. and Another*; 2007 (2) Civil Court Cases 467 (Allahabad)**. I went through the judgments. In para no. 7, the High Court enumerated essentials which should have been fulfilled before the court could take cognizance of the offence under section 138 of the N.I. Act. It is argued that in the event of absence of any of the above mentioned necessary requirements, the offence shall not be made out. The relevant portion of para no. 7 is as below:-

"Thus, for making out an offence under Section 138, NI Act, four dates are very relevant to be mentioned in the complaint or at least they should be clear from the papers filed along with the filing of the complaint itself. These dates

are (I) date mentioned on the cheque; (ii) date of its deposit in the bank for encashment (for knowing its period of validity), the date on which the notice/memo's advise from the bank was received by the drawee/payee or holder of the cheque regarding its bouncing because of insufficiency of funds by using any phraseology for the same (for determining the period of notice, which is one month, from such a date), the date of notice given by the drawee/payee to the drawer/payer of the cheque (to determine fifteenth day so as to bring "cause of action" to life, in case the cheque money is not paid during this period), the date on which the said notice is received or served to the drawer/payer of the cheque (to determine the date on which the offence is made out, in case the cheque money is not paid within fifteen days of the service of the notice) and lastly, the date of filing of the complaint (for determining the jurisdiction of the Court to entertain the complaint within the prescribed period of limitation and complaint not being time-barred). If these dates are not perceptible from the complaint or papers accompanying it then the Magistrate has not jurisdiction to entertain the complaint for offense under Section 138, NI Act."

9. From the above observation, this much is clear that the date of the receipt of notice is very much important but it is not necessary that any particular date as regard receipt of demand notice should mandatorily be mentioned in the complaint itself. In judgment of Deepak Kumar and Another (supra), this High Court observed that in case dates are not revealed in the complaint, the same can be inferred from the paper on record.

10. The Supreme Court in *Ajeet Seeds Limited vs. K. Gopala Krishnaiah*; (2014) 12 SCC 685, specifically dealt with the absence of averments in a complaint about service of notice upon accused. In the aforesaid case, the Supreme Court agreed with the view taken in *C.C. Alavi Haji vs. Palapetty Muhammed (supra)*, the court explained the nature of presumptions which can be drawn under section 114 of the Evidence Act and under 27 of the General Clauses Act. It was held as below:-

"9. This Court then explained the nature of presumptions under Section 114 of the Evidence Act and under Section 27 of the GC Act and pointed out how these two presumptions are to be employed while considering the question of service of notice under Section 138 of the NI Act. The relevant paragraphs read as under:

"13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the

communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

"27. Meaning of service by post.- Where any Central Act or regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent

by registered post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be presumed. [Vide Jagdish Singh Vs. Natthu Singh (1992) 1 SCC 647; State of M.P. Vs. Hiralal & Ors. (1996) 7 SCC 523 and V.Raja Kumari Vs. P.Subbarama Naidu & Anr. (2004) 8 SCC 74] It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved."

10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business."

From the above judgment of the Supreme Court, the controversy which has been raised by the petitioner is set at rest.

11. In this case the complainant, in his complaint, clearly stated that the notice was sent through a registered post on

19.11.2019 and that it was never returned to the complainant. In view of the above statement in the complaint and in view of the papers produced viz, the cheque, the Bank memo, demand notice, the disclosure of material dates like, date of dishonor, date of sending the notice, the date on which 15 days elapsed, the date of the filing of the complaint clearly and explicitly mentioned in para no. 12 of the complaint, there remains no doubt that the petition is wholly without merit. It may specifically be noted that para no. 12 of the complaint discloses a date of service of notice as well, a fact which has been conveniently ignored by the accused petitioner all the while. In my view, an attempt to stall the proceedings has been made on the basis of non-existent ground.

12. I do not find any infirmity, illegality or irregularity in the summoning order dated 10.12.2020 as well as the order dated 20.01.2023. Therefore, this petition is hereby dismissed.

(2023) 11 ILRA 806

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 13.10.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Matters Under Article 227 No. 5460 of 2023(Criminal)

Data Ram & Ors.

...Petitioners

Versus

State of U.P. & Anr.

...Respondents

Counsel for the Petitioner:

Sri Arvind Srivastava-III, Sri Pradeep Kumar

Counsel for the Respondents:

G.A., Sri Rakesh Kumar Rathore, Sri Sanjeev Kumar

Criminal Law - Indian Penal Code, 1860 - Sections 323, 425, 504 & 506 - Against Summoning order - Code of Criminal Procedure, 1973 - Section 200 - Respondent no. 2's grievance is that his FIR was not lodged, his application to SSP ignored and his application under Section 156(3) CrPC treated as complaint - Complaint disclosed offences under Section 436 IPC and other sections regarding loot of household articles and money, not considered by Magistrate, petitioners were summoned under limited sections - Respondent no. 2 could not seek redress before district court, while petitioners pursued prolonged litigation of their choice - Despite engaging counsel, respondent no. 2 received no effective representation, indicating his inability to protest petitioners - Thus, at stage of summoning, no need to pass detailed order - Impugned order, being based on complaint's contents and evidence, cannot be termed non-speaking - Petition, being devoid of merit and filed with ulterior motive to deny justice to respondent no. 2 - Remedy for petitioners is to move application for discharge at stage of framing of charge or recording of St.ment. (Para 14, 15, 21)

Petition dismissed. (E-13)

List of Cases cited:

1. Lalan Kumar Singh & ors. Vs St. of Mah., 2022 LiveLaw (SC) 833
2. Anil Saran Vs St. of Bihar, (1995) 6 SCC 142
3. Kanti Bhadra Shah Vs St. of W.B., AIR 2000 SC 522
4. M/s Pepsi Foods Ltd. Vs Special Judicial Magistrate, AIR 1998 SC 128

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

1. Heard Sri Pradeep Kumar, advocate holding brief of Sri Arvind Srivastava, learned counsel for the

petitioners, learned AGA for the State and perused the record.

2. This petition under Article 227 of the Constitution has been moved to set aside the entire proceedings of Criminal Complaint Case No.138 of 2021 (Ram Sevak Vs. Data Ram and others) pending before the Additional Civil Judge (JD), Court No.5/Judicial Magistrate, Mainpuri.

3. The petitioners have taken ground that the impugned summoning order dated 05.03.2022 is *non est* and bad in law as the concerned court has passed the impugned order without there being any subjective satisfaction of committance of offence even without recording the prima facie case while no offence is made out against the petitioners. The court below has also overlooked that there are serious contradictions in the complaint and the statements of the witnesses. There is no medical examination and no injury was caused to the respondent no.2 resulting to as alleged incident which prima facie creates doubt the allegations made in the complaint. Respondent no.2 has filed a frivolous complaint against the petitioners to pressurise them so that they do not resist his illegal possession. The plot no.81 is a very big land and the share of the petitioners is only to the extent of an area of 0.4050 hectare and the petitioners have no concern about the rest of the plot no.81. No incident had taken place on the spot that too in the morning at 04:00 a.m. which is quite impossible because in the month of February mostly the sun rises at around 06:00 am. It is very much surprising that the petitioners got awake at around 04:00 a.m. and gone to the house of the respondent. The story is totally concocted and which cannot be believed. The complaint was filed after more than two

months. The police report dated 23.04.2016 did not disclose any such incident. The said report was totally ignored or disbelieved by both the courts below. There is a major contradiction in the statement of the complainant under Section 200 CrPC as he had only stated that the petitioners only slapped them and taken away the household articles alongwith Rs.2,000/- and put fire but nowhere stated that any injury was caused to him and his family members. On the other hand the witnesses namely PW-1 and PW-2 added some extra version in their statements that the petitioners were armed with *lathi* and *danda* and the petitioners beaten brutally but nowhere stated that what injury has been caused to the complainant and his family members.

4. The Apex Court in **Lalan Kumar Singh and others Vs. State of Maharashtra, 2022 LiveLaw (SC) 833**, specially held that the issuance of process is not a mere formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceedings exist in the case or not and the formation of such opinion is required to be stated in the order itself. In absence of any right and title over the land in question under what authority the complainant claimed to be in possession over the land. The entire story is bogus and does not require issuance of process against the petitioners. Hence, the impugned order be set aside.

5. In brief, facts of the case are that the respondent no.2, complainant moved an application Section 156(3) CrPC on 12.04.2016 to lodge an FIR against the petitioners on the ground that he had kept a hut on his land khasra no.81 area 0.607 hectare and had also kept household articles therein. On 16.02.2016 at about 04:00 a.m, Dataram, Vijay Pal, Mohar Pal

and Dharm Pal sons of Raj Kumar, Annu and their family members reached there, abused and directed to vacate the land. The respondent no.2 denied to vacate the land and when he said that the land is in his name where he was pulling on his life with his family, the accused persons started beating the applicants, his wife and his children. They took away the house hold articles alongwith box in which he had kept Rs.2,000/- and also two cots, two mattresses, two quilts, pots, one pair of silver anklet and other household materials and put the hut into fire. They also threatened that if he again informed the police, he and his family members would be killed. He visited the police station twice but his report was not lodged. The accused persons are the musclemen who often restrain his way and the family members also and threaten to kill them if they did not vacate the land in question. The applicant has also mentioned name of the witnesses as Rajvir, Anil and his daughters Mamta, Pratima and other eye-witnesses. The complainant further averred that he had given a letter to SSP on 01.04.2016 through post but no action was taken. Hence, he has moved the aforesaid application.

6. A report was called for from the concerned police station which was submitted on 23.04.2016. The application was converted into complaint and the statement of the complainant Ram Sevak under Section 200 CrPC and the statements of PW-1, Anil Kumar and PW-2, Rajvir were recorded under Section 202 CrPC. After hearing the argument, the accused persons were summoned under Sections 323, 425, 504 and 506 IPC. Being aggrieved, the petitioners had preferred a Criminal Revision No.33 of 2022 which was dismissed by the learned Sessions Judge on 19.04.2023. Being aggrieved by

both the orders, the petitioners have preferred this petition.

7. Learned counsel for the petitioners have argued that since the police report was not in favour of the complainant hence there was no occasion to summon the petitioners as accused.

According to this Court, a report summoned with regard to Section 156(3) CrPC is only to know as to whether any FIR has been lodged on the facts of the application or not. The police report cannot be basis to reject or allow an application under Section 156(3) CrPC.

8. So far as the non-rising and reaching on the place of occurrence at about 04:00 a.m. in the month of February is concerned, this Court is not in consonance with the opinion of the learned counsel for the petitioners. Even in winter season villagers awake by 04:00 a.m. and start agricultural works, ploughing the fields and irrigating the crops. It is also noteworthy that an accused would choose the time when there would be least resistance.

9. So far as the delay in filing the complaint is concerned, from the records it reveals that the applicant had approached the police station twice after the incident but his FIR was not lodged. It is very much clear from the police report that after the alleged occurrence the police had not visited the place of occurrence. It is nowhere mentioned in the police report that before sending the report to the concerned Magistrate, the concerned police had inspected the place of occurrence. If the petitioners rely on the police report, it is not absolutely in favour of the petitioners. In the very report it has also been mentioned

that the property in question belongs to both the parties i.e. the applicant-respondent no.2 and the petitioner no.1, Data Ram. It is also noteworthy that the petitioners are claiming only an area of 0.4050 hectare of khasra no.81. It has been mentioned by the petitioners in their criminal revision No.33 of 2022 that the area of khasra no.81 is about 26 bigha and in which in addition to the complainant (respondent no.2), revisionist and other villagers are also in possession. It has also been mentioned by the petitioners that the survey of the aforesaid khasra number has been completed and he was in possession since 2008. He has filed extract of khatauni and khasra which shows that petitioner no.1 is the bhumidhar with non-transferable rights of khasra plot no.81/4 area 0.405 hectare in which mustard had been sown in 1427 fasli. The petitioners did not file the khatauni and khasra with regard to the area which belongs to the respondent no.2. No map has been filed by the petitioners to ascertain the situation of their land. The petitioners have accepted in their revision that the respondent no.2 is also in possession over khasra no.81. It has not been said by the petitioners either in the revision or before this Court that on the alleged place of occurrence, they had sown mustard and the same has also not been mentioned in the police report.

10. It has been averred by the petitioners that there are variations in the statements and the version of the complaint. This Court has gone through the records and has not found any material variation in it.

11. So far as the lack of injury report is concerned, since it is not a case of any grievous hurt and the learned Magistrate has found it to be a case under Section 323

IPC with regard to the injury for which injury report is not very much required. Even if a person is beaten by legs and fists and some complaint of pain arises, the person responsible may be summoned under Section 323 IPC.

12. Section 425 IPC is about mischief. Section 504 IPC is about intentional insult with an intention to provoke breach of peace and Section 506 IPC defines criminal intimidation and threat to cause death or grievous hurt, etc. For these sections injury report is not required and only oral evidence is sufficient if the same is trustworthy.

13. From the above discussion, it has also been proved that the petitioners and the respondent no.2, both the parties have interest in khasra no.81. It is a matter of evidence as to whether the alleged occurrence had been caused by the petitioners or not. The law is this that even a trespasser cannot be evicted and no force can be applied against him without adopting the due course of law. As per the version of the complaint and the statement under Sections 200 and 202 CrPC, a *prima facie* case to summon the petitioners as accused is certainly made out.

14. In the facts and circumstances of the case there should be grievance to the respondent no.2 that firstly his FIR had not been lodged, his application to the SSP was not considered and when he moved an application under Section 156(3) CrPC to lodge the FIR, the same was also not accepted but it was treated to be a complaint. It is also noteworthy that the application/complaint bears the ingredients of Section 436 IPC and other sections regarding loot of the household articles and money but the same was also not

considered by the concerned Magistrate and the petitioners were simply summoned under the aforesaid sections. The respondent no.2 could not approach the district court for the aforesaid grievances but the petitioners started a long legal battle and are utilising the hierarchy of the courts of their choice. In this case the respondent no.2 had engaged counsel Sri Rakesh Kumar Rathor and Sri Sanjiv Kumar Rathor but they neither filed any objection/counter affidavit nor attended the Court when the case was taken up. It proves that the respondent no.2 is unable to contest/protest the petitioners.

15. According to this Court at the time of passing of summoning order there is no need to pass a detailed order. The impugned order is based on the evidence and the contents of the complaint. The impugned order cannot be said to be a non-speaking order.

16. Learned counsel for the petitioners relied on **Lalan Kumar Singh** (supra) in which the Apex Court has held that while passing the summoning order under Section 204 CrPC, the Magistrate is required to apply his mind as to whether sufficient ground for proceeding with the case exists or not.

In paragraphs-28 to 30 of the aforesaid judgment the principles in this regard have been laid down in the fact and circumstances of the aforesaid case where no formal summoning order was passed and the process were issued. The aforesaid proceeding relates about the summoning of a director and the matter was with regard to company law and an offence with regard to the Drug and Cosmetics Act, 1940 where no formal summoning order was passed. The order passed by the learned Magistrate

is being reproduced in paragraph-26 of the judgment which is as under:

“Take entry in register of criminal cases and issue summons against accused to ask them to appear in the court.”

17. Here the case is quite different and is mostly based on the oral and ocular evidence where a proper speaking summoning order has been passed. Therefore, this Court is of the view that the principles laid down in the aforesaid case cannot be applied blindly in favour of the petitioners.

18. In **Anil Saran Vs. State of Bihar, (1995) 6 SCC 142**, it has been held that at the stage of issue of process, it is not for consideration as to whether the offence has been made out and what defences are open to the accused after the issue of process.

19. In **Kanti Bhadra Shah Vs. State of West Bengal, AIR 2000 SC 522**, it has been held that it is quite unnecessary to write a detailed order at the time of issuing process.

20. Though in **M/s Pepsi Foods Ltd. Vs. Special Judicial Magistrate, AIR 1998 SC 128**, it has been held that the Magistrate has to carefully scrutinize the evidence to find out the truthfulness or otherwise of the allegations and then examine if there is prima facie evidence about commission of the offence before issuing summons to the accused persons. In this case the learned Magistrate had already examined the averments of the complaint and evidence thereon and thereafter has summoned the petitioners to face the trial.

21. According to this Court, the petition is devoid of merit and has been filed with ulterior motive only to deny the justice to the respondent no.2 and not to take legal recourse provided to him under the law. The remedy is very much open for the petitioners to move an application for discharge at the time of framing of charge or at the time of recording of statement as the case may be. Thus, the petition is liable to be dismissed accordingly.

ORDER

22. The petition is dismissed accordingly. The summoning order and the order passed by the revisional court are affirmed.

(2023) 11 ILRA 811

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 13.10.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Matters Under Article 227 No. 7011 of
2023(Civil)

**Top Filling Point Proprietor Rakesh
Agarwal, Rampur ...Petitioner**

Versus

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

Counsel for the Petitioner:

Sri Amrendra Nath Rai, Sri Sanjay Singh

Counsel for the Respondents:

G.A., Sri Abhishek Tiwari, Sri Mahendra Pratap Singh, Sri Rohit Singh, Sri Devesh Singh

Civil Law - Negotiable Instruments Act, 1881 - Section 138 - Against Summoning Order - Code of Criminal Procedure, 1973 - Section 200 - Complainant filed case

under Section 138 of Negotiable Instruments Act, producing evidence under Section 200 Cr.P.C., including cheque for ₹2,75,000 which was returned by Bank with remark "funds insufficient," return memo and demand notice - Trial court summoned accused, revisional court upheld order, dismissing revision - From perusal of order, it is noticed that revisional court observed absence of specific date regarding service of demand notice but found from track consignment, paper on record which belied revisionist's contention - Thus trial court appears to have presumed service of demand notice - Even if track consignment report is not filed, court may presume notice was shown to have been sent by registered post to correct address in ordinary course of business. (Para 3, 6, 10)

Petition dismissed. (E-13)

List of Cases cited:

1. Deepak Kumar & anr. Vs St. of U.P. & anr.; 2007 (2) Civil Court Cases 467 (Allahabad) (Para 7)
2. Dashrathbhai Trikambhai Patel Vs Hitesh Mahendrabhai Patel & anr.; 2022 (4) Civil Court Cases 279 (S.C.)
3. Ajeet Seeds Limited Vs K. Gopala Krishnaiah; (2014) 12 SCC 685

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

1. Heard Sri Sanajy Singh, learned counsel for the petitioner, Sri Mahendra Pratap Singh, learned counsel for respondent no. 2 and learned AGA for the State.

2. This petition under Article 227 of the Constitution has been filed with a prayer to set aside the order dated 19.07.2022, whereby the petitioner was summoned under section 138 of the

Negotiable Instruments Act, 1881 in complaint case no. 80 of 2019 and the order dated 01.06.2023 passed by the revisional court in Criminal Revision No. 305 of 2022, by which the summoning order was affirmed.

3. The relevant facts are as below:-

The complainant filed a complaint case under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the NI Act") against the accused. He produced evidence under section 200 Cr.P.C. and also papers. The learned court below heard the complainant and summoned the accused under section 138 of the NI Act. The papers which were produced included a cheque of Rs. 2,75,000/-, which was returned by the Bank on 02.04.2019 with a remark of "funds insufficient", the return memo and the demand notice dated 22.02.2019. The revisional court agreed with the order of the trial court and dismissed the revision.

4. The main contention of the petitioner is that the complainant could not show, by producing any evidence that in fact the notice was served on him, therefore, the essential condition for taking cognizance, as provided under section 138 clause (c) read with section 142(1)(b) of the NI Act was not fulfilled.

5. The contention of the respondent is that though there is no mention of the date on which the demand notice was actually received by the accused in the order passed by the learned trial court, however, the revisional court referred to the track consignment report of the Postal Department (paper no. 9Ka/2), hence the order of the trial court cannot be faulted.

6. From perusal of the order passed in revision, it is noticed that the the learned court of revision took up the above contention and observed that indeed there was no mention of any specific date, as regard service of demand notice, however it was found that there was track consignment, paper on record, which belied the submission of the revisionist.

7. The petitioner has referred to a judgment of Allahabad High Court in **Deepak Kumar and Another vs. State of U.P. and Another; 2007 (2) Civil Court Cases 467 (Allahabad)**. I went through the judgment. In para no. 7, the High Court enumerated essentials which should have been fulfilled before the court could take cognizance of the offence under section 138 of the N.I. Act. It said that in the event of absence of any of the necessary requirements, the offence shall not be made out. The relevant portion of para no. 7 is as below:-

"Thus, for making out an offence under Section 138, NI Act, four dates are very relevant to be mentioned in the complaint or at least they should be clear from the papers filed along with the filing of the complaint itself. These dates are (I) date mentioned on the cheque; (ii) date of its deposit in the bank for encashment (for knowing its period of validity), the date on which the notice/memo's advise from the bank was received by the drawee/payee or holder of the cheque regarding its bouncing because of insufficiency of funds by using any phraseology for the same (for determining the period of notice, which is one month, from such a date), the date of notice given by the drawee/payee to the drawer/payer of the cheque (to determine fifteenth day so as to bring "cause of

action" to life, in case the cheque money is not paid during this period), the date on which the said notice is received or served to the drawer/payer of the cheque (to determine the date on which the offence is made out, in case the cheque money is not paid within fifteen days of the service of the notice) and lastly, the date of filing of the complaint (for determining the jurisdiction of the Court to entertain the complaint within the prescribed period of limitation and complaint not being time-barred). If these dates are not perceptible from the complaint or papers accompanying it then the Magistrate has not jurisdiction to entertain the complaint for offense under Section 138, NI Act."

8. From the above observation, this much is clear that the date of the receipt of notice is very much important but it is not necessary that any particular date as regard receipt of demand notice should mandatorily be mentioned in the complaint itself. The day of receipt of demand notice can very well be inferred from the documents/evidence on record.

9. The petitioner also referred to a judgment of the Supreme Court in *Dashrathbhai Trikambhai Patel vs. Hitesh Mahendrabhai Patel and Another*; 2022 (4) Civil Court Cases 279 (S.C.). The Supreme Court in *Ajeet Seeds Limited vs. K. Gopala Krishnaiah*; (2014) 12 SCC 685, specifically dealt with the absence of averments in a complaint about service of notice upon accused. In the aforesaid case, the Supreme Court agreed with the view taken in *C.C. Alavi Haji vs. Palapetty Muhammed (supra)*. The court explained the nature of presumptions which can be drawn under section 114 of the Evidence Act and under 27 of the General Clauses Act. It was held as below:-

"9. This Court then explained the nature of presumptions under Section 114 of the Evidence Act and under Section 27 of the GC Act and pointed out how these two presumptions are to be employed while considering the question of service of notice under Section 138 of the NI Act. The relevant paragraphs read as under:

"13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

"27. Meaning of service by post.- Where any Central Act or regulation

made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be presumed. [Vide Jagdish Singh Vs. Natthu Singh (1992) 1 SCC 647; State of M.P. Vs. Hiralal & Ors. (1996) 7 SCC 523 and V.Raja Kumari Vs. P.Subbarama Naidu & Anr. (2004) 8 SCC 74] It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint

under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved."

10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business."

From the above judgment of the Supreme Court, the controversy which has been raised by the petitioner is set at rest.

10. In the instant case the trial court seems to have drawn a presumption of law as regard service of demand notice. In my opinion, even if the track consignment report is not filed, the court may presume service of notice in ordinary course of business, if it was shown that the same was sent by registered post on correct address.

11. In view of the above, I do not find any infirmity, illegality or irregularity in the summoning order dated 19.07.2022 as well as the order dated 01.06.2023.

Therefore, the petition lacks merit and is hereby dismissed.

(2023) 11 ILRA 815
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2023

BEFORE

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

Writ-A No. 661 of 2014

Smt. Pancho Devi @ Madhvi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Rakesh Kumar, Sri Manoj Yadav, Sri Rajendra Kumar Srivastava, Sri Rajesh Kumar, Sri Sanjeev Kumar Pandey, Sri Shashi Dhar Pandey

Counsel for the Respondents:

C.S.C., SriManish Goyal, Sri S.P. Singh, Ms. Bushra Mariyam

A. Service Law – UP State District Court Service Rules, 2013 – Rule 3(3) & 4 – UP Subordinate Civil Courts Inferior Establishment Rules, 1955 – Compassionate appointment – Qualification – After employee's death on 22.03.2011, widow's claim for compassionate appointment was rejected vide order dated 10.05.2011 against which writ was allowed remanding the matter for fresh decision – Again widow's application was rejected on 03.09.2013 on the ground of not possessing minimum qualification of Class VI as required under Rules, 2013 coming in force on 04.07.2013 – Validity challenged – Applicability of the Rule of 2013 – Held, right to consideration of an appointee for compassionate appointment is to be governed by the rules in force on the date of death of the employee in harness – If the petitioner's application had been examined in the correct perspective by the

learned District Judge, when it was first rejected vide order dated 10.05.2011, an order that did not find favour with this Court, the result would have certainly been different. (Para 8, 12, 18 and 20)

B. Interpretation of statute – Applicability of Rule – Determinate and fixed criteria or indeterminate and variable criteria – Dependability – *Bheemesh alias Bheemappa's case* relied upon – Held, interpretation as to the applicability of a modified Scheme should depend only upon a determinate and fixed criteria such as the date of death and not an indeterminate and variable factor. (Para 17 and 18)

Writ petition allowed. (E-1)

List of Cases cited:

1. MGB Gramin Bank Vs Chakrawarti Singh; (2014) 13 SCC 583
2. Secretary to Government Department of Education (Primary) & ors. Vs Bheemesh @ Bheemappa; AIR 2022 SC 402

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

This writ petition is directed against the order dated 03.09.2013, passed by the District Judge of Firozabad, bearing Administrative Order No. 90 of 2013, rejecting the petitioner's claim for compassionate appointment.

2. The petitioner's husband, the late Mahadev Prasad, was a permanent Class-IV employee in the establishment of the District Court, Firozabad. He met with an accident on 22.03.2011 and died the same day, still in harness. After her husband's demise, the petitioner moved an application before the learned District Judge, Firozabad, seeking compassionate appointment under the Uttar Pradesh Recruitment of Dependents of Government

Servants Dying in Harness Rules, 1974 (*for short, 'the Rules of 1974'*). The petitioner's application for appointment on compassionate ground lay unattended for a considerable period of time, leaving her with no option but to move this Court by means of Writ-A No. 27883 of 2011, seeking a direction to decide her application. When the said writ petition came on 13.05.2011, learned Counsel for the second respondent informed the Court that the petitioner's application had been rejected by the learned District Judge on 10.05.2011. Taking cognizance of the aforesaid statement made by learned Counsel for the respondents, Writ-A No. 27883 of 2011 was dismissed, with a direction to the learned District Judge, Firozabad to supply a copy of the order dated 10.05.2011 to the petitioner. The petitioner received a copy of the order dated 10.05.2011 issued by the Senior Administrative Officer, District Court, Firozabad, rejecting her claim for compassionate appointment.

3. It is the petitioner's case that a committee of two Judges of the Judgeship at Firozabad held the petitioner not entitled to be considered for appointment under the Rules of 1974. The aforesaid opinion was expressed by the committee of two Judges in their report dated 13.04.2011 and the said report was accepted by the learned District Judge, Firozabad vide order dated 10.05.2011. A true copy of the report dated 13.04.2011 and a copy of the order of the learned District Judge, Firozabad dated 10.05.2011, approving the said report communicated by the Senior Administrative Officer *vide* memo dated 17.05.2011, is on record.

4. The petitioner's claim for compassionate appointment was rejected

by the Committee on ground that the petitioner had passed her Class IVth examination, whereas according the U.P. Subordinate Civil Courts Inferior Establishment Rules, 1955 (*for short, 'the Rules of 1955'*), the minimum qualification for appointment as a Class-IV employee is Junior High-school. It is also averred in paragraph no. 11 of the writ petition that the late Mahadev Prasad's mother (Smt. Shakuntala Devi) along with her other son, Tinku Sharma also moved an application before the learned District Judge, Firozabad with the averment that Mahadev Prasad was unmarried and died in harness on 22.03.2011. On the foot of this allegation, appointment under the Rules of 1974 was sought in favour of Tinku Sharma, Mahadev Prasad's brother. The application moved by Smt. Shakuntala Devi and Tinku Sharma also received consideration by the Committee of two Judges in the report dated 13.04.2011. It was opined regarding Tinku Sharma's claim that he is not a family member, as defined under Section 2(c) of the Rules of 1974. It was held that for the said reason, Tinku Sharma was not entitled to appointment on compassionate grounds.

5. Smt. Shakuntala Devi along with Tinku Sharma filed Writ-A No. 52717 of 2011, challenging the order dated 10.05.2011 passed by the learned District Judge, Firozabad, with a further prayer that Tinku Sharma's case for compassionate appointment be considered in accordance with the Rules of 1974. The petitioner, in assertion of her rights, instituted Writ-A No. 35871 of 2011, also challenging the order dated 10.05.2011/17.05.2011, impugning it regarding the part that has negatived her claim. Both the writ petitions aforesaid were connected, heard together and decided by a common judgment and

order dated 03.05.2013. This Court *vide* judgment and order dated 03.05.2013, allowed Writ Petition No. 35871 of 2011, to wit, the petition filed by the petitioner and dismissed Writ Petition No. 52717 of 2011 (the one filed by Smt. Shakuntala Devi and Tinku Sharma). This Court directed the learned District Judge, Firozabad to consider the petitioner's claim, within a period of two months of the date of production of a certified copy of this Court's judgment and order.

6. In compliance with this Court's order dated 03.05.2013, the learned District Judge, Firozabad referred the petitioner's case to the Grievance Redressal Committee, headed by the senior-most Additional District Judge along with two other members; both the Additional District Judges posted at Firozabad. Pending consideration of the petitioner's application before the Committee, the U.P. State District Court Service Rules, 2013 (*for short, the Rules of 2013*) came into force with effect from 04.07.2013. The educational qualifications for appointment of Class-IV employees, prior to enforcement of the Rules of 2013, were governed by the Rules of 1955. While under Rule 11 of the Rules of 1955, educational qualifications for direct recruitment to the establishment mentioned a preference for the candidates who had passed their Junior High-school or equivalent examination and could read and write English characters and figures, there was no imperative of possessing these qualifications in order to maintain a valid candidature. By contrast, under Schedule-B read with Sub Rule-3(3) and 4 of the Rules of 2013, the minimum educational qualification prescribed for the post of lowest grade is a Class VIth certificate.

7. The Committee to whom the petitioner's case was referred were of opinion that under Schedule-B to the Rules of 2013 read together with Rule 3(3) and 4, the petitioner, who had passed her Class 4, is not eligible for any post of Group-D because the prescribed educational qualification was Junior High-school and for the post of a Sweeper-cum-Farrash, it was Class 6. The Committee further opined that according to the law laid down by the Supreme Court in **MGB Gramin Bank vs. Chakrawarti Singh**¹ the Rules of 2013 notified by then shall be applicable. The committee were, therefore, of opinion that the petitioner was not eligible for being appointed to any post in the Civil Court on compassionate grounds. They recommended that the petitioner's application be rejected. The learned District Judge went through the Rules of 2013 and found that the post at serial no.17 in Schedule-B was that of a Sweeper-cum-Farrash, a post that can be filled up by direct recruitment. The minimum qualification shown in the relevant column for the said post was Class VIth. Since the petitioner had passed her Class IVth examination, the Rules of 2013 notified on 04.07.2013 rendered her ineligible for appointment to any post in the Civil Court's establishment. The learned District Judge took note of the fact that this Court, in its judgment and order dated 03.05.2013, while directing a consideration of the petitioner's case, held that the educational qualifications have not been prescribed for the inferior staff in the establishment of the Civil Court. There is only a preference indicated for those holding certain qualifications.

8. This Court referred to the Rules of 1955 to direct the learned District Judge that he would examine as to whether in the

inferior establishments, there is any vacancy, where no educational qualifications are required, seeing the nature of the work, which is to be done by the appointee. It was also remarked that the learned District Judge, while passing the order impugned in Writ Petition No. 35871 of 2011, earlier preferred by the petitioner, had misread and misinterpreted the Rules of 1955. About this part of the remarks of ours in the judgment and order dated 03.05.2013, the learned District Judge said that though he had been directed to reconsider the petitioner's case for compassionate appointment by this Court, observing that there are certain posts in Group-D in the Civil Court establishment, where no educational qualifications are required, the Rules of 2013 had not been notified by that time. Now, the Rules of 1955 have been repealed and substituted by the Rules of 2013, and, according to the latter Rules, the minimum qualification for a post in the Civil Court establishment is a Class VIth certificate. Therefore, the petitioner is not eligible for appointment under the Rules of 2013. The learned District Judge also took into consideration the law laid down by the Supreme Court in the case of **MGB Gramin Bank** (*supra*) to hold that the petitioner cannot say that while considering her application, her case should be considered as per Rules prevailing on the date of her husband's death. It is not that the cause of action arises on the death of an employee in harness. Accordingly, the petitioner's claim came to be rejected by the impugned order dated 03.09.2013, passed by the learned District Judge, Firozabad.

9. Aggrieved, this writ petition has been instituted.

10. A counter affidavit has been filed on behalf of respondent No. 2. The stand taken in paragraph No. 12 of the counter affidavit is that going by the principle laid down by the Supreme Court in **MGB Gramin Bank**, rules in force on the date of consideration of the applicant's case, for compassionate appointment, would apply, and the applicant has no right to say that the Rules prevailing on the date of death of an employee in harness, that is to say, the date when the cause of action had arisen, ought to be the governing principle. It is pleaded that the Rules of 2013 would govern the rights of the petitioner under which the minimum prescribed qualification for the post of a Sweeper-cum-Farrash is a Class VIth certificate. The petitioner has passed her Class 4 examination, and, is, therefore, ineligible.

11. Heard Mr. Saneev Kumar Pandey, learned Counsel for the petitioner and Ms. Bushra Maryam, learned Special Counsel appearing for the High Court.

12. The crux of the dispute in this matter is : *Whether the rules relating to qualifications on the date the petitioner's husband died would apply to consider her case or those in force on the date that the petitioner's application came to be considered by the Redressal Grievance Committee?* It is no doubt true that there has been some division of opinion in the authorities of the Supreme Court on the point, if the claim for compassionate appointment is to be considered in accordance with the rules or the scheme in force on the date of death of an employee in harness, or a subsequent date, say when the application comes up for consideration before the competent Authority. In **Secretary to Government Department of Education (Primary) and others v.**

Bheemesh alias Bheemappa the issue was whether in case of a compassionate appointment, the Rules governing the right to consideration in force on the date that the death of a Government servant in harness occurs apply or those on a subsequent date, say, when the application for compassionate appointment comes up for consideration before the competent authority. The issue postulates a situation, where the rules for consideration have undergone a change between the date of death in harness and the date on which the dependant's application for compassionate appointment is considered.

13. The facts in **Bheemesh alias Bheemappa** (*supra*) can best be recounted in the words of their Lordships :

“8. Admittedly, the appointment on compassionate grounds in the State of Karnataka is governed by a set of Rules known as Karnataka Civil Services (Appointment on Compassionate grounds) Rules, 1996, issued in exercise of the powers conferred by Section 3(1) read with Section 8 of the Karnataka State Civil Services Act, 1978. The Rules as they stood, on the date on which the sister of the respondent died in harness, did not include an unmarried brother, within the definition of the expression "dependant of a deceased Government servant" under Rule 2(1)(a) of the said Rules vis-a-vis a deceased female unmarried Government servant. But it was only by way of an amendment proposed under a draft Notification dated 20.06.2012 which was given effect under the final Notification bearing No. DPAR 55 SCA 2012, Bangalore dated 11.07.2012 that an unmarried brother of a deceased female unmarried Government servant was included within the definition. There is no dispute about the fact that the sister of the

respondent died as an unmarried female Government servant, but on 8.12.2010, before the amendment was made to the Rules.”

14. The issue, therefore, was if the amended Rules in **Bheemesh alias Bheemappa** that came into force after death of the Government servant there, would have retrospective application and govern the case of the dependant unmarried brother of the deceased unmarried female Government servant, or the amendment would have prospective application from the date it came into force. It was examined and answered by their Lordships thus:

“9. To hold that the amendment will have retrospective application, the High Court as well as the Tribunal relied upon a Judgment of the Division Bench of the High Court of Karnataka in State of Karnataka v. Akkamahadevamma and others, decided on 18.11.2010 in Writ Petition Nos.20914 of 2010 etc.: (Reported in 2011 (2) AIR Kar R 118). But it should be pointed out at the outset that the Judgment of the High Court in Akkamahadevamma arose out of an amendment to the Karnataka Civil Services (General Recruitment) (57th Amendment) Rules, 2000. By the Amendment made on 30.03.2010 to the said Rules, grandson, unmarried granddaughter, daughter in law, widowed daughter and widowed granddaughter were included within the definition of the expression "members of the family" under Explanation-2 of Rule 9. But the amendment so made on 30.03.2010 expanding the definition of the expression "members of the family" was triggered by an Order of the Tribunal which held the unamended rule to be unconstitutional. It is in that context that the amendment made on 30.03.2010 to the Rules issued on

23.11.2000 was held by the High Court to be retrospective in nature. It must also be remembered that the expanded definition was with respect to project displaced persons. The right conferred upon a project displaced person stands on a different footing from the entitlement of a person to seek appointment on compassionate grounds. In any case an amendment brought forth, on the basis of a Judgment of a Court or Tribunal, holding the exclusion of certain categories of persons to be violative of Articles 14 and 16 of the Constitution, may receive an interpretation such as the one proposed by the High Court in Akkamahadevamma. But the same may not be applicable to amendments of the nature that we are concerned with in this case.

10. x x x

11. Be that as it may, Sh. Jayanth Muthraj, learned senior counsel appearing for the respondent pleaded that there are two lines of Judgments of this Court, one taking the view that the Rules/Scheme in force on the date of death of the Government servant would govern the field and the other holding that the Rules/scheme in force on the date of consideration of the claim would govern the field. Unable to reconcile this conflict, a two Member Bench of this Court, by its Order dated 08.02.2019 in State Bank of India v. Sheo Shankar Tewari¹, has referred the matter for consideration by a larger Bench. Sh. Jayanth Muthraj, learned senior counsel therefore made a request that the present appeal may either be placed along with the reference or await a decision on the above reference.

12. But we do not consider it necessary to do so. It is no doubt true that

there are, as contended by the learned senior Counsel for the respondent, two lines of decisions rendered by Benches of equal strength. But the apparent conflict between those two lines of decisions, was on account of the difference between an amendment by which an existing benefit was withdrawn or diluted and an amendment by which the existing benefit was enhanced. The interpretation adopted by this Court varied depending upon the nature of the amendment...”

15. The tabulated reference to the six cases in paragraph No. 12, where their Lordships have analysed the seemingly divergent opinions, expressed by their Lordships on the issue in those cases, as to the date with reference to which rules in force for compassionate appointment would apply for consideration of the dependant’s case, is omitted for the sake of brevity.

16. There are two other cases considered in Bheemesh alias Bheemappa that are not alluded to in the table set forth in paragraph no. 12, where it is observed:

“13. Apart from the aforesaid decisions, our attention was also drawn to the decision of the three member Bench in State of Madhya Pradesh v. Amit Shrivastava². But that case arose out of a claim made by the dependant of a deceased Government servant, who was originally appointed on a work charged establishment and who later claimed to have become a permanent employee. The Court went into the distinction between an employee with a permanent status and an employee with a regular status. Despite the claim of the dependant that his father had become a permanent employee, this Court held in that case that as per the policy prevailing on the

date of death, a work charged/contingency fund employee was not entitled to compassionate appointment. While holding so, the Bench reiterated the opinion in *Indian Bank v. Promila*.

14. The aforesaid decision in *Amit Shrivastava* (supra) was followed by a two member Bench of this Court in the yet to be reported decision in the State of Madhya Pradesh v. Ashish Awasthi decided on 18.11.2021 : (Reported in AIROnline 2021 SC 1047).”

17. After taking note of the seemingly divergent opinions on the issue, the Supreme Court observed in **Bheemesh alias Bheemappa** :

“15. Let us now come to the reference pending before the larger Bench. In *State Bank of India v. Sheo Shankar Tewari* (supra), a two member Bench of this Court noted the apparent conflict between *State Bank of India v. Raj Kumar* and *MGB Gramin Bank* on the one hand and *Canara Bank vs. M. Mahesh Kumar* on the other hand and referred the matter for the consideration of a larger Bench. The order of reference to a larger Bench was actually dated 8.02.2019.

16. It was only after the aforesaid reference to a larger Bench that this Court decided at least four cases, respectively in (i) *Indian Bank v. Promila*; (ii) *N.C. Santhosh v. State of Karnataka*; (iii) *State of Madhya Pradesh vs. Amit Shrivastava*; and (iv) *State of Madhya Pradesh v. Ashish Awasthi*. Out of these four decisions, *N.C. Santosh* (supra) was by a three member Bench, which actually took note of the reference pending before the larger Bench.

17. Keeping the above in mind, if we critically analyse the way in which this Court has proceeded to interpret the applicability of a new or modified Scheme that comes into force after the death of the employee, we may notice an interesting feature. In cases where the benefit under the existing Scheme was taken away or substituted with a lesser benefit, this Court directed the application of the new Scheme. But in cases where the benefits under an existing Scheme were enlarged by a modified Scheme after the death of the employee, this Court applied only the Scheme that was in force on the date of death of the employee. This is fundamentally due to the fact that compassionate appointment was always considered to be an exception to the normal method of recruitment and perhaps looked down upon with lesser compassion for the individual and greater concern for the rule of law.

18. If compassionate appointment is one of the conditions of service and is made automatic upon the death of an employee in harness without any kind of scrutiny whatsoever, the same would be treated as a vested right in law. But it is not so. Appointment on compassionate grounds is not automatic, but subject to strict scrutiny of various parameters including the financial position of the family, the economic dependence of the family upon the deceased employee and the avocation of the other members of the family. Therefore, no one can claim to have a vested right for appointment on compassionate grounds. This is why some of the decisions which we have tabulated above appear to have interpreted the applicability of revised Schemes differently, leading to conflict of opinion. Though there is a conflict as to whether the

Scheme in force on the date of death of the employee would apply or the Scheme in force on the date of consideration of the application of appointment on compassionate grounds would apply, there is certainly no conflict about the underlying concern reflected in the above decisions. Wherever the modified Schemes diluted the existing benefits, this Court applied those benefits, but wherever the modified Scheme granted larger benefits, the old Scheme was made applicable.

19. The important aspect about the conflict of opinion is that it revolves around two dates, namely, (i) date of death of the employee; and (ii) date of consideration of the application of the dependant. Out of these two dates, only one, namely, the date of death alone is a fixed factor that does not change. The next date namely the date of consideration of the claim, is something that depends upon many variables such as the date of filing of application, the date of attaining of majority of the claimant and the date on which the file is put up to the competent authority. There is no principle of statutory interpretation which permits a decision on the applicability of a rule, to be based upon an indeterminate or variable factor. Let us take for instance a hypothetical case where 2 Government servants die in harness on January 01, 2020. Let us assume that the dependants of these 2 deceased Government servants make applications for appointment on 2 different dates say 29.05.2020 and 02.06.2020 and a modified Scheme comes into force on June 01, 2020. If the date of consideration of the claim is taken to be the criteria for determining whether the modified Scheme applies or not, it will lead to two different results, one in respect of the person who made the application before June 1, 2020 and another

in respect of the person who applied after June 01, 2020. In other words, if two employees die on the same date and the dependants of those employees apply on two different dates, one before the modified Scheme comes into force and another thereafter, they will come in for differential treatment if the date of application and the date of consideration of the same are taken to be the deciding factor. A rule of interpretation which produces different results, depending upon what the individuals do or do not do, is inconceivable. This is why, the managements of a few banks, in the cases tabulated above, have introduced a rule in the modified scheme itself, which provides for all pending applications to be decided under the new/modified scheme. Therefore, we are of the considered view that the interpretation as to the applicability of a modified Scheme should depend only upon a determinate and fixed criteria such as the date of death and not an indeterminate and variable factor.

20. Coming to the case on hand, the employee died on 8.12.2010 and the amendment to the Rules was proposed by way of a draft notification on 20.06.2012. The final notification was issued on 11.07.2012. Merely because the application for appointment was taken up for consideration after the issue of the amendment, the respondent could not have sought the benefit of the amendment. The Judgment of the Division Bench of the Karnataka High Court in *Akkamahadevamma* on which the Tribunal as well as the High Court placed reliance, was not applicable to the case of compassionate appointments, as the amendment in *Akkamahadevamma* came as a result of the existing rule being declared to be ultra vires Articles 14 and 16 of the Constitution.”

18. The principle then laid down is that the right to consideration of an appointee for compassionate appointment is to be governed by the rules in force on the date of death of the employee in harness. This interpretation has been favoured, as observed by their Lordships, for reason that adopting a rule of interpretation, which produces different results, depending upon individual action and processes would produce varying results based on the same rights. Therefore, the date of death of an employee in harness, which is not something variable but fixed, has been favoured to determine the right of the dependent for a consideration of the claim for compassionate appointment according to the Dying-in-Harness Rules in force on that date.

19. In this case, there is a further feature to be noticed. In most of the Authorities, where the issue has arisen as to which rule amended or otherwise, or newly introduced would apply to govern a dependant's claim for compassionate appointment, were cases where there was a change or the introduction of a new Rule to the Dying-in-Harness Scheme or the Dying-in-Harness Rules. In the present case, there is no change at all in the Rules of 1974. The change has come about on account of the Rules relating to eligibility for appointment to a Class IV post in the Civil Court establishment. The further question that may be posed is, if the principle in **Bheemesh alias Bheemappa** would apply to the present case, where there is no change in the Dying-in-Harness Rules or the Scheme, but the criteria of eligibility under the relevant service rules. To the understanding of this Court, this may be a difference of form, but not of substance.

20. Ultimately, the issue is : *What are the whole gamut of Rules that would govern the right of a dependant to seek compassionate appointment after the death of an employee in harness?* Whether the change in Rules affecting the dependant's candidature comes from the Dying-in-Harness Rules or from the recruitment Rules applicable, is of no consequence. It is of no consequence, in the opinion of this Court, for reason that the principle is same that the eligibility for consideration must depend on an interpretation that turns on a determinate and fixed criteria; not on something that is subject to variation by individual action or inaction. If for instance, in the present case, the petitioner's application had been examined in the correct perspective by the learned District Judge, when it was first rejected vide order dated 10.05.2011, based on the report of the Grievance Redressal Committee dated 13.04.2011, an order that did not find favour with this Court, the result would have certainly been different. The order dated 03.05.2013 was passed, directing a reconsideration of the petitioner's candidature in accordance with the Rules of 1955, within a period of two months. What if the Grievance Redressal Committee were more prompt and put in a report within a week and the learned District Judge had to pass his orders not on 03.09.2013, but on the some day in the month of June, 2013, or in the first three days of July, 2013? The result of the petitioner's claim for compassionate appointment would have been very different. It is these vagaries based on individual action or inaction that the interpretation in **Bheemesh alias Bheemappa** seeks to eschew.

21. I have taken the same view in a very recent decision in **Bechan Giri vs. Union of India, 2023 (8) ADJ 692**, albeit

in the context of the introduction of a scheme for compassionate appointment that came into effect in the respondent's establishment in that case after the date of demise of the employee in harness. But the principle in the said decision, again based on **Bheemesh alias Bheemappa**, is the same.

22. No other point was pressed on behalf of either party.

23. In the result, this petition **succeeds** and shall stand **allowed**. The impugned order dated 03.09.2013, *passed by the learned District Judge, Firozabad is hereby quashed*. A mandamus is issued to the learned District Judge, Firozabad to reconsider the petitioner's claim for compassionate appointment within a month, in accordance with law and the guidance in this judgment. Costs easy.

(2023) 11 ILRA 824
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.10.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ-A No. 4493 of 2023
 And
 Writ-A No. 7492 of 2023

Neelam Devi **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Savita Jain

Counsel for the Respondents:
 C.S.C.

A. Service Law – UP Government Servants dying-in-harness Rules, 1974 – R. 2 (c)

and 7 – Compassionate appointment – Both son and widowed daughter-in-law staked claim – Son was given primacy over widowed daughter-in-law – Validity challenged – Held, Rule 2 does not indicate any primacy required to be accorded to one member of family with regard to claim of another – It is required to be adverted to only in accordance with Rule 7 which provide that the decision has to be taken keeping in view the overall interest of the welfare of entire family, particularly the widow and minor members thereof – High Court declared impugned order contrary to Rule 7. (Para 11, 15 and 16)

Writ petition allowed. (E-1)

List of Cases cited:

1. General Manager (D & PB) & ors. Vs Kunti Tiwari & anr.; (2004) 7 SCC 271
2. Umesh Kumar Nagpal Vs St. of Har.; (1994) 4 SCC 138

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

1. Heard learned counsel for petitioner and learned State Counsel for opposite parties.

2. Since both the petitions involve same cause of action, they are being disposed of by means of a common judgment.

3. Writ-A No. 4493 of 2023 has been filed by widowed daughter-in-law of the deceased challenging order dated 22.05.2023 whereby her claim for compassionate appointment under the U.P. Government Servants dying-in-harness Rules, 1974 has been rejected.

4. Writ-A No. 7492 of 2023 has been filed by the unmarried son of deceased for a direction to opposite parties to appoint

him on compassionate basis under the aforesaid Rules of 1974.

5. Learned counsel appearing for widowed daughter-in-law submits that her husband late Rajneesh Kumar pre-deceased her father-in-law late Ram Chandra and thereafter petitioner was fully dependent upon her father-in-law. It is submitted that petitioner also has two minor children aged 7 and 4 years and in terms of amendments incorporated in the year 2001 vide notification dated 12.11.2021 in the Rules of 1974, widowed daughters-in-law are now also included under the definition of 'family' as per Rule 2 (c) of the Rules of 1974.

6. It is submitted that petitioner being the widowed daughter-in-law of deceased and being covered under the definition of family under the aforesaid Rules is facing greater hardship than the son of deceased since she also has to take care of her two minor children. It is submitted that while passing the impugned order, opposite parties have not at all complied with Rule 7 of the Rules of 1974 and petitioner's application for compassionate appointment has been rejected only on the ground that the son would have primacy over the widowed daughter-in-law as also on the ground that the widow and daughter of deceased had given a no objection certificate in favour of the son.

7. Learned counsel for appearing on behalf of son of deceased in Writ-A No. 7492, on the other hand submits that the son is required to be granted primacy in consideration for compassionate appointment since he is indicated under Rule 2 (c) (ii) whereas the widowed daughters-in-law are covered under Rule (iii) of the aforesaid Rule. It is submitted

that petitioner also does not have any other means to sustain himself and was fully dependent upon his father and therefore he is required to be granted primacy for compassionate appointment as has been correctly indicated in the order impugned in Writ-A No. 4493 of 2023.

8. Learned State Counsel appearing on behalf of opposite parties as on the other hand submitted that in case there are more than one claimants for compassionate appointment, the provision under Rule 7 of the Rules of 1974 is required to be followed as has been done in the present case and particularly in view of the fact that no objection certificates were granted in favour of the son of deceased by the mother and sister.

9. Upon consideration submissions advanced by learned counsel for parties and perusal of material on record, it is quite evident that the claim of widowed daughter-in-law has been rejected on the twin grounds that a son is required to be given primacy for compassionate appointment in view of his being covered under Rule 2 (c) (ii) whereas widowed daughter-in-laws are covered under Clause (iii) as also the fact that no objection certificates have been issued in favour of the son by his mother and sister.

10. It is admitted between the parties that as yet no compassionate appointment has been provided to the son either till date.

11. Considering the aforesaid facts, it is evident that in case there has more than one member of the family of deceased claiming compassionate appointment, the procedure as indicated in Rule 7 of the Rules of 1974 is required to be followed whereby decision has to be taken keeping

in view the overall interest of the welfare of entire family, particularly the widow and minor members thereof.

12. In the present case, the impugned order does not at all advert to greater financial distress being faced by either of the claimants. There is no subjective satisfaction recorded by the authority concerned regarding overall interest of family which would be served better by compassionate appointment to one or the other member of the family. The order also does not advert to any income being derived by either of the parties or properties being held by them.

13. The aspects which are required to be considered for compassionate appointment have already been indicated by Supreme Court in the case of **General Manager (D & PB) and others versus Kunti Tiwari and another reported in (2004) 7 Supreme Court Cases 271**. The aforesaid judgment in turned places reliance on another judgment of Supreme Court in the case of **Umesh Kumar Nagpal versus State of Haryana (1994) 4 SCC 138**. The aspects indicated therein are as follows:-

"(a) Family pension.

(b) Gratuity amount received.

(c) Employee's/employer's contribution to provident fund.

(d) Any compensation paid by the Bank or its Welfare Fund.

(e) Proceeds of LIC policy and other investments of the deceased employee.

(f) Income of family from other sources.

(g) Employment of other family members.

(h) Size of the family and liabilities, if any, etc."

14. Although, the said factors have been considered in the light of circulars of banks but in the considered opinion of this Court would also have relevance with regard to compassionate appointment of dependents of Government servants as well.

15. So far as question of primacy of one claimant vis-a-vis the other is concerned, a perusal of Rule 2 of the Rules of 1974 will make it evident that it merely indicates the definition of family pertaining to the deceased and does not indicate any primacy required to be accorded to one member of family with regard to claim of another, which in fact is required to be adverted to only in accordance with Rule 7 of the Rules of 1994. Therefore, this Court does not find any justification in the impugned order for recording a finding that the son of deceased would have primacy over the claims of the widowed daughter-in-law. Such a finding would run contrary to Rule 7 of the Rules of 1994.

16. The other aspect as recorded in the impugned order pertaining to grant of no objection by other family members in favour of one particular family member also does not find any sustenance from any provision of the Rules of 1974. Such a procedure adopted by the impugned order also contrary to Rule 7 of the Rules of 1994 whereunder the overall interest and welfare of the family, particularly the widow and

minors of the family are required to have a predominating interest and not a no objection certificate by other members of family in favour of a single member of the family.

17. In view of aforesaid discussion, the impugned order clearly has been passed against the provisions of Rule 7 of the Rules of 1994 as is therefore vitiated. Accordingly, the order dated 22.05.2023 in Writ-A No. 4493 of 2023 is quashed by issuance of a writ in the nature of certiorari. A further writ in the nature of mandamus is issued directing the opposite party no. 2 i.e. Engineer-in-Chief (Project/Planning), Public Works Department, Lucknow to re-consider the matter and pass fresh orders pertaining to claims of Smt. Neelam Devi and Sri Rajnikant strictly in accordance with Rule 7 of the Rule 1994 and in the light of judgments referred to hereinabove particularly adverting to which of the two would face greater financial hardship and grant of compassionate appointment to which of the two would serve the greater interest of the family and the minors.

18. Such a decision shall be taken by opposite party no. 2 within a period of eight weeks from the date a certified copy of this order is produced before him.

19. Resultantly, the Writ-A No. 4493 of 2023 is **allowed** and Writ-A No. 7492 of 2023 is **disposed of**.

(2023) 11 ILRA 827

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 24.07.2023

BEFORE

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

Writ-A No. 9365 of 2023

Chandan Kumar ...Petitioner
Versus
The Chairman/ Principal Officer, State Bank of India, New Delhi & Ors.
...Respondents

Counsel for the Petitioner:

Sri Kanhaiya Lal

Counsel for the Respondents:

Sri Satish Chaturvedi

A. Service Law – Compassionate Appointment – S.B.I.– Scheme for Compassionate Appointment in Public Sector Banks – Applicability – SBI Scheme for Compassionate Appointment in Exceptional Circumstances – Ex Gratia Payment – Eligibility Criteria

Petitioner, son of a deceased S.B.I. employee, sought compassionate appointment under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974, following his father's death in harness on 17.10.2016. The Bank rejected the claim, citing the absence of a compassionate appointment scheme and offering ex gratia payment instead, as per the SBI Scheme for Payment of Ex-Gratia Lumpsum Amount in Lieu of Compassionate Appointment. The petitioner challenged the rejection, relying on the Government of India's Scheme for Compassionate Appointment in Public Sector Banks (effective 05.08.2014).

Held: The Government of India's Scheme for Compassionate Appointment in Public Sector Banks (2014) is a model scheme, not mandatorily applicable to public sector banks unless adopted by their Board of Directors. The S.B.I. adopted it with modifications, implementing the SBI Scheme for Compassionate Appointment in Exceptional Circumstances and the SBI Scheme for Payment of Ex-Gratia Lumpsum Amount, both effective from 05.08.2014. Compassionate appointment is limited to exceptional cases, i.e., death during official duty due to violence, terrorism, robbery, or dacoity, or death within five years of appointment or before age 30, leaving a dependent spouse and/or minor children. The petitioner's case did not meet these criteria, as

his father's death did not occur under such circumstances. The Bank's policy prioritizes ex gratia payment over compassionate appointment in non-exceptional cases. The rejection of the petitioner's claim was upheld, as it aligned with the Bank's policy and the decision in *Sajal Khanna Vs S.B.I.*(2021:AHC:114740). The principle in *Canara Bank Vs M. Mahesh Kumar* (2015) 7 SCC 412, that compassionate appointment is governed by the scheme in force at the time of death, further supported the dismissal. The decision in *Smt. Neelam Singh Vs U.O.I.* (2020) 12 ADJ 227 was distinguished as sub silentio, as it did not address the modified adoption of the 2014 Scheme by the St. Bank of India. (Paras 11-25)

B. Judicial Review – Compassionate Appointment – Scope of Interference

Courts cannot compel an employer to grant compassionate appointment contrary to the applicable policy. The scope of judicial review is limited to ensuring compliance with the policy in force at the time of the employee's death. (Para 21)

Petition dismissed. No order as to costs. (Para 26-27)

Case Law Discussed:

1. Sajal Khanna Vs S.B.I.(2021:AHC:114740)
2. Canara Bank Vs M. Mahesh Kumar (2015) 7 SCC 412
3. Smt. Neelam Singh Vs U.O.I. (2020) 12 ADJ 227
4. Kendriya Vidyalaya Sangathan Vs Dharmendra Sharma (2007) 8 SCC 148

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

1. A rejoinder affidavit has been filed by Mr. Kanhaiya Lal, learned Counsel for the petitioner in Court today. It is taken on record. Let it be numbered by the office.

2. Parties have exchanged affidavits.

3. Admit.

4. Heard forthwith.

5. Heard Mr. Kanhaiya Lal, learned Counsel for the petitioner and Mr. Satish Chaturvedi, learned Counsel appearing on behalf of the respondents.

6. This writ petition has been filed by the petitioner laying a challenge to the order dated 'nil', annexed as Annexure No.10 to the writ petition, rejecting his claim for compassionate appointment. The compassionate appointment has been claimed by the petitioner on account of his father's death in harness.

7. The petitioner's father, the late Gopal Chandra was a permanent employee of the State Bank of India, who was posted as a Sweeper in the office of the Branch Manager, N.R.I. (Computerized Branch), State Bank of India, Main Branch, Kutchehari Road, Prayagraj. He died in harness on 17.10.2016. The late Gopal Chandra left behind him his widow, Smt. Sumitra Devi, four daughters, to wit, Smt. Reena Devi, Smt. Renu Devi, Smt. Ruchi Devi, Km. Shilu and a son, Chandan Kumar, the petitioner here. There is no issue about the fact that the petitioner's father died in harness or that he was a permanent employee of the State Bank of India or that he has left behind family members as above described. It is also not in dispute that the petitioner is the deceased employee's son. The petitioner has asserted that he is a member of the Scheduled Caste, called 'Hela'. The said fact has also not been denied by the respondents.

8. The petitioner passed his High School in the year 2013 and the Intermediate Examination in the year 2016,

both conducted by the Board of High School and Intermediate Education, U.P. After the petitioner's father's demise, the petitioner's mother moved an application before the Branch Manager, N.R.I. (Computerized Branch), State Bank of India, Main Branch, Kutchehari Road, Prayagraj, seeking compassionate appointment for her son under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (for short, 'the Dying in Harness Rules'). In response, the petitioner received a memo dated 10.02.2017 from the Branch Manager, saying that there is no scheme for compassionate appointment in the Bank. The Branch Manager, however, conveyed that they had introduced a new scheme in place of compassionate appointment, providing for the payment of lump-sum *ex gratia* in cases of death in harness. Thus, the Branch Manager declined the petitioner's claim. A similar memo dated 28.03.2017 was issued by the Regional Manager, State Bank of India, Sardar Patel Marg, Civil Lines, Prayagraj, conveying the Bank's inability to appoint the petitioner in the absence of a scheme for compassionate appointment. The petitioner's mother was again apprised about the substitute for compassionate appointment, to wit, *ex gratia* payment in lump-sum.

9. The petitioner instituted a writ petition, titled as Chandan Kumar v. The Chairman Principal Officer and others, Neutral Citation No. - 2022:AHC:80411, seeking a direction to the respondents to consider his case for compassionate appointment. The said petition was disposed of by this Court in terms of an order dated 25.05.2022, directing the respondent Bank to consider and decide the petitioner's application for compassionate

appointment strictly in accordance with law within a period of three months of the date of production of a certified copy of that order. It is in compliance with the said order that the Deputy General manager (B & O), State Bank of India, Administrative Office, Prayagraj has passed the order impugned, rejecting the petitioner's claim.

10. Aggrieved, the petitioner has instituted the present writ petition.

11. The contention of the learned Counsel for the petitioner is that after introduction of the scheme for compassionate appointment dated 05.08.2014 approved by the Ministry of Finance, Government of India, which is applicable to Banks, including the respondent Bank, it cannot be said that the petitioner is not entitled to a consideration for compassionate appointment. It is argued that the petitioner is eligible to be appointed under the scheme of the Government of India, which is called 'Scheme for Compassionate Appointment in Public Sector Banks'. The said Scheme has been enforced w.e.f. 05.08.2014 vide Ministry of Finance D.O.F. No.18/2/2013-IR dated 07.08.2014.

12. Mr. Satish Chaturvedi, learned Counsel for the Bank, on the other hand, has resisted the petition, saying that the Scheme for Compassionate Appointment in Public Sector Banks introduced by the Government of India w.e.f. 07.08.2014, does not apply by its own force to the establishment of any Public Sector Bank, including the respondent Bank. It is in the nature of a proposal by the Government of India to revise the existing policy relating to compassionate appointment. It was left to the Banks to examine the scheme, accept it as such or with modifications, all to be

done with the approval of the Board of Directors of the Banks concerned. It is argued that the State Bank of India has adopted the proposed scheme by the Government of India, modifying it in terms of what is called, 'SBI Scheme for Compassionate Appointment in Exceptional Circumstances'. The Bank has also introduced the alternative scheme called, 'SBI Scheme for Payment of Ex-Gratia Lumpsum Amount in Lieu of Compassionate Appointment'. Both the Schemes, in accordance with the directions of the Government of India, have become effective in the State Bank of India w.e.f. 05.08.2014. It is pointed out that a look at the Schemes would show that after acceptance of the Government of India's proposal, the policy of the State Bank of India given expression through the two Schemes, is not much different than what it earlier was. The two Schemes, above referred, deal with the contingency of an employee dying in harness and the resultant need to bail out his family from the ensuing economic crisis. The rule is payment of ex gratia lump sum in lieu of compassionate appointment, and the exception, to provide compassionate appointment, limited to the extraordinary categories envisaged under the 'SBI Scheme for Compassionate Appointment in Exceptional Circumstances'.

13. It is emphasized by the learned Counsel for the Bank that the Government of India's Scheme for compassionate appointment does not apply on its own terms, but in the form and on terms accepted by individual Public Sector Banks. The petitioner's case is not covered by the 'SBI Scheme for Compassionate Appointment in Exceptional Circumstances' and has been rejected for the said reason. The learned Counsel has

invited the Court's attention to those circumstances where compassionate appointment can be offered to the dependants of a Bank employee dying in harness, which he says, are not attracted to the petitioner's case.

14. Upon hearing learned Counsel for the parties, what this Court finds is that there is no cavil about the fact that the petitioner's father was a permanent employee of the Bank, who died in harness on 17.10.2016. He died after the 'SBI Scheme for Compassionate Appointment in Exceptional Circumstances' had come into force in the establishment of the respondent Bank.

15. On perusing the material available on record, it appears that prior to the 'SBI Scheme for Compassionate Appointment in Exceptional Circumstances', the respondent Bank had two Schemes to extend support to the members of an employee dying in harness. These were the SBI Scheme for Compassionate Appointment in Exceptional Circumstances and the SBI Scheme for Payment of Ex-Gratia Lumpsum Amount in Lieu of Compassionate Appointment. Therefore, the respondent Bank was always following a policy of offering compassionate appointment in exceptional cases. It was upon the representation of the Indian Banks' Association carried in their letters dated 22.04.2014 and 13.06.2014 for a revision of compassionate appointment schemes in Public Sector Banks that the Government of India decided to frame a scheme for compassionate appointment in Public Sector Banks w.e.f. 05.08.2014 vide a letter of the Ministry of Finance bearing D.O.F. No.18/2/2013-IR dated 07.08.2014.

16. A look at the Scheme for Compassionate Appointment in Public Sector Banks framed by the Government of India, together with the contents of the letter dated 07.08.2014 issued by the Ministry of Finance, leaves this Court in no manner of doubt that the Scheme for Compassionate Appointment in Public Sector Banks was a proposal to the Banks to formulate their schemes on those lines with all modifications they would desire by placing the Government Scheme before the Board of Directors of the respective Banks. In short, the Scheme for Compassionate Appointment in Public Sector Banks was a model. It could be adopted as such or with modifications to it. It was all left to the Board of Directors of the Banks concerned to decide upon. This fact is evident from the contents of the demi official letter dated 07.08.2014, which was addressed by a Director in the Ministry of Finance, Department of Financial Services, New Delhi to the Chairman, Indian Banks' Association. The contents of the letter, which is on record as Annexure No.1 to the counter affidavit, read:

“Kindly refer to IBA's letters No. HR&IR/KC/Govt/532/ 9274 dated 22.4.2014 and 13.6.2014 regarding IBA's proposal for revising the Compassionate Appointment Scheme in Public Sector Banks (PSBs). The proposal has been examined in this Department and it is decided to convey the approval of the Government on the proposal of IBA as follows:

i) To open the Compassionate Appointment in PSBs on the lines of Central Government;

ii) Discontinuing the provision of ex-gratia in lieu of Compassionate Appointment in PSBs.”

2. Accordingly, IBA is also requested to take appropriate action to circulate the revised Scheme to all PSBs for adoption with the approval of their respective Boards. The scheme shall be applicable from 5.8.2014.

3. This issues with the approval of Hon'ble Finance Minister.”

17. The Scheme for Compassionate Appointment in Public Sector Banks proposed by the Government of India would have given a very broad right for consideration to the dependants of employees dying in harness, but that would happen only if the Government Scheme were adopted as such. It appears that the respondent Bank were not inclined to give up their policy providing rehabilitative aid to the members of an employee dying in harness in the manner they did earlier, to wit, as a rule by payment of ex gratia lump sum, if the family were in financial distress; and, in exceptional cases, according to the Bank's specified policy. It was in this view of the matter that an Under Secretary to the Government of India in the Ministry of Finance, Department of Financial Services, New Delhi, addressed a memo dated 5th December, 2014 to the Chairman, India Banks' Association. The relevant part of the memo dated 5th December, 2014 as aforesaid reads:

“I am directed to refer to this Department's letter of even number dated 7th August, 2014 on the subject cited above and to say that State Bank of India has now approached the Government proposing for the need to continue the earlier provisions

of the scheme i.e. compassionate appointment in exceptional cases or payment of ex-gratia lump sum amount in lieu of compassionate appointments.

2. The matter has been examined in this Department and it has now been decided that all Public Sector Banks can have both the options i.e. compassionate appointment or payment of lumpsum exgratia amount. However, any of these two options can be used only when the other conditions of compassionate appointment are met.

3. This has the approval of Finance Minister.

18. The proposal was then placed before the Executive Committee of the Central Board of the respondent Bank by the Deputy Managing Director & Corporate Development Officer, State Bank of India on 10.12.2014 carrying a proposal in the following terms:

“5. The Executive Committee of the Central Board is requested to approve following proposals:

(I) Continuation of Scheme for Compassionate Appointment in Exceptional Cases and Scheme for payment of Ex-gratia lumpsum amount in lieu of compassionate appointment, both duly modified, as proposed in para 3(A), 3(B) and 3 (C) herein above and detailed in Annexure-I.

(II) Authorization to Dy. Managing Director & Corporate Development Officer to issue clarification on various provisions under the schemes.”

19. The matter was placed before the Directors of the respondent Bank constituting the Executive Committee, which was approved by the Central Board of the Bank on 23.12.2014. The proposal that was placed before the Executive Committee of the Bank Board reads:

“C-CDO-3 (1) SBI Scheme for Compassionate Appointment in exceptional circumstances (II) SBI Scheme for payment of ex-gratia lumpsum amount in lieu of Compassionate Appointment

SUBMITTED a Memorandum dated the 10th December 2014 by the Deputy Managing Director & Corporate Development Officer, recommending that, for the reasons and on the terms stated therein, approval be accorded for:

i. continuation of Scheme for Compassionate Appointment in exceptional cases and Scheme for payment of ex-gratia lumpsum amount in lieu of Compassionate Appointment, both duly modified, as proposed in para 3 of the Memorandum and detailed in Annexure-I thereto; and

ii. authorising Dy. Managing Director & CDO to issue clarification on various provisions under the Schemes,

as detailed in the Memorandum and annexures thereto.

Copies of the Memorandum and enclosures had been circulated to the Directors on the Executive Committee.

Approved”

20. The ‘SBI Scheme for Compassionate Appointment in Exceptional Circumstances’, therefore,

provides for eligibility to a consideration for appointment on compassionate grounds in the following cases alone:

“(i) Employee dying while performing official duty, as a result of violence terrorism, robbery or dacoity;or

(ii) Employee dying within five years of first appointment or before reaching the age of 30 years, whichever is latter, leaving a dependent spouse and /or minor children.”

21. In all other cases, if the family are found deserving and entitled to compassionate appointment, ex gratia lump sum payment is to be made in lieu of compassionate appointment. It is precisely drawing on the terms of the 'SBI Scheme for Compassionate Appointment in Exceptional Circumstances' that the petitioner's case for compassionate appointment has been rejected by the Bank. Admittedly, the petitioner's father did not die while performing official duty, as a result of violence, terrorism, robbery or dacoity, or within five years of his first appointment before reaching the age of 30, whichever was later, and leaving behind a dependant spouse and/ or minor children. He did leave behind dependants in the entitled category, but does not fulfil the other criteria under the ‘SBI Scheme for Compassionate Appointment in Exceptional Circumstances’ to be eligible for appointment. In this connection, reference may be made to the decision of this Court in **Sajal Khanna v. State Bank of India through its Chairman, Mumbai and others**, Neutral Citation No. - 2021:AHC:114740. In **Sajal Khanna (supra)**, it has been observed by Vivek Agarwal, J.:

*“Therefore, once an option was given by the Ministry of Finance to the Indian Banks' Association and in consonance of said D.O., State Bank of India has prepared a memorandum and that memorandum in regard to provisions in lieu of it, payment of ex-gratia has been approved by the Directors of the Executive Committee, then this Court is not required to travel beyond the said memorandum because law as has been laid down in case of **Kendriya Vidyalaya Sangathan and others vs. Dharmendra Sharma (2007) 8 SCC 148**, it is settled that Courts, while considering a matter for grant of compassionate appointment, are only required to look into the policy, which was in vogue at the time of consideration of the application and nothing more or less, as an employer cannot be compelled to make compassionate appointment contrary to the policy, therefore, when examined in the light of the memorandum prepared by the State Bank of India and approved by its Executive Committee, then it cannot be said that petitioner's case has not been dealt with in consonance of the said memorandum and impugned order dated 18.6.2018, being in consonance with the said memorandum cannot be faulted with.”*

22. Here, note may be taken of two decisions of the Supreme Court, on which learned Counsel for the petitioner placed emphatic reliance. He has particularly placed reliance upon the decision of the Supreme Court in **Canara Bank and another v. M. Mahesh Kumar, (2015) 7 SCC 412**. Now, this Court does not find anything about the principles laid down in **M. Mahesh Kumar (supra)** by their Lordships that may have direct or decisive bearing on the issue involved here. The issue in **M. Mahesh Kumar** was that the deceased, a clerk with the Canara Bank,

whose dependants had claimed compassionate appointment, died in harness on 10.10.1998. At that time, a dying in harness scheme was in force, that provided consideration for compassionate appointment to the dependants of an employee. The claim made by the dependants remained pending for a long time and in the meantime, the dying in harness scheme, that was issued vide Circular No.154 of 1993 e.e.f. 08.05.1993, was replaced with a different scheme dated 14.02.2005 in terms of the Head Office Circular No.35 of 2005. The scheme for compassionate appointment was scrapped and in lieu thereof a scheme for ex gratia payment introduced. It was in the context of these facts that the issue arose if the rights of the applicant for compassionate appointment would be governed by the Scheme of 2005 that provides for ex gratia payment in lump sum, but not compassionate appointment, or the one that came in force in the year 1993, making provision for compassionate appointment. It was in that context that their Lordships of the Supreme Court held in **M. Mahesh Kumar**:

“12. The main question falling for consideration is whether the Scheme passed in 2005 providing for ex gratia payment or the Scheme then in vogue in 1993 providing for compassionate appointment is applicable to the respondent.

13. The appellant Bank has placed reliance upon the judgment of this Court in Jaspal Kaur case [(2007) 9 SCC 571 : (2007) 2 SCC (L&S) 578] to contend that the respondent's case cannot be considered on the basis of “Dying in Harness Scheme 1993” when the new 2005 Scheme providing for ex gratia payment had been put in place.

14. In Jaspal Kaur case [(2007) 9 SCC 571 : (2007) 2 SCC (L&S) 578] , Sukhbir Inder Singh employee of State Bank of India, Record Assistant (Cash and Accounts) passed away on 1-8-1999. The widow of the employee applied for compassionate appointment in State Bank of India on 5-2-2000. On 7-1-2002, the competent authority of the Bank rejected the application of Jaspal Kaur in view of the Scheme vis-à-vis the financial position of the family. Against that decision of the competent authority, the respondent filed writ petition before the Punjab and Haryana High Court which had directed to consider the case of Jaspal Kaur by applying the Scheme formulated on 4-8-2005 when her application was made in the year 2000. In that factual matrix, this Court has directed that dispute arising in the year 2000 cannot be decided on the basis of a scheme that was put in place much after the dispute.

15. By perusal of the judgment in Jaspal Kaur case [(2007) 9 SCC 571 : (2007) 2 SCC (L&S) 578] , it is apparent that the judgment specifically states that claim of compassionate appointment under a scheme of a particular year cannot be decided in the light of the subsequent scheme that came into force much after the claim.”

23. It is, therefore, apparent that the decision of their Lordships in **M. Mahesh Kumar** can be of little assistance to the petitioner. Rather, it reiterates the principle that compassionate appointment has to be considered in accordance with the relevant rules in force on the date of death of the deceased. The principle that is also discernible is that the right to compassionate appointment is not an inherent right but flows from the scheme or

rules applicable at the relevant point of time to the employer's establishment.

24. The learned Counsel for the petitioner has placed reliance on the decision of a learned Singal Judge of this Court in **Smt. Neelam Singh and another v. Union of India through Ministry of Finance and others, 2020 (12) ADJ 227**. He has particularly drawn the Court's attention to the following remarks in **Neelam Singh (supra)**:

“13. It is also pertinent to note that 2005 Scheme provides only for exgratia payment in lieu of compassionate appointment, which stands superseded by the Scheme of 2014 which has revived the scheme providing for compassionate appointment. Thus, I find that after policy decision dated 05.04.2014 taken by Bank of India in respect of compassionate appointment, the case of the petitioners can be considered in light of the letter dated 05.04.2014 issued by Government of India.”

25. The report of the decision in **Smt. Neelam Singh** does not at all show that it was brought to the notice of the Court that the Scheme for Compassionate Appointment in Public Sector Banks proposed by the Government of India to be adopted in each Bank was in fact a model scheme and that in the State Bank of India, it was accepted by the Board of Directors, subject to modifications and adhering to the system of two Schemes, one offering compassionate appointment in exceptional circumstances and the other *ex gratia* lump sum payment, where otherwise a case for compassionate appointment was made out. The decision in **Smt. Neelam Singh**, therefore, must be held *sub silentio* on the issue in hand. It is, therefore, of no

assistance to the petitioner either. Since, it is an admitted case that the petitioner's father is not covered by the exceptional circumstances envisaged under the 'SBI Scheme for Compassionate Appointment in Exceptional Circumstances', this Court does not find any infirmity with the order impugned.

26. In the result, this petition fails and is **dismissed**.

27. There shall be no order as to costs.

(2023) 11 ILRA 835
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2023

BEFORE

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

Writ-A No. 9538 of 2023

Vibhushit Singh ...Petitioner
Versus
N.T.P.C. Ltd. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Siddharth Khare, Sri Mohammad Atif, Sri Ashok Khare (Sr. Adv.)

Counsel for the Respondents:

Sri Naresh Chandra Nishad, Sri Hanuman Prasad Dube, Sri Ravi Kant (Sr. Adv.)

A. Service Law – National Thermal Power Corporation Service Rules – Rule 24.9 – Conduct, Discipline and Appeal Rules, 1977 – Rule 26(2)(vi)(e) – Termination of service by abandonment – Charge of unauthorized absence – Study leave for two years was sanctioned as leave without pay – Petitioner was unable to complete the course successfully, though he reported back to join before expiry of leave – Effect – Instead of giving joining, the respondent started to conduct enquiry

– Petitioner’s name was struck off the roll of NTPC – Validity challenged – Held, it is not a case where the petitioner completed the course of study and failed to earn his degree. It is a case where he abandoned the course – It would not constitute unauthorized absence from duty or overstaying the sanctioned leave within the meaning of Rule 24.9 of the NTPC Service Rules r/w Rule 26(2)(vi)(e) of the CDA Rules. Therefore the decision by the respondents to consider the petitioner’s services as abandoned cannot be countenanced. (Para 28)

Writ petition allowed. (E-1)

List of Cases cited:

1. V.C., Banaras Hindu University & ors. Vs Shrikant; (2006) 11 SCC 42
2. M.P. Joseph Vs U.O.I. & ors. ; 2013 Lab. I.C. 2790
3. Vijay S. Sathaye Vs Indian Airlines Ltd. & ors. ; (2013) 10 SCC 253
4. Buckingham and Carnatic Co. Ltd. Vs Venkatiah & anr.; AIR 1964 SC 1272

(Delivered by Hon’ble J.J. Munir, J.)

Does the unreported abandonment of a course of study by an employee, who was sanctioned study leave for a specified period of time, entitle the employer to treat the period of sanctioned leave unauthorized absence from duty, leading to abandonment of service?

This question has arisen in the context of Rule 24.9 of the National Thermal Power Corporation Service Rules read with Rule 26(2)(vi)(e) of the Conduct, Discipline and Appeal Rules, 1977 applicable to the National Thermal Power Corporation¹. How the above referred question has arisen would shortly appear from facts giving rise to this writ petition.

2. The NTPC is a public sector undertaking of the Central Government. It is incorporated as a public limited company. According to the petitioner, it is classified as a “Maharatna” central public sector undertaking, possessing a certain degree of financial freedom. One of the projects of the NTPC is Rihand Super Thermal Power Project, Rihand Nagar, District Sonbhadra. The petitioner applied for consideration of his candidature in the recruitment of Executive Trainee (ET-2012). He participated in the various stages of selection and finally stood selected. In consequence of the selection, an offer of appointment dated 13.07.2012 was made by the Manager, Human Resource Centre of the NTPC. If accepted by the petitioner, the offer required him to undergo the formalities specified. The petitioner completed those formalities in response to the offer of appointment dated 13.07.2012 on the 21st of August, 2012. The Manager, Human Resource Centre issued a letter of appointment dated 21st August, 2012, saying that subject to the petitioner successfully completing the training, he would be posted to one of the projects/stations of the NTPC, based on his performance during training, assessed periodically. The petitioner, it goes without saying, completed the training successfully and was posted at the Rihand Super Thermal Power Project, Rihand Nagar, Sonbhadra.

3. After serving the NTPC for some years, the petitioner secured admission to the Master of Technology² Course. He then applied for sanction of study leave for a period of two years in order to enable him to pursue the full-time course of M.Tech. at the Krishna Institute of Engineering and Technology³, Ghaziabad. The petitioner's application was considered and sanctioned

vide an order dated 17.06.2017, issued by the Senior Manager, Human Resource. He was sanctioned study leave from 19.06.2017 to 18.06.2019. The study leave was sanctioned on condition that the petitioner would not be entitled to any pay or allowances during the period of leave. The conditions carried in the order dated 17.06.2017, sanctioning study leave to the petitioner, read :

- He shall execute a service agreement bond to serve the Company for a minimum period of three years after completion of the study leave or to pay to the company Rs. 50,000/- in case of default.

- He will not be entitled to any pay or allowances during the period of study leave and he will not accept any part/full time employment, scholarship, honorarium or any other payment during this period without prior approval of the Competent Authority.

- He will be entitled to the benefits of the continuity of service for CPF and Gratuity and if he chooses to contribute to his provident fund account during study leave period. the Company will make a matching contribution as per rules framed from time to time.

- During the study leave period, he shall not be considered for promotion. However, the period will count for eligibility for promotion only if he successfully completes his study. He will be considered for promotion as per the Company policy after rejoining duties on expiry of study leave. The duration of Study Leave availed without completing the study will not be reckoned for purposes of eligibility for promotion or for earning

increments. He will also not be eligible for grant of study leave again.

- The Study Leave period will not be considered for the purpose of earning any kind of leave.

- He shall vacate the company accommodation provided to him within stipulated time period, failing which market rent will be charged.

- He shall also be covered by any other rules in respect of study leave as framed by NTPC from time to time.

4. The petitioner took admission at the KIET, Ghaziabad in the M.Tech., Electrical & Electronics Course in the first year of the Academic Session 2017-18. The petitioner pursued his studies in the first semester of the course. The petitioner says that on account of his “personal circumstances” he could not appear in the examination at the end of the first semester. During this period of time, the petitioner married on 18.04.2018. The parties are ad idem that the petitioner was unable to complete the course successfully, that would have led to award of the degree of M.Tech. On the 17th of June, 2019, that is to say, well within time before expiry of leave, the petitioner reported back to duty. He submitted his joining report to the respondents, but not permitted to join. The petitioner stayed back at District Sonbhadra for about a month. During this period of time, the petitioner made abortive attempts to join duties, but not permitted. He returned to his hometown, awaiting further orders from the respondents. The respondents constituted a three-member committee headed by the General Manager (O & M) with an Assistant General Manager, Human Resource and the

Assistant General Manager (MTP) as its members, for the purpose of holding an inquiry into the petitioner's 'unauthorized absence'. The petitioner was finally required to appear before the committee last mentioned on 20th September, 2019, which he did. It is the petitioner's case that certain questions were put to him, which he answered. His answers were recorded. The Committee submitted a report to the respondents, recommending that the period of the petitioner's study leave be treated as unauthorized absence under Rule 24.9 of the NTPC Rules read with Rule 26(2)(vi)(e) of the Conduct, Discipline and Appeal Rules, 19774. Both these Rules appear to have been amended by Corporate Personnel Circular No. 415/99 dated 13.05.1999 issued by the Corporate Circular Personnel Division of the NTPC. The petitioner says that a copy of the inquiry report was not supplied to the petitioner, when it was made. It was at a subsequent stage that the said inquiry report was supplied to the petitioner, upon an application made for the purpose under the Right to Information Act, 2005. The report was supplied to the petitioner, under the Act last mentioned, through a memo dated 1st April, 2021.

5. Much before a copy of the inquiry report was supplied to the petitioner, the impugned order dated 31.03.2020 came to be passed by the Senior Manager (HR-EB) Rihand Super Thermal Power Project, Sonbhadra, holding that based on the recommendations of the committee and approval of the competent authority, the period of leave shall be treated as unauthorized absence, and, in consequence, the petitioner held to have abandoned service. The petitioner's lien was declared to be lost on the post held by him. The aforesaid order was passed in the exercise

of powers under Rule 24.9 of the NTPC Rules read with Rule 26(2)(vi)(e) of the CDA Rules, directing that the petitioner's name be struck off the rolls of NTPC with effect from 17.09.2017, afternoon. The period of unauthorized absence from 19.06.2017 to 17.06.2019 was directed to be treated as dies non.

6. The petitioner preferred an appeal under Rule 32(i) of the CDA Rules, challenging the order dated 31.03.2020 to the competent authority, but the appeal was dismissed both as not maintainable and on merits vide order dated 03.03.2023.

7. Aggrieved by the orders dated 31.03.2020 and 03.03.2023, the petitioner has instituted this writ petition under Article 226 of the Constitution.

8. In the writ petition, it is the petitioner's case that unauthorized absence has a specific connotation under Rule 24.9 of the NTPC Rules, which postulates unauthorized absence from duty or work, either without sanction of leave or after the expiry of sanctioned leave. The absence from duty for any reason, in either of the two eventualities, is for a period of 90 consecutive days or more. It is only then that the consequence of the employee automatically losing lien on the post attaches, resulting in the voluntary abandonment of service. It is pleaded on behalf of the petitioner that the petitioner proceeded on duly sanctioned study leave, and, merely because he could not successfully complete his course of study, the consequences envisaged under Rule 24.9 of the NTPC Rules would not attach. For the same reason, the consequences envisaged under Rule 26(2)(vi)(e) of the CDA Rules would also not be attracted. The case of the petitioner pleaded is that

the consequences would be governed by Paragraph No. 2.6 (iv) of the NTPC Scheme of Facilities for Higher Studies, which provides that in case the employee fails to complete the course of study satisfactorily, rejoining the services of the company will require specific approval of the Director, Human Resource.

9. A counter affidavit has been filed on behalf of the NTPC, respondent No. 1 being the NTPC represented by its Chairman and the other three respondents being its officers of varied rank.

10. The stand taken by the NTPC in the counter affidavit is that the petitioner never intimated the management at any stage that he did not appear in any of the papers of the first semester examination of the M.Tech. Course and had discontinued his course of study. The petitioner had been sanctioned study leave for the purpose of enabling him to complete the course. The stand of the respondents is that study leave having been granted to the petitioner under the leave rules for a particular purpose, the purpose having been abandoned by the petitioner, he would no longer be entitled to the leave sanctioned. It was then incumbent upon the petitioner to have intimated the NTPC regarding discontinuance of his course of study. It is the respondent's case that the petitioner deliberately concealed material facts regarding discontinuation of his studies, nor did he post the NTPC with developments in this regard up to the date of reporting for duty, upon completion of the study leave on 17.06.2019. The management say that the petitioner has played fraud on them.

11. In the rejoinder affidavit, the aforesaid contention has been disputed by

the petitioner, with the material facts pleaded in paragraph No. 6, that reads :

6. The fact that the petitioner could not appear in all the papers of the first semester examination is not disputed. However it is incorrect to assert that intimation of such fact had not been given by the petitioner to the authority. It is specifically stated that during the period the petitioner was on leave the petitioner had specifically intimated the authority on telephone with regard to his existing position on which the petitioner was intimated that he should report for joining after expiry of period of leave. The order sanctioning the study leave itself also specify the consequences of failure to complete the study during the leave period. There existed no indication of the petitioner being treated during this period as being on unauthorized absence. It is false to aver that the petitioner made any concealment of fact or played any fraud on the management. Both the allegations of fraud and concealment are allegations of misconduct requiring the same to be established during the course of regular disciplinary proceedings.

12. Heard Mr. Ashok Khare, learned Senior Advocate assisted by Mr. Mohammad Atif, learned Counsel for the petitioner and Mr. Ravi Kant, learned Senior Advocate assisted by Mr. Hanuman Prasad Dube, learned Counsel on behalf of the respondents.

13. This Court has keenly considered the matter and perused the record as well as the rules relevant to the issue. There is no issue about the fact that the petitioner is a permanent employee and his services can be terminated in one or the other eventualities, as they are called, provided

for by Clauses (a) to (h) of sub-Rule (1) of Rule 24 of the NTPC Rules. Unauthorized absence is one of the contemplated contingencies, which may lead to termination of an employee's services. Unauthorized absence is a particular and special eventuality, which entitles the employer to treat the employee as having abandoned service. It is not one of the usual modes by which the employer may dispense with the services of an employee. Normally, unauthorized absence from duty is a misconduct, upon which, disciplinary action against the employee concerned may follow. It is only in cases where for a particularly long period of unauthorized absence that rules provide for abandonment can the employer, upon strict compliance with the conditions of the rule, infer abandonment. In those cases also, the Courts insist on opportunity to be given to the employee, whose services the employer proposes to treat as abandoned. Therefore, the most important question to be determined in this case is whether Rule 24.9 of the NTPC Rules can, at all, be invoked to treat the petitioner as an employee abandoning his services.

14. To the understanding of the Court, the mode of termination of service by abandonment being a special provision, very different from the normal modes where the services of an employee may be terminated for misconduct, after following the procedure prescribed, the rule can be invoked only if the conditions thereof are strictly satisfied. Said differently, the rule has to be strictly construed in favour of the employee with burden upon the employer to show that the employee's act, indeed, falls in the teeth of the rule and the conditions of the rule to be applied have been strictly followed by the employer.

15. The foremost condition to attract the rule, as evident from a bare reading of Rule 24.9 of the NTPC Rules, is 'unauthorized absence from duty or place of work, without sanction of any leave' or 'not reporting for duty after expiry of the sanctioned leave for any reason whatsoever'. The next condition is that the absence in either contingency, whether it be unauthorized absence without leave or overstaying leave, should be for a consecutive period of 90 days. When both these conditions are satisfied, the Rule authorizes the employer to treat the employee as having lost his lien on the post and deemed to have voluntarily abandoned service without notice. The employee's rights are safeguarded by the proviso which says that upon reporting for duty within 90 days from the date of the termination order, if the employee explains the cause for his absence to the entire satisfaction of the management, the management may regularize the unauthorized absence on terms and conditions considered fit.

16. This Court, in the facts of the present case, does not intend to go into the validity of the rule that confines opportunity to account for unauthorized absence within 90 days of the termination of service, because we think that the said question does not, indeed, arise in this case. Here, to the understanding of this Court, either of the two fundamental conditions for the invocation of the rule does not arise. It is not a case where the petitioner has unauthorizedly absented from duty, for reason that admittedly, he proceeded on study leave for two years, which was granted under the rules as leave without pay.

17. The second condition is not fulfilled, because the petitioner did report

for duty on the expiry of two years, which he says he did on 17.06.2019, but was not allowed to join. His date of reporting for duty is not in issue. Therefore, there is, strictly speaking, no case of overstaying leave either.

18. The issue, which the respondents raise, is that leave was granted for a particular purpose, that is to say, to complete his M.Tech. Course, and the petitioner having abandoned that purpose even before he appeared for his end semester examination of the first semester, he forfeited his leave. The respondents say that having abandoned the course before the end semester examination of the first semester, it was incumbent upon the petitioner to have intimated the respondents regarding the discontinuance of his studies. The respondents, therefore, say that the study leave of two years, that was validly granted, turned into unauthorized absence the moment the petitioner abandoned the purpose for which leave was granted. The respondents also say that it amounts to playing fraud on the management, making the sanctioned leave turn into unauthorized absence, within the meaning of Rule 24(9) of the NTPC Rules.

19. As already remarked, the rule as to abandonment of employment under the NTPC Rules, like any other similar rule, has to be strictly construed. No doubt the petitioner did act unauthorizedly in abandoning his course of study while being on study leave and not intimating the management about it, followed by reporting for duty at the end of the period of leave. But, construing the rule strictly in favour of the employee, it does not satisfy the second condition where the rule may be invoked i.e. not joining duty after expiry of leave within the period of 90 consecutive

days. The first part of the Rule about absence from duty without leave is not involved here at all. The petitioner was sanctioned study leave for a period of two years and did join on schedule. The fact that he did not pursue his course of study for which the leave was sanctioned, which was a special leave and without pay, may have rendered the petitioner liable for disciplinary action, but that is not the case here. In the opinion of this Court, the sweep of the rule cannot be expanded to cover cases which may logically or through process of reasoning be regarded as unauthorized absence. The rule can be invoked, where there is a case of actual unauthorized absence for the specified period of time without sanctioned leave or overstaying leave beyond the sanctioned time for the specified period.

20. The Authorities that were cited at the Bar on both sides do not specifically bear on the question that arises here, though they generally are good guidance on principles relating to abandonment of employment, where rules provide for it. The decision of the Supreme Court in **V.C., Banaras Hindu University and others v. Shrikant**⁵ on which, much reliance has been placed by Mr. Ashok Khare, was a case where the employee, a Lecturer in Ophthalmology at the Institute of Medical Sciences, Banaras Hindu University, applied for different categories of leave with effect from 01.03.2000 to 30.06.2000, enabling him to accompany his wife to the United Kingdom on a Commonwealth Fellowship and also attend a Retina Meeting from 07.04.2000 to 09.04.2000 at Frankfurt, Germany as well as the Annual Congress of Royal College of Ophthalmology at Harrowgate, United Kingdom from 23.05.2000 to 24.05.2000. The leave was recommended by the Head

of Department, but not sanctioned by the Vice Chancellor. The employee left for the United Kingdom without sanction of leave and without the Vice Chancellor's permission. He was asked to join his duties by the Registrar vide notice dated 24.03.2000, with a further direction to show cause why action be not taken against him for misconduct. The employee said he received the letter on or about 31.03.2000, which he answered on 12.04.2000. The University, by an order dated 18.04.2000, asked the employee to submit his reply by 05.05.2000, failing which, he would be deemed to have abandoned service with effect from 01.03.2000. By another notice dated 04.05.2000, the employee was asked to join his duty by 17.05.2000 on ground that his earlier reply has not been found satisfactory. It was also mentioned in this notice that he would be deemed to have abandoned his service with effect from 01.03.2000 if he did not respond to the last notice on ground that he had failed to comply with the orders, requiring him to report back. The services of the employee were terminated by the Vice-Chancellor with effect from 01.03.2000.

21. Apart from other issues on which **Shrikant** (*supra*) is an authority, including the Vice-Chancellor's jurisdiction to pass that kind of an order, which was held to be exclusively the Executive Council's province, the most relevant fact is that **Shrikant** was, after all, a case where the employee had left his duties, left the station as also the Indian shores without sanction of leave by the competent authority. Action was taken in terms of the relevant ordinance of the University, providing for abandonment of employment in case of unauthorized absence from duty. Therefore, the authority in **Shrikant** is about a case where an employee did go away from his

duty, without sanction of leave by the competent authority and refused to join back, when given a certain time to do so. It is another matter that the determination of employment on other premise was held bad in that case, but, the authority does not, at all, deal with the issue that arises here, that we have noticed and dwelt upon in ample measure hereinbefore.

22. Reliance on behalf of the respondents is placed by Mr. Ravi Kant, learned Senior Advocate on a decision of the Kerala High Court in **M.P. Joseph v. Union of India and others**⁶. This was a case where the services of an officer of the Indian Administrative Services were held abandoned and a deemed resignation inferred under Rule 7(2) of 21(f) of the All India Services (Leave) Rules, 1955⁷. In the said case, the employee had been deputed on foreign assignment to a project of the International Labour Organization. After the period of deputation was over, he joined back for a day and then left post, after putting in an application for extraordinary leave for four years. The leave application was rejected and repeat directions issued to the officer to join back his duties. Besides these steps, disciplinary proceedings were initiated for unauthorized absence to take up remunerative assignment and failing to report for duty. He unauthorizedly absented for a continuous period of five years. He was given an opportunity to explain his absence, as provided in the Note to Rule 7(2) of the Rules of 1955 and held deemed to have resigned in accordance with the Rules aforesaid. As the report of the decision would show, the officer challenged the order of his deemed resignation as well as Rule 7(2) of the Rules of 1955 as *ultra vires* before the

Central Administrative Tribunal. Failing there, he petitioned the High Court.

23. It appears that disciplinary proceedings were initiated, but noticing that there was continuous absence of more than five years, Rule 7(2) was invoked to declare the officer's deemed resignation. The decision of the Government under the Rule was upheld as also the vires of Rule 7(2). This decision, too, hardly bears on the point, because it was, on facts, a case of the officer leaving his post unauthorizedly and staying away for a period of five years, without sanctioned leave. The point here is very different, as already indicated.

24. In **Vijay S. Sathaye v. Indian Airlines Limited and others**⁸, the issue arose in the context of the Deputy Manager (Operations) of the erstwhile Indian Airlines, seeking voluntary retirement. The employee, in the said case, submitted an application on 07.11.1994, seeking voluntary retirement with effect from 12.11.1994. The petitioner was informed vide letter dated 11.11.1994 that he should continue in service till such time a decision is taken. However, the officer did not attend duty on 12.11.1994. He joined a certain Blue Dart Limited, and did not go back to his employers to work on 12.11.1994. Since there was no response from the Indian Airlines, he filed a writ petition before the High Court for a mandamus, directing the Airlines to accept his application for voluntary retirement. Pending the said petition, the employee was informed that his application had been rejected. The employee then challenged the order rejecting his application for voluntary retirement. Pending the said writ petition, the employee attained the age of superannuation. The High Court dismissed the petition. The employee petitioned the

Supreme Court seeking Special Leave to Appeal. Upholding the High Court, an inference of abandonment from service was drawn. It was observed in **Vijay S. Sathaye (supra)** :

11. Even otherwise, the petitioner was asked to continue in service till the decision is taken on his application. However, he did not attend the office of the respondents after 12-11-1994. In view of the above, as the petitioner had voluntarily abandoned the services of the respondents, there was no requirement on the part of the respondents to pass any order whatsoever on his application and it is a clear-cut case of voluntary abandonment of service and the petitions are liable to be dismissed.

12. It is a settled law that an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntary abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer.

13. In **Jeewanlal (1929) Ltd. v. Workmen** [AIR 1961 SC 1567] this Court held as under : (AIR p. 1570, para 6)

“6. ... there would be the class of cases where long unauthorised absence may reasonably give rise to an inference that such service is intended to be abandoned by the employee.”

(See also *Shahoodul Haque v. Registrar, Coop. Societies* [(1975) 3 SCC 108].)

14. For the purpose of termination, there has to be positive action on the part of the employer while abandonment of service is a consequence of unilateral action on behalf of the employee and the employer has no role in it. Such an act cannot be termed as “retrenchment” from service. (See *State of Haryana v. Om Parkash* [(1998) 8 SCC 733 : 1999 SCC (L&S) 262] .)

15. In *Buckingham and Carnatic Co. Ltd. v. Venkatiah* [AIR 1964 SC 1272] , while dealing with a similar case, this Court observed : (AIR p. 1275, para 5)

“5. ... Abandonment or relinquishment of service is always a question of intention, and, normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf.”

A similar view has been reiterated in *G.T. Lad v. Chemical and Fibres of India Ltd.* [(1979) 1 SCC 590 : 1979 SCC (L&S) 76 : AIR 1979 SC 582]

16. In *Syndicate Bank v. Staff Assn.* [(2000) 5 SCC 65 : 2000 SCC (L&S) 601] and *Aligarh Muslim University v. Mansoor Ali Khan* [(2000) 7 SCC 529 : 2002 SCC (L&S) 965 : AIR 2000 SC 2783] this Court ruled that if a person is absent beyond the prescribed period for which leave of any kind can be granted, he should be treated to have resigned and ceases to be in service. In such a case, there is no need to hold an enquiry or to give any notice as it would amount to useless formalities. A similar view has been reiterated in *Banaras*

Hindu University v. Shrikant [(2006) 11 SCC 42 : (2007) 1 SCC (L&S) 327] , *Chief Engineer (Construction) v. Keshava Rao* [(2005) 11 SCC 229 : 2005 SCC (L&S) 872] and *Bank of Baroda v. Anita Nandrajog* [(2009) 9 SCC 462 : (2009) 2 SCC (L&S) 689].

25. The decision in **Vijay S. Sathaye** turns on the principle that absence for a very long period may amount to abandonment of service, and, in that eventuality, the relationship of employer and employee comes to a terminus automatically, without an order by the employer. Apparently, in **Vijay S. Sathaye**, there was no order declaring the petitioner to have abandoned the post. Therefore, the general principle regarding abandonment was stated without reference to any provision governing abandonment. Long absence from the employer’s establishment was held to give rise to an inference about abandonment.

26. One of the Authorities noticed in **Vijay S. Sathaye is Buckingham and Carnatic Co. Ltd. v. Venkatiah and another**⁹. The case before the Supreme Court in **Buckingham** (*supra*) arose out of an award of the Labour Court, where the employer had refused to take back the workman in service. The workman proceeded on six days’ leave starting from 10.01.1957, which, after taking into consideration the intervening holidays, expired on 18.01.1957. He did not report for duty on 19.01.1957 according to the employers, but remained absent without leave and without sending any communication seeking extension of leave. He sent a letter on 11.03.1957, saying that after reaching his village, he had suffered from fever and dysentery and treated by the Civil Assistant Surgeon. The letter was

accompanied with a certificate issued by a government doctor. The medical certificate said that the workman had suffered from Chronic Malaria and Dysentery from 15.01.1957 to 17.03.1957. The workman appeared before the Manager, but was asked to report to the Senior Manager. The Medical Officer was unable to ascertain if he had been ill for a period of two months. The employers refused to take back the workman in service and informed him to the above effect on 23.03.1957, treating it to be a case of abandonment of service. His case was treated as one falling under Standing Order No. 8(ii) of the Standing Orders applicable to the employer's establishment. It was in the context of the aforesaid facts that it was held by their Lordships of the Supreme Court :

5. ...This Standing Order is a part of the certified Standing Order with had been revised by an arbitration award between the parties in 1957. The relevant clause clearly means that if an employee falls within the mischief of its first part, it follows that the defaulting employee has terminated his contract of service. The first provision in clause (ii) proceeds on the basis that absence for eight consecutive days without leave will lead to the inference that the absentee workman intended to terminate his contract of service. The certified Standing Orders represent the relevant terms and conditions of service in a statutory form and they are binding on the parties at least as much, if not more, as private contracts embodying similar terms and conditions of service. It is true that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately

drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and, normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. But where parties agree upon the terms and conditions of service and they are included in certified Standing Orders, the doctrines of common law or considerations of equity would not be relevant. It is then a matter of construing the relevant term itself. Therefore, the first part of Standing Order 8(ii) inevitably leads to the conclusion that if an employee is absent for eight consecutive days without leave, he is deemed to have terminated his contract of service and thus relinquished or abandoned his employment.

27. It, therefore, appears from the said decision that while essentially, abandonment is a matter of intention on the employee's part, if the issue is governed by a rule, the abandonment would depend on the terms of the rule.

28. What was said by their Lordships in **Buckingham** was about a certified standing order relying on a rule on the subject of abandonment. In the present case, this Court has, for the same reason, looked into the terms of the rules and concluded that the conditions spelt out therein, that are an exception to the usual mode of termination, have to be strictly construed in favour of the employee, and are not attracted here at all, for reasons already indicated. It is urged on behalf of the petitioner by the learned Senior Advocate that the consequences of failure to complete the course of study are dealt with under Paragraph No. 2.6 (iv) of the NTPC Scheme of Facilities for Higher Studies. The petitioner's case may not be

open to be dealt with under para 2.6(iv) last mentioned, because it is not a case where the petitioner completed the course of study and failed to earn his degree. It is a case where he abandoned the course. As already remarked, the petitioner ought to have informed the respondents about his decision to abandon or the circumstances that led him to give up the course early into the first semester, but, in whichever manner the respondents may deal with the aforesaid lapse on the petitioner's part, it would not constitute unauthorized absence from duty or overstaying the sanctioned leave within the meaning of Rule 24.9 of the NTPC Service Rules read with Rule 26(2)(vi)(e) of the CDA Rules. Therefore, the decision by the respondents to consider the petitioner's services as abandoned cannot be countenanced.

29. In the result, this writ petition **succeeds** and shall stand **allowed**. The impugned orders dated 31.03.2020 and 03.03.2023 passed by the Senior Manager (HR-EB), Rihand Super Thermal Power Project, Bijpur, Sonbhadra are hereby quashed. A mandamus is issued to the respondents to reinstate the petitioner forthwith with seniority and continuity of service, though no emoluments would be payable for the period by the terms of the leave.

30. It shall be open to the respondents to take action against the petitioner in abandoning the course of study for which study leave was taken as permissible under the rules.

31. There shall be no order as to costs.

(2023) 11 ILRA 847
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2023

BEFORE

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

Writ-A No. 10999 of 2023

Rajeev Kumar **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Sri Rama Nand Shukla, Sri Mani Shanker Pandey

Counsel for the Respondents:

C.S.C., Sri Abhishek Srivastava, Sri Brajesh Pratap Singh, Sri Ram Bahadur Singh

A. Service Law – Punishment – Dismissal from service – Charge of embezzlement – Disciplinary proceeding – Right of cross examination – Charges were serious enough to lead to the possible imposition of a major penalty – No date, time and place was fixed for the inquiry – Effect – Held, where slackness in performance of duties etc. is the substance, it was incumbent upon the establishment, in the first instance, to examine witnesses and prove the charges against the petitioner, with opportunity to the petitioner to cross-examine such witnesses. (Para 11 and 13)

B. Service Law – Disciplinary enquiry – Oral hearing – Meaning – By oral inquiry, is meant that the establishment examines witnesses on their behalf, in the first instance, to prove the charges before the Inquiry Committee through a presenting officer. It has nothing to do with orally hearing the delinquent employee. (Para 15)

Writ petition allowed. (E-1)

List of Cases cited:

1. Roop Singh Negi Vs P.N.B. & ors. ; (2009) 2 SCC 570

2. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB) (LB)

3. St. of U.P. & anr. Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB) (LB)

4. Ranveer Singh Vs U.O.I. & ors. ; 2021 (5) ADJ 136

5. Prem Narain Singh Vs St. of U.P. & anr.; 2023 (2) ADJ 580

6. Allahabad Bank & ors. Vs Krishna Narayan Tewari; (2017) 2 SCC 308

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

1. Heard Mr. Mani Shanker Pandey, learned Counsel for the petitioner, Mr. Abhishek Srivastava, learned Counsel appearing on behalf of respondent Nos. 2 and 3, Mr. Ram Bahadur Singh, Advocate holding brief of Mr. Brajesh Pratap Singh, learned Counsel for respondent Nos. 4, 5 and 6 and Ms. Monica Arya, learned Additional Chief Standing Counsel appearing on behalf of respondent No. 1.

2. This writ petition is directed against the order dated 07.06.2023 passed by the Managing Director, Uttar Pradesh Power Corporation Limited, dismissing the petitioner from the Corporation's service.

3. A counter affidavit was filed on behalf of the U.P. Power Corporation on 27.07.2023 by Mr. Abhishek Srivastava, learned Counsel appearing on behalf of respondent Nos.2 and 3 and original records of the inquiry also produced before the Court on the date last mentioned. These records have been retained and perused. A statement was made on behalf of learned Counsel for the parties on 27.07.2023 that they do not intend to file any further affidavits. Accordingly, the writ petition was admitted to hearing and heard

forthwith on the said date. Judgment was reserved.

4. The petitioner was an Executive Agent and functioning as the Head Cashier (Revenue) at the Vidyut Vitran Khand-I, Baghpat. At the relevant time, one Suresh Babu, who held the post of a Technician (Grade-II) with the Pashchimanchal Vidyut Vitran Nigam Limited, was assigned duties of the cashier. He was later on promoted in the month of March, 2019 to the post of a Junior Engineer, going by his cadre. According to the petitioner, after Suresh Babu's promotion, the Managing Director, Pashchimanchal Vidyut Vitran Nigam Ltd., on account of some suspicion relating to accounts, directed reconciliation to be made. It was discovered that there was embezzlement committed by Suresh Babu to the tune of Rs.3,68,25,552/- out of the revenues collected on behalf of the Corporation. A First Information Report was lodged by the Executive Engineer, Vidyut Vitran Khand-I, Baghpat with the Police, that came to be registered as Crime No.300 of 2019, under Section 409 IPC, Police Station Baghpat, District Baghpat. In the FIR, Suresh Babu was nominated as the main accused and besides him, four other persons, to wit, the petitioner (Rajeev Kumar), Vikalp Mahesh, Ishpal Singh and Rajveer Singh. The Police after investigation submitted a charge-sheet dated 13.11.2019 against Narendra alias Pintu and Fakhruddin for offences punishable under Sections 408/120-B IPC and exculpated the petitioner with the remark that his implication in the case was found false upon investigation.

5. It is the petitioner's case that he was suspended pending enquiry on 16.05.2019 and during his suspension on 07.09.2019, he was served with a charge-sheet dated

07.09.2019. He submitted his reply dated 20.09.2019, denying the charges. The petitioner, amongst other things, said that he was neither working with the Vidyut Vitran Khand-I, Baghpat since 01.05.2015 to 16.05.2019, nor during the period 01.05.2015 to 16.05.2019 and 08.11.2013 to 13.12.2014.

6. It is the petitioner's case that he has, therefore, no concern about the embezzlement, which happened in a different period of time between the years 2013 – 14. The petitioner has asserted that he was working with the Vidyut Vitran Khand-I, Baghpat for a short time in the year 2014-15. It is next made out that the two charges framed against the petitioner in the charge-sheet allege no embezzlement by him, but negligence as the Chief Cashier, leading to embezzlement by Suresh Babu, who is at the centre stage of the charge, subject matter of this enquiry. It is also said that the petitioner had informed his superior Authorities about the embezzlement, but no action was taken. It is also pleaded that due to lack of training in handling the online billing system, nor the provision of an ID to do online billing work, or supervise the same, the petitioner faced hardship in discharging his duties, so far as Charge No.1 goes. Charge No.2 is an amalgam of about five different lapses committed by the petitioner in his supervisory duties, which led to the embezzlement by Suresh Babu.

7. The petitioner offered defences on each of these lapses that he has pleaded in the writ petition also. A copy of the inquiry report has not been annexed to the writ petition. It is averred in paragraph No.30 of the writ petition that the petitioner appeared before the Inquiry Committee while the inquiry was in progress. But, there is

nothing said about a copy of the inquiry report being given to him. It is averred that he submitted a reply to the Managing Director on 31.12.2021, that would show that he was given a show cause post inquiry, to which he replied. In the absence of the inquiry report and, particularly, in view of the fact that this Court wanted to know if the employers had examined any witnesses during the inquiry to find the petitioner guilty on a charge, which led to the imposition of a major penalty, the records of the inquiry were summoned.

8. Our observations about the inquiry report, which we have looked into in the records, will be alluded to later in this judgment. At this stage about the facts being noticed, suffice it to say that the inquiry report is a document dated nil, which is available on the original records between pages 161-167. Acting on this inquiry report, the Managing Director, Pashchimanchal Vidyut Vitran Nigam Ltd. issued a show cause notice dated 04.12.2021, a fact gathered from the reply submitted to it by the petitioner, a copy whereof is annexed as Annexure No.11 to the writ petition. The show cause notice being one dated 04.12.2021, and the date of the enquiry report being 25.10.2021, is also corroborated from an averment to that effect, and some annexed record in paragraph No.7 of the counter affidavit, filed on behalf of respondent Nos.2 and 3.

9. The petitioner's reply also shows that in the show cause notice, the date of the inquiry report, which is not mentioned on the original, has been indicated to be a document dated 25.10.2021. The best that can be made of it, is that the inquiry report, bearing no date, was submitted to the Managing Director along with a cover memo dated 25.10.2021, and that has been

regarded by the petitioner, and, may be by the respondents also, as the date of the inquiry report. The petitioner has submitted a reply to the show cause notice on 31.12.2021. Thereafter, in due course, the impugned order dated 07.06.2023 has been passed by the Managing Director, U.P. Power Corporation.

10. Aggrieved, this petition has been instituted under Article 226 of th

11. A perusal of the enquiry report, as also the entire record of the inquiry, does not indicate at all that the Inquiry Committee held proceedings according to the salutary principles governing procedure for holding such proceedings, where charges are serious enough to lead to the possible imposition of a major penalty. The record of the inquiry or the Inquiry report itself does not indicate that a date, time and place was fixed for the inquiry with notice to both the charge sheeted employee and the establishment. The essentials of a domestic enquiry into grave charges requires that the Inquiry Committee should sit as a detached Tribunal, before whom the establishment/ employer ought to lead evidence, both documentary and oral in support of the charges through a presenting officer duly appointed. The Inquiry Committee in this case do to not appear to have sat as independent arbiters, before whom the employers/ establishment led evidence, both oral and documentary, through a presenting officer. Contrary to this, the members of the Inquiry Committee, who are otherwise officers of the same establishment, did not forsake their role as part of the establishment and virtually sat to hold the disciplinary inquiry in the manner of an investigation or a fact-finding inquiry, glossing through papers offered by the establishment and hearing

the petitioner orally about his defence. This is not what the salutary principles about the procedure of a domestic enquiry contemplate.

12. The namesake of an inquiry that has been undertaken by the Committee, has held the petitioner guilty of Charge No.1 and partly guilty of Charge No.2. This Court has strained hard to see through the records produced, if there were any proceedings of the inquiry, recorded on daily order-sheets. We did not find any schedule for the inquiry, where the Inquiry Committee, comprising two officers of the establishment, sitting as impartial arbiters, would have intimated any date, time and place of the inquiry, both to the establishment and the petitioner. We also did not find that any witness was examined in support of the two charges, which in this case was all the more important, given the nature of the charges against the petitioner. The charge against the petitioner is not about committing the embezzlement himself, but slackness in supervision.

13. There are a few letters written by the petitioner to the higher officers regarding the delay in submission of *challans* by Cashiers. About two of these letters dated 28.08.2018 and 21.11.2018, it is remarked in whatever kind of a finding is recorded by the Inquiry Committee that these letters are self attested by the petitioner, whereas the attestation should have been secured from the Electricity Distribution Division, Baghpat. We think that in the matter of a charge of this kind, where slackness in performance of duties etc. is the substance, it was incumbent upon the establishment, in the first instance, to examine witnesses and prove the charges against the petitioner, with opportunity to the petitioner to cross-examine such

witnesses. No finding could have been recorded against the petitioner by an Inquiry Committee sitting behind a bureau and flipping through papers made available by the establishment and considering themselves to be no more than officers of the establishment, rather than independent arbiters. We are convinced upon looking through the records that the Inquiry Committee did not follow the essentials of the established procedure to hold a disciplinary inquiry in the matter involving the imposition of a major penalty. And, it has certainly prejudiced the petition in the outcome.

14. Mr. Abhishek Srivastava, learned Counsel was at pains to show that in fact an oral inquiry took place. He has drawn the Court's attention to paragraph No.6 of the counter affidavit, to say that it is evident from a perusal of the letter dated 21.01.2020, asking the petitioner to appear before the Inquiry Committee for personal hearing, and, the fact, that in response the petitioner appeared on 01.02.2020 before the Inquiry Committee, that oral inquiry was held, where he supported the contents of his reply dated 20.09.2019, in answer to the charge-sheet.

15. We are afraid that an oral hearing of this kind does not at all fulfil the requirements of holding what is called an oral inquiry. By oral inquiry, is meant that the establishment examines witnesses on their behalf, in the first instance, to prove the charges before the Inquiry Committee through a presenting officer. It has nothing to do with orally hearing the delinquent employee. This misconception about the procedure ought to be taken note of by the respondents once and for all, so that fundamental flaws of procedure that vitiate the inquiry, may be eschewed.

16. About the requirements of the law relating to the manner of holding a departmental enquiry, reference may be made to the authority of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others**, (2009) 2 SCC 570, where it has been observed:

“14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.”

17. Again, in **Smt. Karuna Jaiswal v. State of U.P.**, 2018 (9) ADJ 107 (DB) (LB), it has been held by a Division Bench of this Court:

“15. The law in this regard is very well-settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of **State of Uttar Pradesh and others v. Saroj Kumar Sinha**, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or

disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the un rebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable.”

18. Also, in **State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB) (LB)**, the importance of holding an oral inquiry, where witnesses are examined first by the establishment to prove charges, was emphasised by a Division Bench of this Court at Lucknow in terms of the following remarks:

“14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541.”

15. In another case in Subhash Chandra Gupta v. State of U.P., **2012(4) ADJ 4 (NOC)**, the Division Bench of this Court after survey of law on this issue observed as under:

“It is well-settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgement of the Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division

Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541.”

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, **2008(3) ESC 1667**, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

“10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11.A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005.”

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold an ex parte enquiry where evidence must be led vide Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR

570, had also occasion to deal with the same issue. It held:

“At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that those documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect.”

B The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.”

(emphasis by Court)

19. I also had occasion to consider the issue in **Ranveer Singh v. Union of India and others, 2021 (5) ADJ 136 and Prem Narain Singh v. State of U.P. and another, 2023 (2) ADJ 580**. In both the aforesaid decisions, the necessity of examining witnesses in support of the charges, in a case involving the imposition of a major penalty has been explained. In the present case, as already said, no witness has been examined by the establishment and findings recorded acting on idle papers. The enquiry is, therefore, ex facie flawed. All proceedings taken on its basis are, therefore, vitiated.

20. This Court may add that the impugned order dated 07.06.2023 passed by the Managing Director, on its own terms also, hardly qualifies for a valid order by the Disciplinary Authority. A perusal of the said order shows that after a brief reference to facts, there is a reference to the two charges against the petitioner. In the next part, the petitioner's defence to the two charges has been set out. There is then a brief reference to the fact of oral hearing before the Inquiry Committee on 01.02.2020, to which we have already made allusion hereinbefore. In the next part of the order impugned, there is an elaborate reference to the findings on the two charges by the Inquiry Committee, setting forth all that they have said. In the following part, the petitioner's answer to the show cause notice has been set forth with reference to the two charges on the findings of the Inquiry Committee. Doing all this, the Managing Director has consumed ten of the ten pages and a quarter of the total length of his order. For his finding, after a reproduction of all the material indicated hereinbefore, the Managing Director has

expressed himself very cryptically in a few lines, that read:

"अभ्यावेदन का परीक्षण :-

श्री राजीव कुमार द्वारा आरोप सं0 - 01 एवं 02 के सम्बन्ध में किया गया कथन स्वीकार योग्य नहीं है क्योंकि श्री राजीव कुमार उक्त खण्ड में मुख्य रोकड़िया के महत्वपूर्ण पद पर तैनात थे एवं खण्ड के विभिन्न रोकड़ियों द्वारा राजस्व के मद में प्रतिदिन कितनी धनराशि प्राप्त की जा रही है व उसके सापेक्ष कितनी धनराशि बैंक में अथवा मुख्य रोकड़िया को आर0आर0 स्टेटमेंट के साथ जमा की जा रही है इसका अनुश्रवण करना उनका मुख्य दायित्व था । यदि उनके द्वारा (Counterwise Daily Revenue Collection Report) का अनुश्रवण किया गया होता तो राजस्व गबन न होता। उनके द्वारा एच०सी०एल० की कोई आई०डी० न होने का उल्लेख किया गया है, किन्तु उनके द्वारा आई०डी० बनवाने हेतु क्या प्रयास किये गये के सम्बन्ध में कोई उल्लेख नहीं किया गया है। वे राजस्व गबन जैसे गम्भीर मामले में कार्यवाही न करने एवं अपने कर्तव्यों में उत्तरदायित्वों में शिथिलता बरतने हेतु उत्तरदायी है। उन पर लगाया गया आरोप सं0-01 सिद्ध तथा आरोप सं0-02 आंशिक रूप से सिद्ध होता है।"

21. It is, indeed, appalling that the Disciplinary Authority should condemn the petitioner, holding him guilty on a charge leading to the imposition of the major penalty, and record his findings in so cryptic an expression that it is difficult to understand how the Disciplinary Authority has reasoned to reach the conclusion that the petitioner is guilty. In this connection, reference may be made to the authority of the Supreme Court in **Allahabad Bank and others v. Krishna Narayan Tewari, (2017) 2 SCC 308**, where it is observed:

"7. We have given our anxious consideration to the submissions at the Bar. It is true that a writ court is very slow in interfering with the findings of facts recorded by a departmental authority on the basis of evidence available on record. But it is equally true that in a case where the disciplinary authority records a finding that

is unsupported by any evidence whatsoever or a finding which no reasonable person could have arrived at, the writ court would be justified if not duty-bound to examine the matter and grant relief in appropriate cases. The writ court will certainly interfere with disciplinary enquiry or the resultant orders passed by the competent authority on that basis if the enquiry itself was vitiated on account of violation of principles of natural justice, as is alleged to be the position in the present case. Non-application of mind by the enquiry officer or the disciplinary authority, non-recording of reasons in support of the conclusion arrived at by them are also grounds on which the writ courts are justified in interfering with the orders of punishment. The High Court has, in the case at hand, found all these infirmities in the order passed by the disciplinary authority and the appellate authority. The respondent's case that the enquiry was conducted without giving a fair and reasonable opportunity for leading evidence in defence has not been effectively rebutted by the appellant. More importantly the disciplinary authority does not appear to have properly appreciated the evidence nor recorded reasons in support of his conclusion. To add insult to injury the appellate authority instead of recording its own reasons and independently appreciating the material on record, simply reproduced the findings of the disciplinary authority. All told, the enquiry officer, the disciplinary authority and the appellate authority have faltered in the discharge of their duties resulting in miscarriage of justice. The High Court was in that view right in interfering with the orders passed by the disciplinary authority and the appellate authority.”

(emphasis by Court)

22. Since this Court is minded to send back the matter to the respondents, if they elect to pursue proceedings afresh against the petitioner, it is imperative that all that has been said hereinbefore about the proceedings of the inquiry and the obligations of the Disciplinary Authority while writing his order, shall be borne in mind.

23. In the result, this petition **succeeds** and is **allowed**. The impugned order dated 07.06.2023 passed by the Managing Director, Uttar Pradesh Power Corporation Limited, Lucknow is hereby quashed. The respondents are ordered to reinstate the petitioner in service forthwith, and pay him current salary from the date of this judgment. If, however, the respondents choose to place the petitioner again under suspension in view of the liberty hereinafter indicated, the petitioner shall be paid his subsistence allowance regularly. The respondents shall be at liberty to undertake inquiry afresh in the matter, on the basis of the charge-sheet, already issued. The respondents in that event will proceed, bearing in mind the guidance in this judgment. If the respondents elect to proceed against the petitioner as per liberty given, it would be open to the respondents either to reinstate the petitioner, assigning him duties or not, but paying salary to him, or place him under suspension pending the inquiry to be held afresh. The question of payment of back-wages shall depend upon the outcome of the inquiry and the decision taken by the respondents in the proceedings, if they elect to pursue such proceedings. It is also ordered that if fresh proceedings are taken, the same shall be concluded expeditiously, wherein the petitioner shall cooperate. There shall be no order as to costs.

24. Let the original records be handed over to Mr. Abhishek Srivastava, learned Counsel appearing on behalf of the U.P. Power Corporation for their onward transmission to the respondents.

(2023) 11 ILRA 855
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2023

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Writ-A No. 11509 of 2023

Imtiyaz Ahamad ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Shivendu Ojha, Sri Naushad Alam, Sri
Radha Kant Ojha (Sr. Adv.), Sri Ratnakar
Upadhyay

Counsel for the Respondents:

C.S.C., Sri Samarath Singh, Sri Sankalp Narain

A. Service Law – UP Intermediate Education Act, 1921 – Section 16FF – Minority institution – Officiating Principal – Appointment of an ineligible and unqualified candidate – Committee's power – How far exemption from the provision can be claimed – Held, though, there is no quarrel to the proposition that the Committee of Management of a minority institution is free to choose any incumbent to officiate but the same is not an unfettered right so as to create a situation whereby an ineligible and unqualified person is being allowed to man the post. Otherwise it would create not only anarchy but would also be detrimental to the interest of the institution. (Para 33)

Writ petition allowed. (E-1)

List of Cases cited:

1. Secretary Malankara Syrian Catholic College Vs T. Jose & ors. ; (2007) 1 SCC 386
2. Mohd. Ayub Khan Vs State; 2008 (10) ADJ 477
3. Nisar Ahmad Vs Registrar/Inspector of Arabi, Farsi, Madarsas & ors. ; 2006 (62) ALR 919
4. Ashok Kumar Malhotra & ors. Vs St. of U.P. & ors. ; 2018 (8) ADJ 511
5. N. Ammad Vs Manager, Emjay High School & ors. ; AIR 1999 SC 50
6. SK. MD. Rafique Vs Managing Committee, Contai Rahamania High Madrasah & ors. ; 2020 (4) ESC 863 (SC)
7. Writ A No. 45123 of 2008; Sunil Kumar Sharma Vs State of U.P. & others decided on 16.8.2023
8. Writ A No. 44485 of 2011, Smt. Praveena Yadav Vs St. of U.P. & ors. decided on 8.8.2011

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Radha Kant Ojha, learned Senior Counsel, assisted by Sri Ratnakar Upadhyay, Sri Naushad Alam, learned counsels for the writ petitioner, Sri Pradeep Kumar Shahi, learned Additional Chief Standing Counsel, who appears for the State official respondents as well as Sri Sankalp Narain, learned counsel, who appears for the respondent nos.4 and 5.

2. Since a statement has been made by the learned counsel for the rival parties that they do not propose to file any further affidavits thus with their consent the writ petition is being decided at the fresh stage.

3. The case of the writ petitioner is that there is an institution by the name of S.M. National Inter College Machhati, District Ghazipur, fourth respondent, which

is a minority institution conferred with certain protection and benefits under Article 30 of the Constitution of India recognised and aided under the provisions of U.P. Intermediate Education Act, 1921 (In short 1921, Act) and the provisions of U.P. Act No.24 of 1971 stands applicable. As per the writ petitioner the said institution has his own approved scheme of administration. The writ petitioner herein claims to be working as Lecturer (Physics) in the institution in question since 1997. It is the case of the writ petitioner that seniority list was published on 3.2.2021 wherein the name of the writ petitioner found place at serial no.2 as whereas the name of the fifth respondent is at serial no.8.

4. Records reveal that one Sri Subhanullah Khan was appointed as the Principal of the institution in question however six months before his superannuation he proceeded on medical leave resulting to the fact that a vacancy stood arisen and one Smt. Farhat Mirza Khan was handed over the officiating charge of the Principal in question and her signatures were also attested 16.3.2021. One Sri Quamaruddin who claimed himself to be the senior most Lecturer in the seniority list challenged the appointment of Smt. Farhat Mirza Khan as Officiating Principal while filing a Writ-A No.6467 of 2021 which was dismissed on 16.7.2021.

5. It has come on record that Sri Subhanullah Khan superannuated on 31.3.2022. Thereafter, Smt. Farhat Mirza Khan resigned on 6.5.2022, Committee of Management proceeded to resolve to grant the charge as Officiating Principal of the institution in question to the fifth respondent, Shoab Ahamd Khan and he

was accorded joining and signatures were attested on 17.6.2022.

6. The writ petitioner herein questioned the officiation of the fifth respondent as a Principal in the institution in question while filing **Writ-A No.13591 of 2022, Imtiyaz Ahamad vs. State of U.P. & 4 others** as whereas the fifth respondent, preferred **Writ-A No.21404 of 2022, Shoeb Ahmad Khan vs. State of U.P. and 3 others** for a mandamus directing the Committee of Management as well as the District Inspector of Schools to accord payment of salary to him in the grade of Principal and not to interfere in his functioning. Both the writ petitions were consolidated together and were decided by a common order on 14.3.2023 which is quoted herein under :-

1. These two connected matters relate to the issue of appointment of respondent no. 5 namely Shoeb Ahmad Khan as an Officiating Principal of an Intermediate College recognized and governed under the Intermediate Education Act, 1921 and so the entitlement of Mr. Khan to salary as admissible to the post of Principal of a recognized and aided institution while Imtiyaz Ahamad, the present petitioner in writ petition being Writ - A No. 13591 of 2022 has questioned the appointment of Mr. Khan as Officiating Principal of the Institution for the reason that he did not possess the requisite qualification for the post of Principal of a recognized Intermediate College as per the qualification prescribed in Appendix-A of Intermediate Education Act, 1921.

2. Mr. Khan who happens to be the petitioner in connected matter being Writ - A No. 21404 of 2022 has on the other hand prayed for a writ of mandamus

directing the Committee of Management as well as District Inspector of Schools to make payment of salary to him in the grade of Principal of a recognized aided Intermediate College as admissible in law as a consequence to his appointment as Officiating Principal of the Institution and his taking charge of the office on 21.05.2022. The signatures of Mr. Khan came to be attested by District Inspector of Schools on 17.06.2022.

3. The facts that emerged from the pleadings of two connected matters can be placed in a narrow compass like this that the Institution that is aided minority institution is managed by a validly elected Committee of Management and the earlier Principal Mr. Subhanullah Khan, who was validly continuing in the Institution and was to retire on 31.03.2022, proceeded on long leave on 30.12.2020 and so the Committee of Management proceeded to appoint one Smt. Farhat Mirza Khan as Officiating Principal of the Institution giving her charge and consequently her signatures came to be attested on 16.03.2021. The challenge was made on the ground that Smt. Farhat Mirza Khan did not possess the requisite qualification for the post of Principal of the Institution vide Writ - A No. 8702 of 2022 by the present petitioner. However, while the petition remained pending, Smt. Farhat Mirza Khan resigned on 06.05.2022.

4. It is also brought to the notice of this Court by Sri Sankalp Narain, learned counsel for the petitioner in connected matter that the senior most teacher of the Institution namely Mr. Qamar Uddin had also challenged the appointment of Smt. Farhat Mirza Khan as Officiating Principal of the Institution and the said petition was dismissed as found to

be meritless by a detailed order dated 16.07.2021 passed in Writ - A No. 6467 of 2021. It transpires that after Smt. Farhat Mirza Khan resigned on 06.05.2022 the Committee of Management proceeded to resolve on 20.05.2022 to appoint the respondent no. 5 namely Shoeb Ahmad Khan as Officiating Principal of the Institution and so consequently he was appointed and given joining and his signatures came to be attested on 17.06.2022 and it is this order which is under challenge in present writ petition filed by Mr. Imtiyaz Ahamad.

5. It has been argued by Sri R.K. Ojha, learned Senior Advocate appearing for the petitioner that as per Appendix - A of the Intermediate Education Act, 1921 a teacher who is not having B.Ed. qualification to his credit, can be granted exemption from the degree if he completes 10 years of service as an Assistant Teacher in the event he has passed out the Post Graduate degree in 1st / 2nd Division, however, in the event a candidate has passed out in 3rd division then the requisite experience would be of 15 years of service. It is therefore, submitted that respondent no. 5 who was appointed as a Lecturer on 02.07.2012 could have completed 10 years of teaching experience only on 01.07.2022 in order to seek exemption from B. Ed. Degree and therefore, resolution of the Committee to appoint him on 20.05.2022 was de hors the qualification prescribed for and so neither the respondent no. 5 could have been appointed, nor his signatures were to be attested as Officiating Principal of a recognized aided Institution.

6. As a sequel to the above, the argument advanced is that the vacancy having occurred on 01.04.2022 a candidate even to officiate on the position of

Principal ought to have requisite qualification as on that date.

7. Sri Sankalp Narain, learned Advocate who is appearing for the petitioner namely Mr. Shoeb Ahmad Khan, the 5th respondent in the connected matter submits that since he has already submitted his joining and officiating Principal as such unless and until the appointment is set aside, he is entitled to function as Officiating Principal of the Institution and so he may be permitted to continue as Officiating Principal and also consequently be paid salary.

8. Having heard learned counsel for the respective parties and their arguments raised across the bar and having examined the relevant provisions as contained in Appendix - A of Intermediate Education Act, 1921, I am of the view that this matter requires examination in the first instance at the state of District Inspector of Schools who happens to have attested the signatures of the 5th respondent.

9. Both the learned Advocate agree that the matter can be directed to be examined and then decision by the District Inspector of Schools after giving opportunity of hearing to both the parties and the appointment and continuation of 5th respondent as Officiating Principal of the Institution should abide by the final decision to be taken by the District Inspector of Schools and so also the question of payment of salary.

10. Learned Standing Counsel also does not have any objection in the event matter is remitted to the District Inspector of Schools for decision afresh strictly in accordance with law in a time bound period.

11. In view of the above, I dispose of both these petitions with a direction to the District Inspector of Schools, Ghazipur to examine the matter qua legality of the appointment of 5th respondent as Officiating Principal of the Institution after giving full opportunity of hearing to both the contesting parties as well as to the Committee of Management of the Institution. The decision shall be taken by the District Inspector of School, Ghazipur within a maximum period of 30 days from the date of presentation of certified copy of this order.

12. Needless to add that the order to be passed by the District Inspector of Schools, Ghazipur shall be reasoned and speaking one. The continuation of the petitioner as Officiating Principal of the Institution and the payment of salary against the post in question as admissible in law would be governed by the decision to be taken by the District Inspector of School, Ghazipur as directed herein above.

13. With the aforesaid observations and directions, both the aforesaid petitions are hereby disposed of."

7. Post remand, now the District Inspector of Schools, Ghazipur, third respondent has proceeded to pass the order dated 6.6.2023 according approval and benefits to the fifth respondent as an Officiating Principal.

8. Questioning the said order, the writ petitioner has filed present writ petition with the direction to the respondents to permit the writ petitioner to work as Ad hoc/Officiating Principal of the institution in question. The writ petition was entertained by this Court on 16.8.2023 and

thereafter dates were fixed on 28.3.2023 requiring the parties to exchange affidavits and ultimately on 14.9.2023 the following order was passed:-

It has been reported that the lawyers are abstaining from work today.

This Court on 16.08.2023 proceeded to pass the following order:-

"A neat question arises in the present proceedings as to what would be the date of occurrence of the vacancy which is to be co-related to the qualification which is to be possessed by the respective Lecturer for granting officiation promotion as Principal. Further in para 6 of the writ petition, it has also been averred that the fifth respondent could not have been accorded officiation as Principal in view of the forbidden clauses referable to the relationship norms. The issue which is also engaging attention with regard to the qualification of the fifth respondent.

On the request of the parties, put up this on 23.08.2023 as fresh on which date the parties shall advance their arguments."

Thereafter on 23.08.2023 following order was passed.

"This court on 16.08.2023 proceeded to pass the following order:

"A neat question arises in the present proceedings as to what would be the date of occurrence of the vacancy which is to be co-related to the qualification which is to be possessed by the respective Lecturer for granting officiation promotion as Principal. Further

in para 6 of the writ petition, it has also been averred that the fifth respondent could not have been accorded officiation as Principal in view of the forbidden clauses referable to the relationship norms. The issue which is also engaging attention with regard to the qualification of the fifth respondent.

On the request of the parties, put up this on 23.08.2023 as fresh on which date the parties shall advance their arguments." Today, learned counsel appearing for the respondents have made a statement that they shall be filing counter affidavit. The affidavits, be served upon the learned counsel for the petitioner by 05.09.2023. Rejoinder affidavit may be filed by 12.09.2023.

Put up this case on 14.09.2023, as fresh.

It is expected that the respondents shall file their responses so as to enable this Court to give his final verdict."

Learned Standing Counsel who is appearing for the respondents has made a statement at bar that he has written a letter on 26.08.2023 for the purposes of filing of the response. Learned Standing Counsel seeks further time to file its response.

The matter is passed over for the day.

Put up this matter in the list of fresh cases on 05.10.2023 by which date affidavits be exchanged between the parties."

9. A counter affidavit has been filed by the first and second respondent sworn by District Inspector of Schools, Ghazipur,

third respondent dated 13.10.2023. Further a response has also been filed by the fourth and fifth respondents sworn by the fifth respondent on 15.9.2023. To the counter affidavit of the respondents no. 4 and 5 a rejoinder affidavit has been filed. However the learned Senior Counsel for the petitioner submits that he does not propose to file any rejoinder affidavit to the counter affidavit filed by the respondents no. 1 and 2. Thus, with the consent of the parties, the writ petition is being decided at the fresh stage.

10. Sri Ojha, learned Senior Counsel has sought to argue that the order dated 6.6.2023 passed by the District Inspector of Schools, Ghazipur, third respondent cannot be sustained for a single movement particularly in view of the fact that though the fourth respondent in a minority institution and it is a prerogative of the Committee of Management to permit any of the Lecturers to officiate as a Principal of the institution in question however the said right is not a unfettered right as it is subject to the qualifications and the eligibility possessed by an incumbent who seeks officiation. According to him the statutes are clear on the said aspect as 16FF of the U.P. State Universities Act, 1921 itself provides for the procedure and the modalities according to which appointments are to be made on the post in question and Chapter II, Regulation-1 provides for the minimum qualification for appointment as a Head of the institution and Teachers in any recognised institution whether by direct recruitment or otherwise as per Appendix-A.

11. Submission is that the fifth respondent, Sri Shoab Ahmad Khan does not possess the relevant eligibility required for officiating as a Principal of the

institution in question as besides the essential qualifications, he does not possess the 10 years of teaching experience in an Intermediate Class of any recognised institution.

12. While inviting attention towards Appendix-A serial no.1 (Item No.2) it is being sought to be contended that for being appointed on the post of Principal/ Head of the Institution for a first or second class post graduate degree holder, the incumbent should possess teaching experience of 10 years in Intermediate Classes of any of the recognised institution or 15 years of a teaching experience in the case of third Class Post Graduate Degree.

13. According to Sri Ojha since the fifth respondent, Sri Shoab Ahmad Khan had joined the post of Lecturer in Economics on 2.7.2012 therefore, on the date of the occurrence of vacancy on 1.4.2022 consequent to the retirement of Sri Subhanullah Khan on 31.3.2022, the fifth respondent did not possess 10 years experience which was mandatory condition.

14. It is the further submission of Sri Ojha that on even on the date of the resolution of the Committee of Management to accord officiation of the fifth respondent, Sri Shoab Ahmad Khan on 20.5.2022, he did not possess the necessary experience thus by no stretch of imagination he could have been accorded officiation of the post in question.

15. In order to buttress the said submission, Sri Ojha, learned Senior Counsel has relied upon the judgement in the case of **Committee of Management, National Inter College and another vs.**

State of U.P. and others reported in 2020 (4) ESC 1312.

16. Additionally, it has been argued that the fifth respondent, Sri Shoab Ahmad Khan is the son in law of the manager of the institution and also brother in law of the Vice President of the Committee of Management. Relevant averments have been made in paragraph no.16 (H) of the writ petition. While inviting attention towards paragraph no.5 and 6 of the writ petition it is being sought to be argued that as per para 4 of the Approved Scheme of Administration there happens to be a bar that no teacher shall be appointed whether in temporary or clear vacancy in an institution who is related to the member of the Committee of Management and for the purposes of the Regulation the relationship includes the son in law and brother in law.

17. Countering the said submission Sri Sankalp Narayan, has argued that the writ petition preferred at the behest of the writ petitioner is not maintainable and the writ petitioner is not entitled to any relief particularly in view of the fact that here in the present case admittedly the institution is a minority institution thus in view of the law laid down in the case of **Mohd. Ayub Khan vs. State reported in 2008 (10) ADJ 477**, the Committee of Management of a minority institution is free to appoint a Principal of its choice irrespective of seniority. He further submits that though the writ petitioner may be right to contend that on the date of occurrence of vacancy is 1.4.2022, the fifth respondent was not possessed with 10 years of experience but at the time of the filing of the writ petition the fifth respondent is qualified and eligible and the institution being a minority institution, a conscious decision has been

taken by the Committee of Management to accord officiation to the fifth respondent.

18. It is argued that there is no such provisions contained under the 1921, Act and the Regulations applying in the case of the minority institution that on the date of occurrence of vacancy an incumbent is to possess eligibility and in absence of any such provisions rightly the Committee of Management of the institution in question has accorded officiation to the fifth respondent, Sri Shoab Ahmad Khan. He seeks to rely upon the decision in the case of **Nisar Ahmad vs. Registrar/Inspector of Arabi, Farsi, Madarsas and others reported in 2006 (62) ALR 919**.

19. Additionally it is being sought to be argued that once a statutory right is conferred upon a litigant and the said right is being defeated or violated then only a writ petition is maintainable and since the said ingredients are virtually lacking in the case of the writ petitioner thus, this Court may not exercise jurisdiction in favour of the writ petitioner. In this regard he seeks to rely upon the decision in the case of **Ashok Kumar Malhotra and others vs. State of U.P. and others 2018 (8) ADJ 511**.

20. On the issue of the allegations levelled by the writ petitioner that the fifth respondent, Sri Shoab Ahmad Khan is related to Manager of the institution in question being son in law of the Manager and brother in law of Vice President of the Committee of Management is concerned, while relying upon paragraph 6 and 12 of the counter affidavit it is being sought to be contended that the said embargo would come in the way at the stage of initial appointment and not at the stage when the

claim of the fifth respondent is for officiation on the post of Principal. He further submits that the fifth respondent is not related to the Manager. Therefore, it is prayed that the writ petition be dismissed.

21. Sri Pradeep Kumar Shahi, learned Additional Chief Standing Counsel has adopted the argument of Sri Sankalp Narayan, however he submits that he has nothing more to add except the fact that once an institution is a minority institution then it is the right and the choice of the institution to appoint officiating/ad hoc Principal and thus the order of the District Inspector of Schools, Ghazipur is not liable to be interfered with.

22. Before delving into the tenability of the arguments of the rival parties it would be apposite to notice the relevant statutory provisions which are governing the field.

23. To start with the relevant provisions are quoted herein under:-

16-FF. Savings as to minority institutions.-(1) Notwithstanding anything in sub-section (4) of Section 16-E, and Section 16-F, the Selection Committee for the appointment of a Head of Institution or a teacher of an institution established and administered by a minority referred to in Clause (1) of Article 30 of the Constitution shall consist of five members (including its Chairman) nominated by the Committee of Management :

Provided that one of the members of the Selection Committee shall-

(a) in the case of appointment of the Head of an institution, be an expert selected by the Committee of Management

from a panel of experts prepared by the Director;

(b) in the case of appointment of a teacher, be the Head of the Institution concerned.

(2) The procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be prescribed. (3) No person selected under this section shall be appointed, unless-

(a) in the case of the Head of Institution the proposal of appointment has been approved by the Regional Deputy Director of Education; and

(b) in the case of a teacher such proposal has been approved by the Inspector.

(4) The Regional Deputy Director of Education or the Inspector, as the Case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualification prescribed and is otherwise eligible.

(5) Where the Regional Deputy Director of Education or the Inspector, as the case may be, does not approve of a candidate selected under this section the Committee of Management may, within three weeks from the date of receipt of such disapproval, make a representation to the Director in the case of the Head of Institution, and to the Regional Deputy Director of Education in the case of teacher.

(6) Every order passed by the Director or the Regional Deputy Director

of Education on a representation under sub-section (5) shall be final.

Chapter II

APPOINTMENT OF HEADS OF INSTITUTIONS AND TEACHERS

[Sections 16-E, 16 - F and 16 - FF]

1. The minimum qualifications for appointment as Head of Institution and Teachers in any recognised Institution, whether by direct recruitment or otherwise, shall be as given in Appendix A.

2. (1) The post of the Head of Institution shall except as provided in clause (2) be filled by direct recruitment after reference to the Selection Committee constituted under sub-section (1) of Section 16-F or, as the case may be, under sub-section (1) of Section 16-FF :

Provided that in the case of any institution not being an institution referred to In Section 16-FF a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or by death, retirement or suspension of an incumbent occurring during an educational session in the post of the Head of Institution shall be filled by the promotion of the senior most qualified teacher, if any, in the highest grade in the institution.

[(2) (a) Where an institution is raised from a High School to an Intermediate College, the post of Principal of such college shall be filled by promotion of the Headmaster of such High School if he was duly appointed as Headmaster in substantive capacity in accordance with

law for the time being in force and possesses a good record of service and the minimum qualifications prescribed in that behalf or has been granted exemption from such qualifications by the Board.

(b) The Committee of Management of such institution shall submit the proposal for promotion of the Headmaster concerned to the Regional Deputy Director of Education for his concurrence.

(c) The proposal referred to in sub-clause (b) shall be accompanied by a copy of the resolution of the Committee of Management approving such Headmaster for promotion, his service Book and Character Roll and shall contain the following particulars in relation to him, namely-

(i) date of birth,

(ii) examinations passed by him stating the subjects, divisions and year of passing such examinations.

(d) The Regional Deputy Director of Education shall communicate his decision on such proposal within two weeks from the date of receipt thereof, failing which the Regional Deputy Director shall be deemed to have given his concurrence to such proposal.

(e) The decision of the Regional Deputy Director of Education under sub-clause (d) shall be communicated to the Committee of Management as well as the Headmaster concerned.

(f) Any person aggrieved from the decision of the Regional Deputy Director of Education, including the Committee of

Management may within 10 days from the date of communication of the order under subclause (e) make a representation against it to the Director whose decision in the matter shall be final.

(g) A Headmaster of a High School who is not found fit for promotion as Principal of the upgraded Intermediate College or a Headmaster of a Junior High School who on its being raised as a High School, is not selected by the Selection Committee for the post of the Headmaster of upgraded High School, shall be retained as an assistant teacher on the highest post for which he is qualified, provided that this pay-scale shall not be reduced.

Explanation-Nothing this sub-clause shall apply to a person who was not permanent or was not duly appointed in accordance with law on the date on which the institution was raised to the level of a High School or an Intermediate College, as the case may be.

(3) Where the temporary vacancy in the post of head of institution is, for a period not exceeding thirty days, the senior-most teacher in the highest grade may be allowed to work as acting head of institution, but he shall not be entitled to pay in a scale higher than the scale of pay in which he is drawing salary as such teacher.

(4) In all cases in which promotions are made under this regulation a copy of the resolution of the Committee of Management together with particulars in the pro forma prescribed in Appendix 'B' shall be immediately forwarded by the Manager to the Inspector as well as the Regional Deputy Director of Education.

10. The procedure for filing up the vacancy of the head of institution and teaches by direct recruitment in any recognised institution shall be as follows:

(a).....

(b).....

(c).....

(d).....

(e) Every candidate called for interview will have to pay the interview fee at rates given below:

(i) For the post of head of institution; Rs.

*General Candidates
20*

*Scheduled Caste/Tribe Candidate
5*

(ii) For the post of teacher :

*General Candidates
13*

*Scheduled Caste/Tribe Candidate
3*

The interview fee shall be payable by crossed postal order or bank draft or through treasury challan by depositing the amount in the State Bank of India under the head indicated by the Inspector. In no case, the interview fee shall be accepted in cash. All postal order, bank drafts and treasury challans shall be sent by the Manager to the Inspector immediately after the selection.

(f) A statement (in six copies) showing the names, qualifications and other particulars in respect of every candidate called for the interview shall be got prepared by the Committee of Management in the form given in Appendix 'C' and the same shall be placed before each member of the Selection Committee at the time of the interview. All the applications including those of candidates not called for the interview, the register maintained by the institution referred to in Clause (d), office copies of all letters sent to the members of the Selection Committee and of all interview cards including the post office receipts of sending the same by registered post and acknowledgments, if any, shall also be placed before the Selection Committee by the Management through the manager of the institution.

11. (1) It shall be the duty of the experts attending selection of a head of institution or- teacher to scrutinise all papers concerning selection and in particular to examine that the candidates called for interview have been rightly so called as per provisions of the Act and the Regulation and that no candidate has been deprived of the opportunity of interview which rightly should have gone to him. They should furnish a certificate to this effect in the proceedings of the selection as proposed in the statement in Appendix 'C'. In case they feel that a candidate has been deprived of the legitimate opportunity of interview as a result of any error or omission they shall inform the Inspector with full details of the case. If the Inspector is satisfied that the proceedings of the interview has been vitiated thereby he shall declare the proceedings of the interview null and void and shall pass orders for holding of selection again in such cases.

The orders of the Inspectors in this regard shall be final and binding on all concerned.

(2) All applications, papers and registers relating to selection shall be preserved by the Management till such period as may be prescribed by the Director and shall be furnished to the Inspector, Regional Deputy Director of Education or the Director as and when the same may be summoned.

12. The Manager of the institution shall ensure that all necessary action to be taken under the Act and the regulations prior to the holding of selection including nomination of the Chairman or the member of the Selection Committee by the Committee of Management shall be taken well in time and that all arrangements have been made for the meeting of the Selection Committee and seating of candidates called for interview on the date fixed for the interview.

16. Every expert attending a meeting of the Section Committee and every person engaged for awarding quality-point-marks shall be entitled to be paid remuneration at such rates as may be sanctioned by the State Government from time to time. In addition, the experts shall be paid travelling allowance at such rates as may be sanctioned by the State Government.

17. The procedure for filling up the vacancy of the head of institution and teachers by direct recruitment in any recognised institution referred to in Section 16-FF, shall be as follows:

(a) After the management has determined the number of vacancies to be filled up by direct recruitment, the posts

shall be advertised by the manager of the institution in at least one Hindi and one English newspaper having adequate circulation in the State giving particulars as to the nature (I.e., whether temporary/permanent) and number of vacancies, descriptions of post (i.e., Principal or Headmaster, Lecturer or L.T., C.T. or J.T.C./B.T.C. grade teacher including the subject or subjects in which the lecturer or teacher is required), scale or pay and other allowances, experience required minimum qualification and age prescribed, if any, for the post and prescribing a date which should not ordinarily be less than two weeks from the date of advertisement) by which the applications shall be received by the Manager. A copy of the advertisement shall be simultaneously sent to the Inspector concerned.

Notes (1) All vacancies in the posts of teachers and the head of institution existing at the time of advertisement shall be advertised.

(2) No new post shall be advertised unless sanction of the appropriate authority for the creation thereof has been received by the management.

(b) All applications shall be made in the form prescribed by the management and shall contain all necessary particulars about qualifications, teaching experience and other activities and be accompanied by certified copies of all the necessary certificates and testimonials. The management may charge cost of the application form not exceeding the amount referred to in Clause (2) of Regulation 10.

(c) An application by a person employed in an institution and applying for

a post elsewhere or in the same institution shall not be withheld by his employer but shall be forwarded to the authority concerned immediately.

(d) All applications received from the candidates shall be serially numbered and entered in a register and particulars of the candidates noted under appropriate columns. The candidates to be called for interview shall be seven for each post (the number of applicants, permitting). The Manager shall intimate by registered post all the members of the Selection Committee as well as all such candidates as are called for interview, the date, time and place of selection at least ten days before it is held. The Selection Committee will hold the selection accordingly. If on account of any unavoidable reason, the expert selected by the Committee of Management under Clause (a) of the proviso to sub-section (1) of Section 16-FF is unable to attend the selection on the date fixed the meeting of the Selection Committee shall be postponed.

(e) The provisions of Clauses (e) and (f) of Regulation and those of Regulations 11, 12 and 16 shall mutatis mutandis apply to selections made under this regulation.

(f) A panel of experts consisting of fifteen or more persons selected from category (a) referred to in Regulation 14 shall be drawn by the Director for each region and be sent to the Regional Deputy Director of Education concerned, The Regional Deputy Director of Education shall out of the said panel communicate the names of three experts in a sealed cover to the management through its Manager as soon as he receives any request for supply of names of experts from him. The regional

panel of experts shall, however, remain valid until it is replaced by a new one.

concerned under the signature of the Manager.

'[(g) किसी पद के लिए समस्त अभ्यर्थियों का साक्षात्कार कर लिए जाने के पश्चात् चयन समिति का सभापति किये गये चयन की कार्यवाहियों पर दो प्रतियों में एक टिप्पणी तैयार करायेगा जिसमें चुने गये अभ्यर्थी का नाम तथा प्रतीक्षा सूची के दो अन्य अभ्यर्थियों के नाम उल्लिखित किये जायेंगे, इस प्रकार तैयार की गई टिप्पणी पर चयन समिति के सभापति तथा अन्य सदस्य हस्ताक्षर करेंगे और अपना अपना पूर्ण नाम, पद नाम और पता तथा दिनांक उल्लिखित करेंगे, सभापति इस टिप्पणी की एक प्रति तथा विनियम 10 के खण्ड (च) में निर्दिष्ट विवरण की एक प्रति धारा 16-चच के अधीन यथा अपेक्षित अनुमोदन के लिये, यथास्थिति, संभागीय उप-शिक्षा निदेशक या निरीक्षक को तुरन्त अग्रसारित करेगा, सम्बन्धित अभिलेखों के प्राप्त होने के दिनांक के एक माह के भीतर यथास्थिति सम्भागीय उप शिक्षा निदेशक या निरीक्षक, उन पर अपना निर्णय दे देंगे और ऐसा न करने पर अनुमोदन प्रदान कर दिया गया समझा जायेगा]

18. (1) Within fifteen days of the receipt of the recommendation of the Selection Committee constituted under sub-section (1) or (2) of Section 16-F, and in case of an institution referred to in Section 16-FF, the approval of the authority specified therein, the Manager shall, on authorisation under resolution of the Committee of Management issued an order of appointment by Registered Post to the candidate in the form given in Appendix 'B' requiring the candidate to join duty within ten days of the receipt of such order, failing which the appointment of the candidate will be liable to cancellation.

(2) In case of promotions and (ad hoc appointments also a formal order of promotion or appointment in the form as near as possible to the form referred to in Clause (1) shall be issued to the person

(3) A copy of every order referred to in Clauses (1) and (2) shall be sent to the Inspector and in case of appointment of the head of institution, a copy thereof shall also be sent to the Regional Deputy Director of Education.

APPENDIX-A Minimum Qualifications for Appointment of Head Master and Teachers in Private Recognised Higher Secondary Schools

S.No	Name of the post & Educational Training Experience	Age	Desirable qualification	
1	2	3	4	
1	[Head of the institution (1) Trained M.A. or M.Sc. or M.Com. or M.Sc. (Agri) or any equivalent post-graduate or any other degree which is awarded by corporate body specified in abovementioned para one and should have at least teaching experience of four years in classes 9 to 12 in any training institute or in any institution or University specified in abovementioned para one or in any degree college affiliated to such University or institution,	Minimum 30 years		

recognised by Board or any institution affiliated from Boards of other States or such other institutions whose examinations recognised by the Board, or should the condition is also that he/she should not be below 30 years of age. or (2) [First or second class postgraduate degree along with teaching experience of ten years in Intermediate classes of any recognised institutions or third class post-graduate degree with teaching experience of fifteen years, or (3) Trained post-graduate diplomaholder in science. The condition is that he has passed this diploma course in first or second class and have efficiently worked for 15 or 20 years respectively after passing such diploma course.				

24. I have learned counsel for the parties and perused the record carefully.

25. Undisputedly, the fourth respondent, S.M. National Inter College Machhati, District Ghazipur, is a minority institution. Accordingly, the provisions contains under Section 16FF of the 1921 Act, stands applicable. Section 16FF provides for a constitution of Selection Committee consisting of five members including Chairman (nominated by the Committee of Management). Subsection 3(a) of Section 16FF of 1921 Act provides that no person selected under the said section shall be appointed in case of the Head of the Institution provided the proposal of the appointment has been approved by Regional Deputy Director of Education. Further Sub-Section (4) of Section 16FF provides that the Regional Deputy Director of Education or the Inspector as the case may be shall not withhold approval for selection made under the section where the person selected possess the minimum qualification prescribed and is otherwise eligible. Further so far as the eligibility in the case of minority institution is concerned the same stands specified under Chapter-II Regulation-1 of the 1921 Act, according to which the minimum qualification for appointment as a Head of the institution and Teacher in recognised institution whether by direct recruitment or **otherwise** shall be given in Appendix-A. Appendix-A provides for minimum qualification for appointment of a Head Master and Teacher in private recognised Higher Secondary School.

26. So far as the eligibility is concerned in the case of Head of the Institution it has been provided under the tabular chart, serial no.1 wherein besides educational qualification in case of first or second class postgraduate degree holder, 10 years teaching experience in intermediate

class of any recognised institution and in the case of third class postgraduate degree 15 years of teaching experience is required. Note-(1) appended thereto also provides for the same.

27. Now a question arises as to what would be the date when eligibility it to be reckoned. Regulation 17 of Chapter-II of the 1921 Act provides for filling up the vacancy of the head of the institution and teachers by direct recruitment in any recognised institution referred to Section 16FF. Further Sub-Clause (a) of Regulation 17 under Chapter II of the 1921, Act provides that after the management has determined the number of vacancies to be filled up by direct recruitment, the posts shall be advertised by the manager of the institution in newspaper having adequate circulation in the State giving particulars as to the nature (i.e., whether temporary/permanent) and number of vacancies, descriptions of post (i.e., Principal or Headmaster, Lecturer or L.T., C.T. or J.T.C./B.T.C. grade teacher including the subject or subjects in which the Lecturer or Teacher is required), scale or pay and other allowances, experience required minimum qualification and age prescribed, if any, for the post and prescribing a date which should not be less than two weeks from the date of advertisement).

Note:-(1) appended thereto provides that all vacancies in the post of teachers and the head of institution existing at the time of advertisement shall be advertised. Thus, Regulation 17 of Chapter II of 1921 Act provides for determination of vacancies. Thus, what is relevant is the determination of vacancies which is step prior to undertaking exercise for filling the same.

28. Regulation 18 of Chapter II of the 1921 provides that within 15 days of the receipt of the recommendation of the Selection Committee constituted under Sub-Section (1) and (2) of Section 16F and in case of the institution referred to in Section 16FF, the approval of the authorities specified therein the Manager shall on authorisation under resolution of the Committee of Management issue a formal order of appointment by the registered post to the candidate and further Sub-Regulation (2) of Regulation 18 provides that in case of promotions and ad hoc appointment also a formal order of promotion or appointment in the form as near as possible to the form referred to in Clause(1) shall be issued to the persons concerned under the signature of the manager and a copy of the same shall be sent to the Inspector.

29. Here in the present case the argument of the learned counsel for the fifth respondent is that there is no such provision whereby an incumbent is to obtain necessary qualification and eligibility on the date of the occurrence of the vacancy and thus the management of a minority institution is free to choose anybody despite being not eligible or qualified does not appear to be correct. The basic purpose of application of Appendix-A in the minority institution is to eliminate those contingencies wherein even for officiation / ad hoc purposes/ including Incharge (Principal) an ineligible person is appointed. No provision whatsoever has been pointed out by Sri Sankalp Narayan who appears for the fifth respondent that the framers of the statutes have created a distinction with respect to obtaining qualification and eligibility between a Regular Principal or an Officiating/Ad hoc Principal. More so, selection procedure

commences either after occurrence of the vacancy or before the vacancy occurs in anticipation thereof, thus, the selection is dependent upon the vacancy. The said issue can also be seen from another point of angle that when an incumbent is to retire on a particular date then before the date of retirement the selection proceedings are commenced, however the actual appointment is made post retirement. This can be very well termed as an exercise in anticipation of vacancy. On the other hand consequent to the death or otherwise when the vacancy arises then post, said event the selection proceeding commences.

30. Here in the present case, the date of the retirement of Sri Saifullah Khan was known to everybody i.e. 31.3.2022 might be he had taken medical leave thus what is to be seen is the date of the vacancy. The fifth respondent in the present case is staking his claim for officiation as a Principal against the post which fell vacant on 31.3.2022 for assuming charge on 1.4.2022. Thus, the crucial date would be 1.4.2022.

31. Though, it is the argument of the learned counsel for the fifth respondent that there happens to be a resolution dated 20.5.2022 for according officiating/ad hoc promotion but on the said day also the fifth respondent was not having 10 years of teaching experience which he attained on 1.7.2022.

32. In case the logic propounded by the counsel for the fifth respondent is taken into face value then it would create havoc and undesired results creating a situation whereby an unqualified and ineligible person would be conferred with the benefit sidetracking the claim of the deserving

candidate who is qualified and eligible in that regard.

33. Though, there is no quarrel to the proposition that the Committee of Management of a minority institution is free to choose any incumbent to officiate but the same is not an unfettered right so as to create a situation whereby an ineligible and unqualified person is being allowed to man the post. Otherwise it would create not only anarchy but would also be detrimental to the interest of the institution.

34. In the case of **Secretary Malankara Syrian Catholic College vs. T. Jose and others (2007) 1 SCC 386** while dealing with the contingency relating to the selection and the appointment of Principal in a minority institution the Hon'ble Apex Court in para 27, 28 and 29 observed as under:-

“27. It is thus clear that the freedom to choose the person to be appointed as Principal has always been recognised as a vital facet of the right to administer the educational institution. This has not been, in any way, diluted or altered by T.M.A. Pai¹. Having regard to the key role played by the Principal in the management and administration of the educational institution, there can be no doubt that the right to choose the Principal is an c important part of the right of administration and even if the institution is aided, there can be no interference with the said right. The fact that the post of the Principal/Headmaster is also covered by State aid will make no difference.

28. The appellant contends that the protection extended by Article 30(1) cannot be used against a member of the teaching staff who belongs to the d same

minority community. It is contended that a minority institution cannot ignore the rights of eligible lecturers belonging to the same community, senior to the person proposed to be selected, merely because the institution has the right to select a Principal of its choice. But this contention ignores the position that the right of the minority to select a Principal of its choice is with reference to the assessment of the person's outlook and philosophy and ability to implement its objects. The management is entitled to appoint the person, who according to them is most suited to head the institution. provided he possesses the qualifications prescribed for the posts. The career advancement prospects of the teaching staff, even those belonging to the same community, should have to yield to the right of the management under Article 30(1) to establish and administer educational institutions.

29. Section 57(3) of the Act provides that the post of Principal when filled by promotion is to be made on the basis of seniority-cum-fitness. Section 57(3) trammels the right of the management to take note of merit of the candidate or the outlook and philosophy of the candidate which will determine whether he is supportive of the objects of the institution. Such a provision clearly interferes with the right of the minority management to have a person of their choice as head of the institution and thus violates Article 30(1). Section 57(3) of the Act cannot therefore apply to minority-run educational institutions even if they are aided. “

35. The Hon'ble Supreme Court in the case of **N. Ammad vs. Manager, Emjay High School and others reported in AIR 1999 SC 50** in para 28 observed as under:-

"28. Thus the management's right to choose a qualified person as the Headmaster of the school is well insulated by the protective cover of Article 30(1) of the Constitution and it cannot be chiselled out through any legislative act or executive rule except for fixing up the qualifications and conditions of service for the post. Any such statutory or executive fiat would be violative of the fundamental right enshrined in the aforesaid Article and would hence be void."

36. That the Hon'ble Apex Court judgement has been followed by Division Bench of this Court in the case of **National Inter College (Supra)**.

37. Recently in the case of **SK. MD. Rafique vs. Managing Committee, Contai Rahamania High Madrasah and others 2020 (4) ESC 863 (SC)**, the Hon'ble Apex Court had the occasion to consider the provisions of West Bengal Madrasah Service Commission Recruitment (selection and recommendation of persons for appointment and transfer to the posts of teaching and non-teaching staff) Rules, 2010 wherein the Hon'ble Apex Court scanning the proposition of law culled out in the series of judgements in para 49 to 58 observed as under:-

49. Thus, if the intent is to achieve excellence in education, would it be enough if the concerned educational institutions were to employ teachers with minimum requisite qualifications in the name of exercise of Right under Article 30 of the Constitution, while better qualified teachers are available to impart education in the second category of institutions as stated hereinabove. For example, if the qualifying percentile index for a teacher to

be appointed in an educational institution, considering his educational qualifications, experience and research, is required to be a 50, and if teachers possessing qualifications far greater and higher than this basic index are available, will it be proper exercise for a minority educational institution to select teachers with lower index disregarding those who are better qualified? Will that subserve pursuit of excellence in education? One can understand if under the regulatory regime candidates who are otherwise less qualified are being nominated in the minority educational institution and the minority educational institution is forced to accept such less meritorious candidates. In such cases, the minority educational institution can certainly be within its rights to agitate the issue and claim a right to choose better teachers. But if the candidates who are selected and nominated under the regulatory regime to impart education which is purely secular in character, are better qualified, would the minority institution be within its rights to reject such nomination only in the name of exercise of a right of choice? The choice so exercised would not be in pursuit of excellence. Can such choice then be accepted? If the right is taken to be absolute and unqualified, then certainly such choice must be recognised and accepted. But, if the right has not been accepted to be absolute and unqualified and the national interest must always permeate and apply, the excellence and merit must be the governing criteria. Any departure from the concept of merit and excellence would not make a minority educational institution an effective vehicle to achieve what has been contemplated in various decisions of this Court. Further, if merit is not the sole and governing criteria, the minority institutions may lag behind the non-minority institutions rather than keep in

step with them. Going back to the example given above, as against index of 50 i.e. the minimum qualifying index, if a candidate nominated under the regulatory regime is at an index of 85, selection by a minority educational institution of a candidate at an index 55 may certainly be above the minimum qualifying mark, but in preference to the one at the index of 85 who is otherwise available, the appointment of a person at the index level of 55, will never give the requisite impetus to achieve excellence. A meritorious candidate at the index level of 85 in the above example, if given the requisite posting will not only help in upholding the principle of merit but will in turn generate an atmosphere of qualitative progress and sense of achievement commensurate with societal objectives and ideology and such posting will, therefore, be in true national interest.

50. At the cost of repetition, clarified that if the minority institution has a better candidate available than the one nominated under a regulatory regime, the institution would certainly be within its rights to reject the nomination made by the authorities but if the person nominated for imparting education is otherwise better qualified and suitable, any rejection of such nomination by the minority institution would never help such institution in achieving excellence and as such, any such rejection would not be within the true scope of the Right protected under Article 30(1) of the Constitution.

51. With these basic principles in mind, we may now consider the statutory provisions under which the teachers could be nominated under the Commission Act and see whether the concerned regulations help in achieving excellence or whether

those provisions are violative of the Rights of the minority institutions.

52. In terms of Section 4 of the Commission Act, the Commission is to consist of a Chairman and four Members. The Chairman of the Commission has to be an eminent educationist knowledge in Islamic Culture h having profound and must be well versed in education with teaching experience inter alia as a teacher of a University or as a Principal of a college, for a period of not less than twelve years. It is true that the Rahamania High Madrasah (Uday Umesh Lalit, J.) 929 latter part of Section 4(ii) speaks of an officer of the State Government not below the rank of Joint Secretary who could also be appointed as the Chairman of the Commission. But in our view, considering the nature of duties that the Chairman is to discharge, even an officer of the State Government has to be a person with profound knowledge in Islamic Culture. Apart from the Chairman, there are four Members who are to be appointed in terms of Section 4(iii) of the Commission Act. Out of these four Members, one has to be an eminent educationist having profound knowledge in Islamic Theology and Culture, while the other two Members must have teaching experience inter alia as a teacher of a University, or a Principal of a College for a period of not less than ten years. The fourth member could be a non-educationist, but he must have held the position of eminence in public life or in Legal or Administrative Service. Predominant composition of the Commission is thus of educationists and two of them have to be persons with profound knowledge in Islamic Culture and Islamic Theology. The provisions of the Commission Act are thus specially designed for Madrasahs and Madrasah

Education System in the State. Rule 8 of the 2010 Rules stipulates fair and transparent process of merit based selection and the statutory mechanism would ensure that only those teachers would be selected who would be best suited to impart education in Madrasah Education System. The State Legislature has taken care to see that the composition of the Commission would ensure compatibility of the teachers who would be selected to impart education in Madrasah Education System, which is also emphasized in the Statement of Objects and Reasons.

53. It is true that the recommendations or nominations of teachers made by the Commission are otherwise binding on the Managing Committees of concerned Madrasahs, but, in terms of second proviso to Section 10 of the Commission Act, if there be any error, it is open to the Managing Committee of the concerned Madrasah to bring it to the notice of the Commission for removal of such error. The concept of 'error' as contemplated must also include cases where the concerned Madrasah could appoint a better qualified teacher than the one nominated by the Commission. If any such error is pointed out, the Commission will certainly have to rectify and remove the error. The further protection is afforded by Section 12 of the Commission Act, under which the concerned Madrasah could be within its rights to refuse to issue appointment letter to the candidate recommended by the Commission if any better qualified candidate is otherwise available with the managing committee of the concerned Madrasah. Such refusal may also come within the expression 'any reasonable ground' as contemplated in Section 12(i) of the Act. The legislature has thus taken due care that the interest of a

minority institution will always be taken care of by ensuring that i) in normal circumstances, the best qualified and suitable candidates will be nominated by the Commission; ii) and in case there be any error on part of the Commission, the concerned Managing Committee could not only point out the error which would then be rectified by the Commission but the Managing Committee may also be within its rights in terms of Section 12 (i) to refuse the nomination on a reasonable ground.

54. The regime put in place by the State legislature thus ensures that the Commission comprising of experts in the field would screen the talent all across the State; will adopt a fair selection procedure and select the best available talent purely on merit basis; and even while nominating, the interest of the minority institution will also be given due weightage and taken care of. The statutory provisions thus seek to achieve 'excellence' in education and also seek to promote the interest of the minority institutions. The provisions satisfy the test as culled out in the decision of this Court in TMA Pai Foundation, (2002) 8 SCC 481, case.

55. In our considered view going by the principles laid down in the decision in TMA Pai Foundation case, (2002) 8 SCC 481, the concerned provisions cannot, therefore, be said to be transgressing the rights of the minority institutions. The selection of the teachers and their nomination by the Commission constituted under the provisions of the Commission Act would satisfy the national interest as well as the interest of the minority educational institutions and said provisions are not violative of the rights of the minority educational institutions.

56. The aforesaid conclusions have been arrived at by us in keeping with the principles laid down by this Court in TMA Pai Foundation, (2002) 8 SCC 481, case. We are aware that in Brahmo Samaj Education Society, (2004) 6 SCC 224, Sindhi Education Society, 2010(4) ESC 483 (SC) and Chandana Das (Malakar), 2019(3) d ESC 783 (SC), decided after TMA Pai Foundation, (2002) 8 SCC 481, this Court had also dealt with the question whether the concerned authorities could validly nominate teachers to be appointed in minority educational institutions. Brahmo Samaj Education Society, (2004) 6 SCC 224, did not specifically deal with the question whether rules were valid or not and left it to the authorities to bring the rules and regulations in conformity with the principles in TMA Pai Foundation, (2002) 8 SCC 481, case. Sindhi Education Society, 2010(4) ESC 483 (SC), dealt with the issue in the context of reservation. It also found that the teachers nominated by the concerned authorities would not be compatible to teach in educational institutions run by linguistic minorities.

In Chandana Das (Malakar), 2019(3) ESC 783 (SC), the basic issue was whether the concerned institution was a minority institution or not. Sindhi Education Society, 2010(4) ESC 483 (SC) and Chandana Das (Malakar), 2019(3) ESC 783 (SC), dealt with statutory regimes which did not have any special features or matters concerning compatibility of teachers which could be required going by the special characteristics of the minority educational institutions. However, the additional feature in the present matter shows that the composition of the Commission with special emphasis on persons having profound knowledge in Islamic Culture and Theology, would

ensure that the special needs and requirements of minority educational institutions will always be taken care of and thus the present case stands on a different footing. We, therefore, have no hesitation in going by the test culled out in the TMA Pai Foundation, (2002) 8 SCC 481, and hold that the provisions of the Commission Act are not violative of the rights of the minority educational institutions on any count.

57. In the premises, while allowing these appeals, we set aside the view taken by the Single Judge and the Division Bench of the High Court and dismiss Writ Petition No. 20650(W) of 2013 and other connected matters. We also hold Sections 8, 10, 11 and 12 of the Commission Act to be valid and constitutional.

58. In the end, we declare all nominations made by the Commission in pursuance of the provisions of the Commission Act to be valid and operative. However, if after the disposal of the matters by the High Court any appointments are made by the concerned Madarshas, such appointments of teachers shall be deemed to be valid for all purposes. But the Commission shall hereafter be competent to select and nominate teachers to various Madarshas in accordance with the provisions of the Commission Act and the Rules framed thereunder.

38. In the case of **Sunil Kumar Sharma vs. State of U.P. & others, Writ-A No.45123 of 2008 decided on 16.8.2023** this Court had the occasion to consider the issue with regard to the applicability of Regulation IV of Chapter III of the Regulations framed under the U.P.

Intermediate Education Act, 1921 impinging upon the rights of minority institution as guaranteed under the Constitution of India and while noticing the provisions of Section 16FF of 1921 Act, it was opined as under:-

“The minimum qualifications for appointment of teachers in an institution are provided in Regulation 1 Chapter II which refers to Appendix 'A'. From the provisions of Section 16FF (4) of the 1921 Act a noticeable legislative intent is clearly decipherable namely that apart from requiring a selected candidate to possess the minimum qualifications prescribed, it also requires a selected candidate to be "otherwise eligible". Section 16FF was inserted in 1921 Act by U.P. Act No. 26 of 1975 and at the time when it was inserted Regulation 4 Chapter III providing restrictions for appointment of relatives was already there. The Legislature will therefore be presumed to be well aware of the existing provisions of the Regulations as provided for in Section 16FF of the 1921 Act i.e. the requirement of selection of teachers in a minority institution; (i) the candidate should possess the minimum qualifications prescribed (ii) and is otherwise eligible. The above provisions in no uncertain terms indicates that merely possessing of minimum qualifications is not sufficient for a candidate to be selected in a minority institution and the scheme contemplates possession of other eligibilities as prescribed by Regulations.”

A Nine Judges' Bench in The Ahmedabad St. Xaviers Society & Anr. Vs. State of Gujarat & Anr, (1974) 1 SCC 717, had occasion to consider the ambit and scope of Article 30 of the Constitution. It is useful to quote paragraph 30 of the said judgment where the Apex Court held that in

the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. It was held that the right to administer is to be tempered with regulatory measures to facilitate smooth administration. Following was laid down in paragraph 30:

"30. Educational institutions are temples of learning. The virtues of human intelligence are mastered and harmonized by education. Where there is complete harmony between the teacher and the taught, where the teacher imparts and the student receives, where there is complete dedication of the teacher and the taught in learning, where there is discipline: between the teacher and the taught, where both are worshipers of learning, no discord or challenge will arise. An educational institution runs smoothly when the teacher and the taught are engaged in the, common ideal of pursuit of knowledge. It is, therefore, manifest that the appointment of teachers is an important part in educational institutions. The, qualifications and the character of the teachers are really important. The minority institutions have the right to administer institutions. This right implies the obligation and duty of the minority institutions, to render the very best to the students. In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tempered with regulatory measures to facilitate smooth administration. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclectic in the administration of the institution. The best compliment that

can be paid to a minority institution is that it does not rest on or Proclaim its minority character."

In Sindhi Education Society & Anr Vs. Chief Secretary, Government of NCT of Delhi & Ors, (2010) 8 SCC 49, the Apex Court had laid down that regulations could relate to guidelines for the efficiency and excellence of educational standards, ensuring the security of the services of the teachers or other employees. It is useful to extract following observations made in paragraphs 94, 97 and 111:

"94. It is also equally true that the right to administer does not amount to the right to maladminister and the right is not free from regulations. The regulatory measures are necessary for ensuring orderly, efficient and sound administration. The regulatory measures can be laid down by the State in the administration of minority institutions. The right of the State is to be exercised primarily to prevent maladministration and such regulations are permissible regulations. These regulations could relate to guidelines for the efficiency and excellence of educational standards, ensuring the security of the services of the teachers or other employees, framing rules and regulations governing the conditions of service of teachers and employees and their pay and allowances and prescribing course of study or syllabi of the nature of books etc. Some of the impermissible regulations are refusal to affiliation without sufficient reasons, such conditions as would completely destroy the autonomous status of the educational institution, by introduction of outside authority either directly or through its nominees in the governing body or the managing committee of minority institution to conduct its affairs etc. These have been

illustrated by this Court in State of Kerala v. Very Rev. Mother Provincial [1970] 2 SCC 417, All Saints High School v. Govt. of A.P. [(1980) 2 SCC 478] and T.M.A. Pai's case (supra).

97. It is not necessary for us to examine the extent of power to make regulations, which can be enforced against linguistic minority institutions, as we have already discussed the same in the earlier part of the judgment. No doubt, right conferred on minorities under Article 30 is only to ensure equality with the majority but, at the same time, what protection is available to them and what right is granted to them under Article 30 of the Constitution cannot be diluted or impaired on the pretext of framing of regulations in exercise of its statutory powers by the State. The permissible regulations, as afore-indicated, can always be framed and where there is a maladministration or even where a minority linguistic or religious school is being run against the public or national interest, appropriate steps can be taken by the authorities including closure but in accordance with law. The minimum qualifications, experience, other criteria for making appointments etc are the matters which will fall squarely within the power of the State to frame regulations but power to veto or command that a particular person or class of persons ought to be appointed to the school failing which the grant-in-aid will be withdrawn, will apparently be a subject which would be arbitrary and unenforceable.

111. A linguistic minority has constitution and character of its own. A provision of law or a Circular, which would be enforced against the general class, may not be enforceable with the same rigors against the minority

institution, particularly where it relates to establishment and management of the school. It has been held that founders of the minority institution have faith and confidence in their own committee or body consisting of the persons selected by them. Thus, they could choose their managing committee as well as they have a right to choose its teachers. Minority institutions have some kind of autonomy in their administration. This would entail the right to administer effectively and to manage and conduct the affairs of the institution. There is a fine distinction between a restriction on the right of administration and a regulation prescribing the manner of administration. What should be prevented is the maladministration. Just as regulatory measures are necessary for maintaining the educational character and content of the minority institutions, similarly, regulatory measures are necessary for ensuring orderly, efficient and sound administration."

Section 16FF(4) of the 1921 Act contains two requirements for selected candidates; firstly he should possess minimum qualifications and secondly "is otherwise eligible." The words "is otherwise eligible" are wide enough to save any valid conditions for appointment which have been provided in the regulations. Section 16FF (4) has to be read along with the regulations framed under the U.P. Intermediate Education Act, 1921. The mere fact that Section 16FF does not contain any provision for prohibition of appointment of relatives does not lead to the inference that relatives can be appointed despite the statutory restrictions provided for under Chapter III Regulation 4. Learned Single Judge in Satendra Kumar Misra's (supra) case has not referred to Chapter III Regulation 4 hence,

the said judgment cannot be said to laying down the correct law."

39. Though reliance has been placed upon the judgement in the case of **Nisar Ahmad (Supra)** so as to contend while relying upon paragraph 13 and 14 that in absence of any provisions under the Rules or the Regulations that the qualification has to be adjudged on the date of occurrence of vacancy thus the fifth respondent was rightly entitled for the said benefit is concerned, the said judgement is not applicable as that was a case wherein the provisions of U.P. Arabic, Farsi, Madarsa Rule 1987 were under consideration but here in the present case there happens to be provision under the U.P. Intermediate Education Act, 1921 for determination of the vacancy. This Court may also hasten to add that in absence of any provisions creating a class or a distinction for determination of the eligibility on the date of the occurrence of vacancy in the case of an institution otherwise vis-a-vis a minority institution, this Court cannot subscribe to contention raised by counsel for the fifth respondent.

40. As regards the judgement in the case of **Ashok Kumar Mehrotra (Supra)** is concerned the same is of no help to the respondents particularly when in the present case at hand there has been violation of principles of law and once this Court finds that the action of the respondent is illegal then obviously the Court cannot shut its eyes.

41. A coordinate Bench of this Court in **Writ-A No.44485 of 2011, Smt. Praveena Yadav vs. State Of U.P. and others decided on 8.8.2011** had the occasioned to consider the issue with regard to the eligibility of Regular Principal

and an Officiating/Ad hoc Principal and held as under:-

Consequently, this Court has no hesitation to record that so far as respondent no. 5 is concerned she cannot be appointed as Officiating Principal because of lack of minimum essential qualification prescribed for the post. The issue that the Officiating Principal be possessed of the prescribed minimum qualifications has been settled by a Division Bench of this Court in Special Appeal No. 756 of 1991 decided on 14.09.2001 which has since been followed by the Hon'ble Single Judge in Civil Misc. Writ Petition No. 55697 of 2000 decided on 25.05.2001. The Special Appeal filed against the same bearing no. 810 of 1993 was dismissed and thereafter the Special Leave to Appeal No. 154 of 2000 filed was also dismissed by the Apex Court vide order dated 23.11.2009.

42. The distinction drawn by the District Inspector of Schools, Ghazipur in the order impugned that the fifth respondent has been made incharge to look into day today affairs without any monetary benefits only the same is preposterous besides be misconceived as once an incumbent is not eligible and qualified then it would not cloth either the Committee of Management of minority institution or the beneficiary who even otherwise is not eligible to be conferred with the said benefit. After all the Committee of Management has a right to choose an Officiating Principal as per his choice but the said liberty cannot be given such a leverage so as to do violence with the aims and object for which the statute has been enacted.

43. Since the fifth respondent, Shueb Ahmad Khan has been held to be not possessing the the relevant eligibility for

being appointed as an Officiating/Incharge Principal of the institution in question thus, this Court is not addressing upon the issue with regard to the disqualification so attached in view of the relationship norm as per the clauses in the scheme of administration.

44. Accordingly, this Court is of the firm opinion that the order of the District Inspector of Schools, Ghazipur impugned dated 6.6.2023 cannot be sustained and is liable to be set aside and is set aside.

45. Resultantly, the writ petition stands **allowed**.

(2023) 11 ILRA 879
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2023

BEFORE

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

Writ-A No. 13188 of 2023

Snehata **...Petitioner**
Versus
Registrar & Commissioner, Cooperative
U.P. Lko & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Uday Pratap Singh

Counsel for the Respondents:
 C.S.C., Sri Devendra Pratap Singh, Sri Satyam Singh

A. Service Law – Termination – Disciplinary Proceeding against bank's employee – Charge of payment made in dormant account contrary to norms – Neither date, time and place of enquiry was fixed and intimated to the charged employee nor evidence, particularly oral evidence, was produced on behalf of the establishment – Effect – Burden of proof,

on whom lie – Held, the employers have, of course, the burden to prove the charges by producing evidence – The enquiry report is classically one that falls foul of the principles, requiring the establishment to lead evidence before the Inquiry Officer through a presenting officer, treating the Inquiry Officer as an impartial arbiter. It also falls foul of the principles that the establishment has to establish the charge, may be by preponderant probability, even if the employee does not offer defence or produce evidence. (Para 24, 25 and 26)

List of Cases cited:

1. Roop Singh Negi Vs P.N.B. & ors. ; (2009) 2 SCC 570
2. State of U.P. & anr. Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB) (LB)
3. Dukh Haran Prasad Vs St. of U.P. & ors. ; 2015 (3) ADJ 677
4. St. of Uttaranchal & ors. Vs Kharak Singh; (2008) 8 SCC 236

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

1. This writ petition is directed against an order dated 17.06.2021 passed by the Secretary/ Chief Executive Officer, Zila Sahkari Bank Limited, Ghazipur, dismissing the petitioner from service and the order dated 13.06.2022 passed by the Commissioner and Registrar, Cooperative, U.P., Lucknow, rejecting the petitioner's representation against the said order.

2. The petitioner's husband was a Branch Manager at the District Cooperative Bank, Ghazipur. He died in harness on 17.09.2007. After his death, the petitioner applied for compassionate appointment and the Bank aforesaid, who are arrayed as respondent Nos.2 and 3 to this petition, considered the petitioner's case, finding her fit to be appointed. Orders in this regard were passed on 26.04.2008 by respondent

No.2. The petitioner, acting on the order of appointment, joined on 29.04.2008. She was posted at the Head Office of the District Cooperative Bank, Ghazipur. Later on, the petitioner was transferred and posted as a Clerk/ Cashier in the Jangipur Branch of the District Cooperative Bank in the month of January, 2012.

3. According to the petitioner, misfortune befell her, when she was placed under suspension, pending enquiry vide an order dated 21.06.2018. Alongside the petitioner, the Branch Manager of the Bank, Ashok Kumar Singh was also placed under suspension. The basis of the disciplinary proceedings against the petitioner was a preliminary enquiry report dated 12.06.2018. It was submitted by a Section Officer (Audit) to the Secretary/ Chief Executive Officer, District Cooperative Bank Ltd. The report had opined that the petitioner, in collusion with the Branch Manager, had made certain payments in dormant accounts worth Rs.5,49,934/- contrary to norms of the Reserve Bank of India. It was also found that further payment of a sum of Rs.1,24,028/- in eight accounts, which were dead accounts, had also been made, besides settlement of an overdraft of Rs.5000/- in a dormant account.

4. In consequence of whatever was found in the preliminary inquiry or the impressions formed on its basis, the petitioner was served with a charge-sheet dated 22.11.2018, laying three charges against her, to wit:

"आरोप संख्या 1-

जांच के दौरान पाया गया कि विभिन्न खातों पर विगत वर्षों में मृतक दर्ज किया गया है, जब कि आप द्वारा खाते में मृतक दर्ज होने के बावजूद जान-बूझकर बैंक की साख को प्रभावित

करते हुए एक सोची समझी साजिश के तहत रु 1,35,028.00 का भुगतान कर गबन / अपहरण किया गया, जिसके आरोप से आपको आरोपित किया जाता है। जिसका विवरण संलग्न सूची के क्रमांक 3, 6, 10, 26, 31, 44, 48, 49 एवं 68 पर अंकित है।

आरोप संख्या-2 -

जांच के दौरान पाया गया कि आप द्वारा खातों में पर्याप्त अवशेष नहीं रहने पर भी बैंकिंग नियमों की अवहेलना करते हुए रु० 23,000.00 का भुगतान कर गबन / अपहरण किया गया है, जिसके कारण खातों में ओवर ड्राफ्ट (अधिविकर्ष) की स्थिति उत्पन्न हुई। जो आपके स्वेच्छाचारिता का परिचायक है। अतः आपको इस आरोप से आरोपित किया जाता है। जिसका विवरण संलग्न सूची के क्रमांक सं० 38, 46, 75, 142, 145, 162, एवं 204 पर अंकित है।

आरोप संख्या - 3-

जांच के दौरान पाया गया कि आप द्वारा अपरिचित खातों से बिना के० वाई० सी० नार्म्स पूर्ण कराये अनियमित ढंग से रु० 1127316.00 का भुगतान किया गया जो बैंकिंग नियमों के विपरीत है। इस प्रकार के भुगतान करके आप द्वारा गबन / अपहरण एवं वित्तीय अनियमितता की गयी है, जिसके आरोप से आपको आरोपित किया जाता है। जिसका विवरण संलग्न सूची के उपरोक्त (आरोप सं० 1 एवं आरोप सं० 2 में अंकित) क्रमांक के अतिरिक्त है।"

5. The petitioner submitted a reply to the charge-sheet on 14.01.2019 and in the opening part said that despite the letters dated 04.12.2018 and 08.01.2019, she was not supplied the proof of charges, which have been laid against her. It was pleaded that the payment of Rs.1,35,028/- had been done on the directions of the Branch Manager, who was authorised to check the signatures on the withdrawal form and tally these with the photographs. She was not authorised to tally the signatures and photographs of the account holders. It was also said that in the ledger account, there was no entry or note that the account holder

is dead. As regards Charge No.2, the petitioner said in brief that the overdraft in the seven accounts had been made as the earlier withdrawal forms were not entered/posted in the ledger account. Therefore, it was not clear whether there was sufficient balance in the account or not and the petitioner proceeded to make payments.

6. Answering Charge No.3, it has been said by the petitioner that carrying out the KYC exercise in accordance with norms was the duty for the Branch Manager, who failed to carry it out. It was not remotely the petitioner's duty to verify the KYC relating to the account holder before making payments. The petitioner, accordingly, said that she deserved to be exonerated.

7. It is the petitioner's case that after she had submitted a reply, the Secretary/Chief Executive Officer, Ghazipur issued a show cause notice dated 12.04.2019, without a copy of the enquiry report, saying that the Inquiry Officer had considered the petitioner's reply dated 14.01.2019, examined the documents and found all the charges against the petitioner to be proved. Therefore, the petitioner was asked to submit a reply within fifteen days, stating why her services may not be terminated. The petitioner submitted a reply to the show cause notice dated 12.04.2019, denying all the charges, and further said that the Inquiry Officer had held the enquiry *ex parte* without affording the petitioner any opportunity to defend herself.

8. The petitioner was then served with a further notice dated 28.02.2020, saying that her reply to the show cause notice had not been found satisfactory and it was proved that she had embezzled funds of the

Bank and committed gross financial irregularities causing loss. The petitioner, therefore, was required to show cause why she should not be dismissed from the Bank's service. Fifteen days were granted to further show cause.

9. To this added notice, the petitioner submitted a reply dated 12.03.2020, categorically saying that no enquiry had been held by the Inquiry Officer. It was said in this reply that the Inquiry Officer had not fixed a date, time and place of enquiry and no witnesses were examined nor the petitioner allowed to cross-examine witnesses. It was also said that the petitioner was not afforded opportunity to produce witnesses and, therefore, the enquiry proceedings were vitiated.

10. The petitioner was then served with a notice dated 17.08.2020 directing the petitioner to deposit a sum of Rs.6,60,436/- within fifteen days in view of a proposal of the Committee of Management to that effect dated 11.06.2020. The petitioner has asserted that no proposal by the Committee of Management was provided to her. She demanded a copy of the proposal dated 11.06.2020 passed by the Committee of Management, but it was never supplied. The petitioner, who is a widowed woman, serving on a compassionate tenure, was advised that she would be reinstated if she deposited Rs.6,60,436/-. The petitioner, therefore, encashed her entire savings and deposited these in the bank's account on 11.09.2020. Thereafter, there was a lull for a long period of time.

11. The petitioner addressed a memo to the Chief Executive Officer on 22.01.2021 followed by another one on 21.06.2021, with the prayer that she is

under suspension for more than three years, but no decision had been taken as yet. It was also stated that the petitioner had not been paid subsistence allowance for sixteen months and she was unable to maintain her small children, taking care of their studies. It was also said that her husband passed away during the Covid-19 pandemic. The lockdown imposed had caused great difficulties for the petitioner. The petitioner, therefore, prayed that her subsistence allowance be released.

12. The respondents resolved to terminate the petitioner's services. They sent a proposal to the Institutional Service Board in accordance with Regulation 87 of the Uttar Pradesh Cooperative Societies Employees Service Regulations, 1975 (for short, 'the Regulations of 1975'). Subsequently, the petitioner was served with the dismissal order dated 17.06.2021.

13. It is averred in paragraph No.17 of the writ petition that while going through the order, the petitioner came to know that a resolution to dismiss the petitioner from service had been passed by the Committee of Management of the Bank on 01.03.2019, and there was no mention of the resolution of the Committee of Management dated 11.06.2020, referred to in the notice dated 17.08.2020, requiring the petitioner to deposit a sum of Rs.6,60,436/-. It is also averred that the petitioner, thinking that she would be reinstated, deposited Rs.6,60,436/-, after encashing all her savings. There is no mention in the impugned order about the resolution of 11.06.2020 or the sum of money deposited by the petitioner.

14. The petitioner preferred an appeal before the Commissioner and Registrar, Cooperative Societies U.P. on 20.04.2022

under Section 128 of the Uttar Pradesh Cooperative Societies Act, 1965 (for short, 'the Act of 1965'), challenging the order of dismissal dated 13.06.2022. The said appeal, described by the Commissioner and Registrar, Cooperatives, as a representation, was held not maintainable against the order of dismissal under Section 128 of the Act of 1965. It was, accordingly, dismissed as not maintainable.

15. Aggrieved, the present writ petition has been instituted.

16. A counter affidavit has been filed on behalf of respondent Nos.2 and 3 in compliance with the order dated 10.08.2023 on 23.08.2023. On the said date, the learned Counsel for the petitioner made a statement at the Bar that he did not wish to file a rejoinder.

17. Mr. Satyam Singh, learned Counsel appearing on behalf of respondent No.4 also made a statement that he does not intend to file a counter affidavit. Accordingly, on 23.08.2023, the petition was admitted and heard forthwith. Judgement was reserved.

18. Heard Mr. Uday Pratap Singh, learned Counsel for the petitioner, Mr. D.P. Singh, learned Counsel on behalf of respondent Nos.2 and 3, Mr. Satyam Singh, learned Counsel on behalf of respondent No.4 and Mr. Dinesh Kumar Singh, learned Additional Chief Standing Counsel on behalf of the State.

19. This Court has keenly considered the submissions advanced by the learned Counsel for both sides.

20. In paragraph No.20 of the writ petition, it is averred that the Inquiry

Officer did not conduct a regular departmental enquiry as per rules. No date, time or place was fixed by the Inquiry Officer with intimation to the petitioner to participate in the enquiry. No oral or documentary evidence was led to prove the charges carried in the charge-sheet. It is averred that once no witnesses were examined on behalf of the establishment, there was no occasion for the petitioner to have examined or cross-examined witnesses or led evidence in support of her case. It is, therefore, said that the enquiry conducted against the petitioner is a mere formality and an eyewash. It is asserted that no departmental enquiry worth the name was ever conducted by the Inquiry Officer.

21. This Court finds in this case that the fact that the Inquiry Officer had not fixed a date, time and place of enquiry and no witness was examined by the establishment in support of the charge, was mentioned by the petitioner in her reply to the show cause notice filed before the Disciplinary Authority on 12.03.2020. There is an averment to that effect in paragraph No.13 of the writ petition. A perusal of the reply to the show cause notice, annexed as Annexure No.9 to the writ petition, shows that there is a specific assertion there that no date, time and place of enquiry was fixed, though it does not say that no witnesses were examined. It is nevertheless said that evidence was not produced in her presence, so as to enable her to cross-examine, which may mean almost the same thing.

22. In the counter affidavit filed on behalf of respondent No.3, the assertion in paragraph No.20 of the writ petition to the effect that no date, time and place of enquiry was fixed and no oral or documentary evidence was led to prove the

charges, has not been denied. This is evident from a perusal of paragraph No.21 of the counter affidavit, where though the contents of paragraph No.20 of the writ petition are denied, all that is offered by way of comment in denial is that the Inquiry Officer submitted the enquiry report after considering the petitioner's reply to the charge-sheet and going through the relevant record. The said assertion clearly admits it for a fact that no date, time and place of enquiry was scheduled or intimated to the petitioner. It is also a plenary admission of the fact that at the enquiry, there was no presenting officer appointed to lead evidence on behalf of the establishment, and in any case, no witnesses were examined on behalf of the establishment to prove the charges before the Inquiry Officer.

23. In case of departmental proceedings, where the enquiry may lead to the imposition of a major penalty, salutary principles laid down by Courts, require that the date, time and place of enquiry be intimated to the charged employee. It is also imperative in such matters that witnesses be produced and not just documents sifted through by the Inquiry Officer to reach his findings. An enquiry in disciplinary proceedings, where the consequences for the employee may be the imposition of a major penalty, particularly, obliges the Inquiry Officer to function as an impartial arbiter with a considerable degree of formality. He is to distance himself from the employer, even if he is an officer in their establishment for the purpose of holding the enquiry. For the employers, it is imperative that they must lead evidence in support of the charges first, particularly, oral evidence apart from documentary evidence. This would apply even if the delinquent/ employee does not appear and

the enquiry proceedings go ex parte. Where the employee does appear even if he / she does not produce his / her own evidence, he / she has a right to cross-examine the employers' witnesses.

24. What then must be the manner of holding an enquiry for the employer in a case where the charges are so serious that the employee may suffer a major penalty? To our understanding the Inquiry Officer on the day he holds an enquiry, cannot do so without a schedule, in the course of his duties as an official in the employer's establishment. He must set time apart for the enquiry and observe the formality of being in session as an impartial arbiter, different from his daily routine. Obviously, once he does that, he would certainly intimate the employee of the date, time and place, which are imperatives of a valid enquiry. The enquiry cannot, therefore, be a routine or a slipshod proceeding done by the officer in the midst of his routine work in the employer's establishment. In short, the Inquiry Officer must convene a proper Inquiry Tribunal. The employers have, of course, the burden to prove the charges by producing evidence, which would include oral evidence.

25. In this case, it is admitted that neither date, time nor place of enquiry was fixed and intimated to the petitioner nor evidence produced on behalf of the establishment, particularly, witnesses/ oral evidence.

26. A perusal of the enquiry report shows that the Inquiry Officer has written out the charge, the petitioner's reply and then proceeded to record findings, considering the petitioner's reply with reference to the documents involved, on the basis of which the charge-sheet has been

issued. There have indeed been no proceedings of the enquiry convened, where evidence on behalf of the establishment, documentary as well as oral, would be led by the presenting officer with opportunity to the petitioner to cross-examine witnesses on behalf of the establishment. The enquiry report is classically one that falls foul of the principles, requiring the establishment to lead evidence before the Inquiry Officer through a presenting officer, treating the Inquiry Officer as an impartial arbiter. It also falls foul of the principles that the establishment has to establish the charge, may be by preponderant probability, even if the employee does not offer defence or produce evidence. The enquiry report here is no more than an opinion written on a reading of mere papers by the Inquiry Officer, with no evidence heard in the matter. Reference in this connection may be made to the decision of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570**, where it has been observed:

“14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by

the enquiry officer on the FIR which could not have been treated as evidence.”

27. The question fell for consideration before a Division Bench of this Court in **State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB) (LB)**, where it was held:

“14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in **State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831**, as well as by a Division Bench of this Court in **Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541**.

16. A Division Bench decision of this Court in the case of **Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667**, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

“10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11.A Division Bench of this Court in **Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541**, considering the question as to whether holding of an oral inquiry is

necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in **Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475** and **Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005.**”

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold an ex parte enquiry where evidence must be led vide **Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348**, **Uma Shankar v. Registrar, 1992 (65) FLR 674 (All)**.

18. The Division Bench of this Court in the case of **Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570**, had also occasion to deal with the same issue. It held:

“At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that those documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be

automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect.”

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.”

(emphasis by Court)

28. The issue under consideration here engaged the attention of this Court in **Dukh Haran Prasad v. State of U.P. and others, 2015 (3) ADJ 677. In Dukh Haran Prasad (supra)**, it was observed:

“16. It is not disputed by the learned Standing Counsel that the imposition of the penalty of stoppage of three increments with cumulative effect upon the petitioners was a major penalty. If that be the admitted position, the procedure prescribed under Rule 7 was to be mandatorily followed. It has been repeatedly held by this Court that in the case of imposition of a major penalty, a failure to hold an oral inquiry is fatal. If there be any need to refer to authority for this proposition, one may only note the judgment rendered by a Division Bench of

this Court in the case of **Sharad Kumar Varma v. State of U.P. and others; 2006 (110) FLR 630.”**

29. Of particular relevance in the context is the guidance of the Supreme Court in **State of Uttaranchal and others v. Kharak Singh, (2008) 8 SCC 236**, where it is observed:

“17. On the other hand, one Mr P.C. Lohani, Dy. Divisional Forest Officer, Nandhaur acting as an enquiry officer after putting certain questions and securing answers submitted a report on 16-11-1985. No witnesses were examined. Apparently there was not even a presenting officer. A perusal of the report shows that the enquiry officer himself inspected the areas in the forest and after taking note of certain alleged deficiencies secured some answers from the delinquent by putting some questions. It is clear that the enquiry officer himself has acted as the investigator, prosecutor and judge. Such a procedure is opposed to principles of natural justice and has been frowned upon by this Court.”

30. In the conspectus of the law above noticed and what we have found on facts and law, the impugned orders dated 17.06.2021 13.06.2022 and the enquiry report dated 08.02.2019, cannot be sustained.

31. This Court makes it clear that we have not expressed our opinion on the merits of the charges, and if the respondents elect to proceed afresh in accordance with law, they will be free to reach a just and fair conclusion, conforming to the law after adhering to the procedure laid down for the holding of domestic enquiries in matters involving the imposition of a major penalty.

32. In the result, this petition succeeds and is allowed. The impugned order dated 17.06.2021 passed by the Secretary/ Chief Executive Officer, District Cooperative Bank Ltd. Ghazipur, the order dated 13.06.2022 passed by the Registrar and Commissioner, Cooperative U.P., Lucknow and the enquiry report dated 08.02.2019 submitted by the Inquiry Officer/ General Manager, District Cooperative Bank Ltd., Ghazipur (Annexure No.1 to the counter affidavit) are hereby **quashed**. A mandamus is issued directing the respondents to reinstate the petitioner in service forthwith. The petitioner shall be entitled to the salary from the date of this judgment. It will be open to the respondents to proceed afresh against the petitioner from the stage of charge-sheet, strictly in accordance with law, bearing in mind the guidance in this judgement. If the respondents elect to proceed afresh against the petitioner, the question of back wages shall be decided, subject to the result of proceedings. In the event, the respondents do not elect to proceed afresh against the petitioner, she would be entitled to 50% back wages. In the event, in any contingency, if the petitioner is reinstated finally, she would be entitled to continuity of service and seniority.

(2023) 11 ILRA 887
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2023

BEFORE

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

Writ-A No. 13315 of 2023

Rajesh Kumar Saraswat ...Petitioner
Versus
The Director, Board of U.P. Power Corp.
Ltd. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Indra Raj Singh, Sri Adarsh Singh, Sri Varun Kumar Agnihotri

Counsel for the Respondents:

C.S.C., Sri Abhishek Srivastava, Sri Manu Ghildyal, Sri Ujjawal Srivastava

A. Service Law – Dismissal – Disciplinary enquiry – Incident of robbery occurred causing huge loss to the Bank – Inquiry Committee proceeded on an assumption that the charges are proof of themselves and it is for the charged employee to offer evidence to establish that he is not guilty – Permissibility – Held, even if any charged employee does not produce any witness in his defence, that would not absolve the Establishment of their burden of proving the charges, by producing documentary as well as oral evidence in support thereof, at the hearing before the Inquiry Committee/Officer – The charges being grave do not mean that the employee can be punished surreptitiously in breach of the established procedure to hold a departmental inquiry. (Para 17, 18 and 24)

Writ petition allowed. (E-1)

List of Cases cited:

1. St. of U.P. & ors. Vs Saroj Kumar Sinha; (2010) 2 SCC 772
2. Roop Singh Negi Vs Punjab National Bank & ors. ; (2009) 2 SCC 570
3. St. of U.P. & anr. Vs Kishori Lal & anr.; 2018 (9) ADJ 397(DB)(LB)
4. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107(DB)(LB)
5. Ashish Kumar Tiwari Vs St. of U.P. & ors. ; 2021 (1) ADJ 420
6. Ranveer Singh Vs U.O.I. & ors. ; 2021 (5) ADJ 136
7. Prem Narain Singh Vs St. of U.P. & anr.; 2023 (2) ADJ 580

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

The petitioner, who was an Office Assistant-III/Cashier (Revenue) in the employ of the U.P. Power Corporation Limited (for short, 'the Corporation'), impugns his dismissal from service vide order dated 07.12.2021 passed by the Chairman of the Corporation as well as the order dated 17.09.2022 passed by the Board of Directors of the Corporation, dismissing the petitioner's appeal and affirming the Disciplinary Authority.

2. The facts giving rise to this petition are that the petitioner was appointed as an Office Assistant-III under the Dying-in-Harness Rules, favoured with a compassionate appointment on account of his father's demise in harness. The petitioner's father was a Junior Engineer. He died on 12.08.2008. The petitioner was appointed on 20.11.2008. The petitioner joined service on the date the letter of appointment was issued and commenced discharging his duties. The petitioner was appointed in the office of Superintending Engineer, Dakshinanchal Vidyut Vitran Nigam Limited, District Hathras. The petitioner was transferred to the newly created office of the Electricity Distribution Division, Sadabad, Hathras and relieved on 21.08.2010. The petitioner joined as an Assistant-III in the newly created office of the Electricity Distribution Division-IV, Sadabad, Hathras on 22.08.2010. The petitioner says that while holding the post of a Cashier (Revenue) in the office of the Executive Engineer, there was a robbery on 16.04.2013. The petitioner reported the incident to the respondents and also lodged a first information report at the Police Station the same day. The Superintending Engineer made a preliminary inquiry into the incident and submitted a report dated 16.04.2013. He held no employee of the Corporation responsible for the incident. It was a case of loot of the bag, carrying cash in the

sum of Rs. 22,70,000/- by three motorcycle-borne robbers, who robbed the petitioner at gun point, just as he was about to enter the Bank with the cash bag, after parking his vehicle. It is averred that at the relevant date and time i.e. 16.04.2013, there was neither any guard appointed nor any security detailed to facilitate the safe deposit of cash in the Bank. It is also pleaded that there was an insurance to the extent of Rs. 16,00,000/-, whereas the recovery and collection in the Bank was always more than the said sum. Subsequently, on account of aforesaid incident dated 16.04.2013, the Superintending Engineer passed an order dated 03.05.2013, placing the petitioner under suspension pending inquiry. The petitioner was arrested in Crime No. 395 of 2013 under Section 409 IPC, P.S Sadabad, District Hathras and sent to jail. It is submitted that the petitioner was falsely implicated and has been charged with loss of the said sum vide a charge-sheet dated 16.03.2017. The petitioner submitted his reply to the charge-sheet after gathering relevant facts and materials in support of his case. The charge-sheet carried twelve charges, all of which were denied by the petitioner.

3. It is the petitioner's case specifically pleaded in paragraph no. 15 of the writ petition that the Inquiry Committee, without issuing any notice, conveying the date, time and venue of inquiry to the petitioner to participate, without perusing the relevant records or giving the petitioner an opportunity of hearing, submitted an inquiry report dated 12.03.2019, holding charges nos. 1, 2, 3, 4, 5, 8 and 12 proved, charges nos. 9, 10, and 11 partly proved and charge no. 7, not proved. A copy of the inquiry report is also on record.

4. The Executive Engineer(Administration-2), Dakshinanchal Vidyut Vitran Nigam

Limited, Agra issued a notice dated 13.08.2020 to the petitioner, asking him to submit his response to the inquiry report. The petitioner, in response to the notice dated 13.08.2020, submitted a reply dated 29.09.2020. He mentioned in his reply that the inquiry was not properly held in accordance with law, and without any cogent evidence, documentary or oral, the charges were held proved in manifest error of law.

5. The Disciplinary Authority, according to the petitioner, without application of mind, passed the order impugned, dismissing him from service vide order dated 07.12.2021. The Authority further directed recovery of a sum of Rs. 72,13,237/- from the petitioner, after adjusting the sum of money, already recovered.

6. The petitioner filed an appeal dated 07.01.2022 to the Board of Directors of the Corporation, raising cogent grounds. Since the petitioner was facing recovery pursuant to the order of the Disciplinary Authority, he instituted Writ-A No. 5220 of 2022 before this Court. This Court, *vide* order dated 05.05.2022, disposed of the said writ petition, directing that the competent Authority shall examine the petitioner's case in appeal/representation preferred against the order of dismissal within a period of two months from the date of submission of a certified copy of the order. It was further directed that in the meanwhile, until decision is taken by the Board of Directors, no recovery shall be made pursuant to the impugned order passed by the Disciplinary Authority. The Board of Directors, sitting as the Appellate Authority vide order dated 17.09.2022, dismissed the petitioner's appeal, affirming the Disciplinary Authority.

7. Aggrieved, the petitioner has instituted the present writ petition under Article 226 of the Constitution.

8. Heard, Mr. Adarsh Singh, learned counsel for the petitioner, Mr. Ujjawal Srivastava, Advocate holding brief of Mr. Abhishek Srivastava, learned counsel for respondent nos. 1, 2 and 3, Mr. Manu Ghildyal, learned counsel for respondent no.4 and Ms. Monika Arya, learned Additional Chief Standing Counsel on behalf of respondent no. 5.

9. It must be remarked here that this writ petition has been heard on a solitary affidavit filed on the respondents' side, which is a personal affidavit of respondent no. 2, the Chairman, U.P. Power Corporation Limited, Lucknow. This course of action has been taken in view of the stand of the parties before this Court recorded in the order dated 23.08.2023, which reads:

“Statement is made on behalf of respondent nos. 1,2 and 3, that no further affidavit is required to be filed. Ms. Monika Arya, learned Additional Chief Standing Counsel appears on behalf of respondent no.5. Mr. Manu Ghildyal, learned counsel appearing on behalf of respondent no.4, states that he does not propose to file a counter affidavit. Learned counsel for the petitioner states that personal affidavit may be treated as a counter affidavit to which he does not intend to file a rejoinder.”

10. The personal affidavit of respondent no.2 was filed in response to an order dated 11.08.2023, the material part whereof reads:

“Mr. Abhishek Srivastava, Advocate shall file an affidavit within a

week on behalf of the Chairman, U.P. Power Corporation Limited, Lucknow clearly indicating whether at the inquiry, the Inquiry Officer fixed a date, time and venue, with notice thereof to the petitioner, and further, if the employers-respondents examined any witnesses (oral evidence), in support of the charges against the petitioner. There is an assertion that neither date, time and place of inquiry was fixed by the Inquiry Officer nor witnesses examined by the establishment.”

11. This issue was inquired into by the Court because the petitioner has averred in paragraph no. 15 of the writ petition that no date, time and place of the inquiry was fixed, enabling him to participate in the oral inquiry. Though, in the writ petition, it is not said in words very specific but the fact that the Establishment did not produce any witness in support of the charges or lead oral evidence to prove them, is precisely what the petitioner wishes to canvass. It was, therefore, imperative for the Court to inquire of the respondents, if they examined any witness in support of the charges against the petitioner. Of course, it was also inquired if any date, time and place of the inquiry was fixed. The personal affidavit that has been filed is not a para-wise reply to the contents of the writ petition but substantially answers the petitioner’s case. In paragraph nos. 8, 9 and 11 of the personal affidavit, it has been averred:

“8. That during the departmental enquiry the petitioner was also issued a letter by the enquiry committee on 11.01.2018, directing him to appear before the enquiry committee, fixing the date and time, in response to which, the petitioner appeared before the enquiry committee on 30.01.2018 and participated in the enquiry.

A copy of the letter dated 11.01.2018 and the minutes of the proceedings dated 30.01.2018 are being annexed herewith and marked as Annexure-CA-2 & CA-3 respectively to this personal affidavit.

9. That after giving due opportunity of hearing to the petitioner and on the basis of material evidence on record, the enquiry committee submitted its report. During the course of departmental enquiry, the petitioner had not shown any interest in asking the department to produce any witness for examination/cross examination. Therefore, once the petitioner has duly participated in the departmental enquiry and enquiry committee has given him all the necessary opportunities in his defence, it can not be said that any prejudice is caused to him in not examining any witness by the department.

11. That from perusal of the record it is evident that no witness was proposed either in the charge sheet or any witness was named by the petitioner to be examined during the departmental enquiry. Therefore, no witness was examined by the Corporation to prove the charges during the course vastava of departmental enquiry in the present case. Further to remove all these anomalies, an Office Memorandum has been issued on 14.8.2023 wherein directions have been issued to all the authorities of the Corporation/discoms enquiry that they should strictly adhere to the provisions of Rule-7 of the Regulations-2020.”

(emphasis by Court)

12. The petitioner’s case that no date, time and place of inquiry was fixed is, therefore, not established, particularly, in view of the fact the petitioner did appear

before the Inquiry Committee, which seems to have held a single sitting on 30.01.2018. The proceedings of the inquiry with reference to the minutes, and the impact of the affidavit filed by the petitioner before the Committee, also dated 30.01.2018, will be adverted to a little later in this judgment. What is not denied, therefore, reading across paragraph no. 9 and 11 of the personal affidavit filed by respondent no. 2 is the fact that indeed the Establishment in order to prove its charges did not produce witnesses, or documentary evidence through a presenting officer before the Inquiry Committee. The sole sitting of the Inquiry held on 30.01.2018, or at least the session, where the petitioner appeared, the recorded minutes thereof read:

टिप्पणी एवं आदेश
केस सं० – 26

30.01.2018

पत्रावली व्यक्तिगत सुनवाई हेतु प्रस्तुत हुई।

आरोपी श्री राजेश कुमार सारस्वत, त० कार्यालय सहायक तृतीय विद्युत वितरण खण्ड- चतुर्थ, सादाबाद, हाथरस ने आज दिनांक 30.01.18 को अपने बचाव में " समिति" के समक्ष व्यक्तिगत रूप से उपस्थित हुये। अनुपूरक आरोप पत्र का अभिकथन एवं साक्ष्य प्रस्तुत करना चाहता हूँ। इस आधार पर आरोपी सेवक ने 15 दिन का समय मांगा जिसे समिति ने स्वीकार कर लिया। इस प्रकार आज की कार्यवाही पूर्ण की जाती है।

ह० अप०	ह० अप०
ह० अप०	
30.01.18	30.01.18
30.01.18	

(Rajesh Kumar Saraswat)
O.A IIIrd (Suspended)

ह० अप०

13. A reading of the minutes of the inquiry shows that during the proceedings, the Committee went by the assumption that the charges numbering twelve were all proof of themselves and that during personal hearing on 30.01.2018, the petitioner, who requested time to file a reply to the supplementary charge-sheet and produce evidence in his defence, was granted fifteen days' time to do so, adjourning proceedings of the inquiry. On the other hand, an affidavit has been taken on record on 30.01.2018 on a printed proforma with blanks filled up. The printed proforma, which the petitioner has signed also seems to be the product of a very objectionable practice. The so-called affidavit, which does not even show the expression of an oath or the verification of its contents, is a printed proforma with blanks to be filled up.

14. A reading of the said affidavit on the printed proforma seems to show that Inquiry Committees of the Corporation are employing this proforma to extract statements from a charged employee, opting to give up his defence. The reason is that the printed script and not the blanks say it without option that the employee has inspected all the records and that the charged employee, apart from his written statement, has nothing else to say in his defence. It is also scripted in printed form that the charged employee does not wish to examine or cross-examine any witness. The last is a printed acknowledgment that the Inquiry Committee has given him full opportunity of hearing.

15. This proforma affidavit annexed as Annexure No. 3 to the personal affidavit, filed by the Chairman of the Corporation, leaves this Court with no option but to believe that the Inquiry Committees of the

Corporation, not just in this case but generally, since it is a printed proforma, are proceeding with departmental inquiries hardly as impartial arbiters with commitment to enquire and discover the truth of the charges. This printed proforma shows the outlook of the Inquiry Committee almost to trick the employee into giving up his defence on charges that may lead to grave civil consequences for him. It also shows that the Inquiry Committee is minded to think its business of inquiring into the charges, more a matter of formality to endorse the Establishment's case, than a duty to act as an impartial arbiter, where the Establishment bears the burden of proving the charges in the first instance by leading evidence.

16. This Court has no hesitation in condemning the practice of asking employees to sign a printed proforma of an affidavit, where the only option is to say that they do not want to produce any evidence in their defence, examine or cross-examine witnesses. The blanks in the affidavit are only about the particulars of the charge-sheet, the name of the employee, etc.; everything else is prescribed. There is already a passing remark by this Court about the validity of the kind of document that is dubbed as an affidavit by the Corporation, and apparently, in general use in their establishment. The document, to say the least, is not at all an affidavit, notwithstanding its authentication by a notary public. The reason is that an affidavit to qualify as such must clearly carry a solemn affirmation or an oath in the name of God, which the document does not show. In addition, there has to be a verification by the deponent of the contents based on personal knowledge or information received or whatever is the source, but there is no such clause in the

proforma document so essential to an affidavit.

17. The approach of the Inquiry Committee apparent from the contents of the proforma affidavit dated 30.01.2018 and the minutes of the inquiry dated 30.01.2018 is one not conforming to the basic standards of fairness in holding a domestic inquiry, in accordance with the settled procedure. The minutes dated 30.01.2018 show that the petitioner was called upon to produce his defence, regarding which he sought opportunity. However, there is nothing on record to show that the Establishment discharged its burden through the agency of a Presenting Officer to produce documentary as well as oral evidence on its behalf before the Inquiry Committee, in support of the charges. In a domestic inquiry, it is imperative that the Inquiry Committee/Officer should act as an impartial arbiter, and not an agent of the Employer in order that the inquiry may qualify as valid in law. It is the duty of the Establishment/Employer to examine before the Inquiry Committee/Officer evidence, documentary, and particularly, oral, where the charges are so serious that, if proved, may lead to the imposition of a major penalty. This is a salutary principle which has come to be accepted by preponderant judicial opinion. Nothing of the kind has been done and the Inquiry Committee seems to have proceeded on an assumption that the charges are proof of themselves and it is for the charged employee/petitioner to offer evidence to establish that he is not guilty.

18. The procedure well settled would require the Establishment, as already said, to examine the witnesses in support of the charges and it is then that the petitioner

would have the option to cross-examine them. After evidence on behalf of the Establishment has been led, the burden would shift to the petitioner or the employee to produce evidence in his defence, including witnesses. Even if the petitioner, or for that matter, any charged employee does not produce any witness in his defence, that would not absolve the Establishment of their burden of proving the charges, by producing documentary as well as oral evidence in support thereof, at the hearing before the Inquiry Committee/Officer. Nothing of the kind has been done in the present case rendering entire inquiry proceedings and the resultant report flawed.

19. The issue here fell for consideration before the Supreme Court in **State of U.P. and others vs. Saroj Kumar Sinha**¹, where it has been held:

“27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the un rebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.”

20. In **Roop Singh Negi vs. Punjab National Bank and others**², it was observed by their Lordships of the Supreme Court:

“14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.”

21. A Division Bench of this Court in **State of U.P. and another vs. Kishori Lal and another**³ had occasion to consider the issue about the procedure by which an inquiry is to be held in matters involving the imposition of a major penalty and observed:

“14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541.

X X X X

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold an ex parte enquiry where evidence must be led vide Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that those documents are sufficient enough to prove the charges.

In any case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also."

(Emphasis by Court)

22. The issue again came up before a Division Bench of this Court in **Smt. Karuna Jaiswal vs. State of U.P.**⁴, where it was held:

“15. The law in this regard is very well-settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of *State of Uttar Pradesh and others v. Saroj Kumar Sinha*, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the un rebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry

by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable.”

23. I also had the occasion to consider this issue in **Ashish Kumar Tiwari vs. State of U.P. and others**⁵ as well as **Ranveer Singh vs. Union of India and others**⁶, besides **Prem Narain Singh vs. State of U.P. and another**⁷. The substance of the principle followed in all these decisions is that in cases involving the imposition of a major penalty, no valid inquiry can be held, unless the Establishment proves charges by examining evidence, particularly, witnesses.

24. The Court must observe here that the charges in this case, that are twelve in number, are about loss of cash belonging to the Corporation to robbery just outside the Bank and some discrepancy, in the sum of money shown looted in the FIR and the cash shown on papers to be in transit to the Bank. There are other charges apart from the robbery as well, such as the one relating to embezzlement of Rs. 8,75,875/- collected through sixty-two receipts, but not shown in the books of accounts. All these charges by their very nature would require to be established by oral evidence on behalf of the Establishment, that is totally wanting. The charges being grave do not mean that the employee can be punished surreptitiously in breach of the established procedure to hold a departmental inquiry. In fact, the more serious the charge and its consequences, the more strict adherence to the procedure prescribed ought to be.

25. In view of what this Court has found above, we are of the considered opinion that the impugned orders dated 07.12.2021 passed by the Chairman of the Corporation and the order dated 17.09.2022 passed by the Board of Directors of the said Corporation cannot be sustained.

26. In the result, this petition succeeds and is **allowed**. The impugned order dated 07.12.2021 passed by the Chairman, U.P. Power Corporation, Lucknow and the order dated 17.09.2022 passed by the Board of Directors of the Corporation are hereby **quashed**. A mandamus is issued to reinstate the petitioner in service **forthwith**. The petitioner shall be entitled to salary from the date of this judgment. It will, however, be open to the respondents to proceed afresh against the petitioner from the stage the charge-sheet was issued to him and conclude the disciplinary proceedings expeditiously, wherein the petitioner will cooperate. If the respondents elect to take fresh proceedings, the petitioner shall not be entitled to any backwages, until conclusion of all disciplinary proceedings against him and final orders being made. In the event, fresh proceedings are taken and the petitioner is finally reinstated in service, the respondents will decide upon the issue of backwages to be paid to the petitioner for the period that he has remained out of service. But in that event, the petitioner would be entitled to seniority and continuity in service. It is also made clear that upon reinstatement in terms of this judgment, it would be open to the respondents, either to take work from the petitioner, or not assign him duties during pendency of the disciplinary proceedings, the further course of action being dependent upon the outcome of the proceedings, as indicated above. The

petitioner upon reinstatement in service, whether he is assigned work or not, would be entitled to his salary from the date of this judgment. It is also made clear that it will be open to the respondents, if they choose to initiate fresh disciplinary proceedings, to place the petitioner under suspension pending inquiry, and in that event, the petitioner would be entitled to subsistence allowance alone, which shall be paid regularly and promptly.

27. There shall be no order as to costs.

28. Let a copy of this order be communicated to the Chairman, U.P. Power Corporation Limited, Lucknow by the Registrar (Compliance)

(2023) 11 ILRA 896

**ORIGINAL JURISDICTION
CIVIL SIDE**

**DATED: ALLAHABAD 03.10.2023 &
12.10.2023**

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-A No. 36716 of 1998

Balram Yadav **...Petitioner**
Versus
D.J., Maharajganj & Anr. **...Respondents**

Counsel for the Petitioner:

Sri Mahendra Pratap, Akhileshwari Dubey, Sri M.K. Dubey, Sri P.K. Upadhyay, Sri S.M. Yadav, Sri V.K. Dubey

Counsel for the Respondents:

C.S.C., Ms. Pooja Agarwal, Sri Samir Sharma

A. Service Law – Right to equality – UP Regularization of Daily Wages Appointments on Group D Posts Rules, 2001– R. 4 – Regularization – Identical

placed persons were regularized – Effect – Held, petitioner’s claim in the light of the Rules of 2001 cannot be ignored, more so, when identically placed persons, who were also included in the list after serial No. 29 onwards, have already been regularized during the pendency of writ petition – Petitioner is also entitled for equal treatment. (Para 13)

B. Service Law – Termination – Charge of negligence causing an incident of water logging into the rest room of Additional Judge leveled – Proof of role, how far bear significance – Held, the petitioner was terminated without assigning any role to him in the alleged incident of water logging – High Court found the termination order unsustainable. (Para 4, 10 and 15)

C. Pleading – Improvement of case through affidavit – Permissibility – Can the defence be taken in the counter affidavit, which is not reflected in the impugned order – *Mohinder Singh Gill’s case* relied upon – Held, the respondents cannot improve their case on the basis of affidavits only. (Para 12)

Writ petition allowed. (E-1)

List of Cases cited:

1. Vibhuti Shankar Pandey Vs St. of M. P. & ors. ; 2023 (3) SCC 639
2. Bhawani Prasad Sahu & ors. Vs St. of U.P. & ors. ; 2023 (5) All LJ 248
3. Secretary, St. of Karn. & ors. Vs Umadevi & ors. ; 2006 (4) SCC 1
4. Mohinder Singh Gill & ors. Vs Chief Election Commissioner, New Delhi & ors. ; AIR 1978 SC 851

(Delivered by Hon’ble Kshitij Shailendra,
J.)

1. Heard Shri Pankaj Upadhyay along with Shri Vipul Kumar Dubey, learned

counsel for the petitioner, Ms. Pooja Aarwal, learned counsel for the respondents and perused the record.

2. The petitioner was appointed as a Class IV employee on Ad-hoc basis on 01.12.1999 in District Judgeship of Maharajganj. Reference to the select-cum-appointment list of year 1991 has been made. The said list shows that pursuant to the written examination dated 20.01.1991 followed by interview dated 11.03.1991, 46 candidates were declared as successful and were appointed in Ad-hoc capacity. The name of the petitioner finds mention at serial No. 35 of the said list with a remark of back-ward class against his name.

3. It is contended that the petitioner was issued a letter of appointment by the District Judge concerned on 12.04.1991, whereby he was appointed as Farrash on Ad-hoc basis on a fixed pay of Rs. 780/- per month w.e.f. 12.04.1991 with a recital that his appointment, being purely temporary in nature, is liable to be terminated any time without notice. Further case of the petitioner is that another order was issued by the District Judge, Maharajganj mentioning that the appointment of various persons including the petitioner would be treated as effective w.e.f. 01.05.1991.

4. It is contended that after about four years, the petitioner moved an application before the Registrar General of this Court on 28.03.1995 seeking regularization of his services. However, while no order was passed on the said application on the Administrative side, in the meantime, learned District Judge, Maharajganj, by an order dated 10.07.1998 terminated the services of the petitioners along with two other persons, while referring to an incident

when water stood logged up into the rest room of Additional District Judge for the reason that Assistant Nazir, namely, Rajesh Yadav being on leave, another Assistant Nazir, namely, Kameshwar Thakur remained negligent and, therefore, Kameshwar Thakur was suspended. The said order dated 10.07.1998 is under challenge in the present writ petition along with another order dated 04.08.1998, whereby the petitioner was reappointed on the same post with a clear recital that his seniority would remain intact. The subsequent order has been challenged to the extent it is against the petitioner and it is contended that the only thing which goes against the petitioner in order dated 04.08.1998 is that he has been given fresh/reappointment.

5. The present writ petition has been filed challenging the aforesaid two orders with a further prayer that services of the petitioner be regularized.

6. Learned counsel for the petitioner has placed reliance upon Uttar Pradesh Regularization of Daily Wages Appointments on Group D Posts Rules, 2001 (herein-after referred to as "Rules of 2001") and while referring to Rule 4 of the said Rules, it has been argued that a daily wager directly appointed before 29.06.1991 and continuing in service on the date when the Rules of 2001 came into force, would be entitled for regularization his services. The submission is that in 2001, the petitioner was continuing in service at the strength of the interim order dated 30.11.1998 passed in the present writ petition.

7. Learned counsel for the petitioner further submits that during the pendency of the writ petition, two persons, namely,

Ravindra Nath Dubey and Matiram Yadav, whose names were shown at serial Nos. 33 and 34 in the list of 1991, have been regularized and, therefore, the petitioner is being discriminated. Learned counsel for the petitioner has also placed reliance upon the judgements of Apex Court in the case of *Sheo Narain Nagar and others vs State of U.P. and others*, reported in 2018 (13) SCC 432 and *Rajnish Kumar Mishra and others vs State of U.P. and others* reported in 2019 (17) SCC 648 and submits that the Apex Court, under identical circumstances, has granted relief to the concerned appellants before the Apex Court after dealing with the regularization Rules of 2001 and cut off date as well as working of the concerned appellants in the establishment.

8. Per contra, Ms. Pooja Agrawal, learned counsel, by referring to the counter affidavit, has argued that there were only 23 vacancies of Class IV in the District Judgeship of Maharajganj and 5 additional posts were created, making the vacancy as 29. It is further contended that the select list relied upon by the petitioner discloses a consolidated list, in which only 29 persons were found to be appointed as against 29 vacant posts and the persons, whose names were mentioned from serial No. 30 onwards, were put in the waiting list and the petitioner being a candidate included in the waiting list and beyond the sanctioned strength, is not entitled either to continue in service or for regularization. As regards the case of Ravindra Nath Dubey and Matiram Yadav, it has been argued that Ravindra Nath Dubey was given appointment pursuant to the order dated 17.07.2013 passed in Writ A No. 1428 of 2004 under the peculiar facts and circumstances and, therefore, no parity can be claimed. She further submits that the learned

Administrative Judge, Maharajganj, while deciding the claim of Ravindra Nath Dubey by order dated 19.12.2015, has taken note of the situation that Ravindra Nath Dubey participated in the fresh selection held in the year 1992 and, therefore, the petitioner cannot claim parity with him. As regards Matiram Yadav, whose services have also been regularized, it is contended that he belonged to backward class and since he was above in the order of merit and seniority in comparison to the petitioner, he was given appointment and, hence, the petitioner being below in the select list, cannot claim any relief. Ms. Pooja Agarwal, learned counsel has relied upon the following authorities in support of her submissions:

(i) Vibhuti Shankar Pandey vs State of Madhya Pradesh and others, reported in 2023 (3) SCC 639

(ii) Bhawani Prasad Sahu and others vs State of U.P. Through Principal Secretary, P.W.D. Lucknow and others, reported in 2023 (5) All LJ 248.

9. While placing reliance upon the aforesaid authorities, it has been argued that no appointment beyond the sanctioned strength can be allowed and the petitioner cannot get any relief in view of the judgment of Supreme Court in the case of ***Secretary, State of Karnataka and others vs Umadevi and others***, reported in 2006 (4) SCC 1.

10. Having heard the learned counsel for the parties, I find that the order dated 10.07.1998 terminating the services of the petitioner is confined to the alleged negligence of one Assistant Nazir, namely, Kameshwar Thakur, who was suspended by the same order, whereas the petitioner

was terminated without assigning any role to him in the alleged incident of water logging. Insofar as second order impugned dated 04.08.1998 is concerned, though the petitioner is shown to have been reappointed, his seniority was kept intact by the District Judge. By the time, the said order was passed on 04.08.1998, no interim order was passed in the present case. Therefore, it cannot be said that the petitioner's continuity in service is to be considered only in pursuance or at the strength of interim order dated 30.11.1998 passed in the present writ petition. The only little break, if at all can be treated, is in between 10.07.1998 and 04.08.1998, i.e. 24 days and once the District Judge maintained the seniority of the petitioner, despite mentioning that he is offering reappointment to him, for the purposes of claim for regularization of the petitioner, the said little break of 24 days would not adversely affect the claim subject to other aspects of the matter.

11. Insofar as the argument of Ms. Pooja Agarwal that the petitioner's name was included in the waiting list in view of 29 vacancies available, I find that the said argument has been developed by way of counter affidavit only and there is no such description either in any of the two orders impugned or in the select list or even in the appointment letter that the petitioner was included in the waiting list. In any case, if the argument of Ms. Pooja Agarwal is accepted in relation to the sanctioned strength, after perusing the order passed in the case of Ravindra Nath Dubey, who was also included in the waiting list as per the respondents, I find that the learned District Judge, Maharajganj in the year 2015, apart from discussing other aspects of the matter of Ravindra Nath Dubey, also took note of the report of the District Judge that against

46 sanctioned Class IV posts in the District Judgeship, Maharajganj, 40 persons were working and 6 posts in the said cadre were lying vacant. Learned Administrative Judge in the order dated 19.12.2015 also observed that Ravindra Nath Dubey had been working in the Maharajganj Judgeship for the last more than 22 years on a meagre sum of Rs. 785/- in these hard economic days and he is now 50 years of age having two sons and one unmarried daughter, who are studying and has also to bear the liability of his brothers' widow. The order dated 19.12.2015 was passed in the case of Ravindra Nath Dubey keeping in view the overall facts and circumstances and the District Judge was directed to consider his case and appoint him against one of six vacant posts of Class IV on regular pay scale.

12. The Court records that any defence taken in the counter affidavit, which otherwise is not reflected from perusal of orders impugned and the documents by which the petitioner was appointed i.e. select list or letter of appointment or even the letter of re-appointment or another list directing taking effect of the appointment w.e.f. 01.05.1991, I find that the stand taken in the counter affidavit regarding waiting list is hit by judgement of Apex Court in the case of ***Mohinder Singh Gill and others vs Chief Election Commissioner, New Delhi and others***, reported in AIR 1978 SC 851 as the respondents cannot improve their case on the basis of affidavits only.

13. Even assuming without admitting that the name of the petitioner was included in the waiting list and a consolidated select list prepared in 1991 though does not mention this, I find that almost thirty two years have passed when the petitioner was

appointed in the year 1991. Even if, interim order granted by this Court in 1998, is ignored for the purposes of considering the claim for regularization of the services of the petitioner, the Court does not find anything, by which the petitioner's claim in the light of the Rules of 2001 can be ignored, moreso, when identically placed persons, who were also included in the list after serial No. 29 onwards, have already been regularized during the pendency of writ petition pursuant to the orders issued at the level of District Judge as well as learned Administrative Judge of this Court. The sanctioned strength and vacancies may vary from time to time, but considering the report of the District Judge submitted before the learned Administrative Judge in the year 2015, whereby 46 sanctioned posts and six vacancies were noted, in view of the direction of learned Administrative Judge to offer appointment to Ravindra Nath Dubey against one of six vacant posts, the Court finds from overall circumstances that the petitioner is also entitled for equal treatment.

14. The submission of Ms. Pooja Agarwal regarding Matiram Yadav, though is contrary to annexure No. 4 to the writ petition, which is dated 01.05.1991, even if it is accepted that Matiram Yadav was senior to the petitioner as per initial select list, since the petitioner also belongs to the backward class and vacancies against the sanctioned posts are still available and the petitioner's case is found to be not inferior to the claim of Ravindra Nath Dubey or Matiram Yadav, the alleged seniority of Matiram Yadav would not defeat the petitioner's claim for regularization particularly, when this Court is not dealing with the case of inter se seniority in between the persons described in the writ petition or otherwise.

15. In view of the above discussion, the orders terminating the services of the petitioner are found to be unsustainable.

16. The writ petition succeeds and is, accordingly, **allowed**.

17. The orders impugned dated 10.07.1998 and 04.08.1998 passed by District Judge, Maharajganj are hereby **quashed**.

18. The petitioner is already continuing in service and is getting a consolidated amount.

19. A writ of Mandamus is issued to the District Judge, Maharajganj to forthwith regularize the services of the petitioner in accordance with the Rules of 2001 maintaining his seniority as already directed under the order impugned dated 04.08.1998 and quashing of the said order is to be understood only to the extent it is against the petitioner i.e. "reappointment".

20. The break of 24 days in service as described herein-above shall not be treated as a break and the same would not affect the continuity in service of the petitioner for the purposes of regularization.

21. The petitioner shall be entitled for all consequential and financial benefits.

In Re:- Correction Application No.31 of 2023

1. Heard learned counsel for the applicant.

2. This is an application seeking correction in my order dated 03.10.2023.

3. The correction application is **allowed**.

4. Date "01.12.1999" appearing in second line of second paragraph of the order is corrected and replaced by date "01.12.1990".

5. This order shall be treated as part and parcel of previous order dated 03.10.2023.

(2023) 11 ILRA 901
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.11.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-C No. 8736 of 2023

Sunil Kumar Jhunjhunwala & Ors.

...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Apoorva Tewari, Anil Kumar Tiwari, Vivek Kumar

Counsel for the Respondents:

C.S.C, Raj Kumar Singh, Rajesh Kumar Singh

Civil Law - Societies Registration Act, 1860 - Section 4(1-A) – Approval of amended bye-laws by Deputy Registrar – Remedy of Appeal – A plain reading of Sub-sections (1), (1-A) and (2) of Section 4 of the Act, 1860 leads to the conclusion that a person aggrieved by an order of the competent authority made under Section 4 may file an appeal before the Commissioner of the Division. The appeal provided under Sub-section (1-A) lies against *all orders* passed under Section 4, and not merely against an order passed under Sub-section (1) of the said Section. In the instant case, by the order impugned, the Deputy Registrar approved the amendments in the bye-laws of the

society and registered the same. Consequently, against such an order passed under Section 4 of the Act, 1860, a statutory remedy of appeal is available before the Commissioner of the Division. (Paras 18, 28, 29)

Dismissed. (E-5)

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Shri Anil Tiwari, Senior Advocate assisted by Shri Apoorva Tiwari for the petitioners, learned Standing counsel appearing for respondent nos.1 & 2 as well as Shri Rajesh Kumar Singh, learned counsel appearing for caveator-respondent no.4 and Shri Raj Kumar Singh, who has filed an application for impleadment and has been permitted to argue the matter as an intervenor.

2. The instant petition has been filed praying for quashing of the order dated 26.08.2023 passed by the Deputy Registrar, Firms, Societies and Chits, Ayodhya Region, Ayodhya, a copy of which is annexure 1 to the petition with a further prayer of mandamus commanding the respondent no.2 to not give effect to the amended bye-laws as contained in annexure no.2 to the petition, and to declare the amended bye-laws as non-est and to restrain the respondent nos.3 & 4 from taking any decision on the basis of amended bye-laws and the impugned order dated 26.08.2023.

3. A preliminary objection has been raised by Shri Rajesh Kumar Singh, learned counsel appearing for the private respondents which is also supported by Shri Raj Kumar Singh, learned counsel who has filed an application for impleadment that against the order impugned, the petitioner has a statutory

remedy of appeal as provided under Section 4 (1-A) of the Societies Registration Act, 1860 (hereinafter referred to as "Act, 1860") as applicable in State of Uttar Pradesh.

4. Elaborating the same, the argument of learned counsel for the private respondents is that as by means of impugned order dated 26.08.2023, the Deputy Registrar has approved the amended bye-laws of the society and has registered the said amendments as such, an appeal lies against the said order to the Commissioner of the division in whose jurisdiction the Headquarter of the society lies, in this case Ayodhya, and it is thus prayed that the writ petition be dismissed on the ground of alternate remedy.

5. Contradicting the same, Shri Anil Tiwari, learned Senior Advocate argues that as Sub-section (1-A) of Section 4 of the Act, 1860 has been inserted after Sub-section (1) of Section 4 of the Act, 1860 and prior to Sub-section (2) of Section 4 of the Act, 1860 as such, the remedy of appeal would only lie against the order passed by the competent authority under Sub-section (1) of Section 4 of the Act, 1860.

6. Elaborating the same, the argument is that it is only Sub-section (2) of Section 4 of the Act, 1860, per which, after the order is passed under Sub-section (1) of Section 4 of the Act, 1860, that the Registrar while sending the list mentioned in Sub-section (1) of Section 4 of the Act, 1860, would send to the Registrar a copy of Memorandum of Association including any alteration, extension or abridgement of purposes made under Section 12, and of the rules of the society corrected up to date.

7. The argument is that as the amendments of the rules of the society are to be sent under Sub-section (2) of Section 4 of the Act, 1860 and Sub-section (1-A) of Section 4 of the Act, 1860 gives the remedy of an appeal under that section, meaning thereby, that it would only be where the order has been passed under Sub-section (1) of Section 4 of the Act, 1860 that an appeal can be filed but as in the instant case, it is the amended rules which have been accepted which would take the order impugned within the realm of Sub-section (2) of Section 4 of the Act, 1860 and thus, the petitioners would not be having a remedy of appeal against the said order leaving the only remedy available to them to approach this Court under Article 226 of the Constitution of India.

8. Heard the learned counsel for the parties and perused the record.

9. From the arguments as raised by learned counsels for the contesting parties and perusal of records, this Court first proceeds to consider the preliminary objections.

10. By means of the order impugned dated 26.08.2023, the Deputy Registrar has approved the amendment in the bye-laws of the society and has also registered the same.

11. As per the preliminary objections, the said order is appealable under Sub-section (1-A) of Section 4 of the Act, 1860. In view of the preliminary objections raised, the Court proceeds to consider as to whether there is a remedy of an appeal against the order impugned.

12. For the purpose of deciding the issue, the provisions of Section 4 of the

Act, 1860 as applicable in Uttar Pradesh, would have to be considered.

13. For the sake of convenience, Section 4 of the Act, 1860 along with amendments made from time to time are reproduced as under:

"4 (1)". Annual list of managing body to be filed - *Once in every year, on or before the fourteenth day succeeding the day on which, according to the rules of the Society, the annual general meeting of the society is held, or, if the rules do not provide for an annual general meeting, in the month of January, a list shall be filed with the [Registrar]², of the names, addresses and occupations of the governors, council, directors, committee, or other governing body then entrusted with the management of the affairs of the society.*

[1: In its application to the state of Uttar Pradesh, "section 4" renumbered as "section 4 (1)" Vide U.P. Act 52 of 1975, section 4 (w.e.f. 10.10.1975)].

[2: In its application to the state of Uttar Pradesh, In section 4, for the words "Registrar of Joint Stock Companies" was substituted by "Registrar" vide U.P. Act 25 of 1958, Section 2 (w.e.f. 25.8.1958)]

³Provided that if the managing body is elected after the last submission of the list, the counter signatures of the old members, shall, as far as possible, be obtained on the list. If the old office bearers do not counter sign the list, the Registrar may, in his discretion, issue a public notice or notice to such persons as he thinks fit inviting objections within a specified period

and shall decide all objections received within the said period.

[3: Vide U.P. Act no. 11 of 1984, Section 4 (w.e.f. 30.4.1984)].

(1A)4 An Appeal against an order made under this section may be preferred to the commissioner of the division in whose jurisdiction the Headquarter of the society lies, within one month from the date of communication of such order:

Provided that the appellate authority may admit an appeal after the expiry of such period if the appellant satisfies the appellate authority that he had sufficient cause for not preferring the appeal within such period.

[4: Vide U.P. Act no. 08 of 2022, Section 3 (w.e.f. 18.7.2022)].

(2)5 Together with list mentioned in sub-section (1), there shall be sent to the Registrar a copy of memorandum of association including any alteration, extension, or abridgement of purposes made under section 12, and of the rules of the society corrected up to date and certified by not less than three of the members of the said governing body to be a correct copy and also a copy of the balance-sheet for the preceding year of account.

[5: Vide U.P. Act no. 52 of 1975, section 4 (w.e.f. 10.10.1975)].

SECTION 4-A AND 4-B

"4-A.6 Changes, etc., in rules to be intimated to Registrar.- A copy of every change made in rules of the society and

intimation of every change of address of the society, certified by not less than three of the members of the governing body shall be sent to the Registrar within thirty days of the change."

[6: Vide U.P. Act 52 of 1975, Section 5 (w.e.f. 10.10.1975)].

"4-B.8 (1) At the time of registration/renewal of a society, list of members of General Body of that society shall be filed with the Registrar mentioning the name, father's name, address and occupation of the members. The Registrar shall examine the correctness of the list of members of the General Body and minutes book thereof, cash book, receipt book of membership fee and bank passbook of the society.

(2) If there is any change in the list of members of the General Body of the society referred to in sub-section (1), on account of induction, removal, resignation or death of any member, a modified list of members of General Body, shall be filed with the Registrar, within one month from the date of change.

7"Any change in the list of General Body shall not be valid unless it is approved by the managing body."

[7: Vide U.P. Act no. 08 of 2022, Section 4 (w.e.f. 18.7.2022)]

(3) The list of members of the General Body to be filed with the Registrar under this section shall be signed by two office- bearers and two executive members of the society.

[8: Vide U.P. Act no. 23 of 2013, Section 2 (w.e.f. 09.10.2013)].

14. It would also be convenient to reproduce the statement of objects and reasons which led to the amendment of Section 4 of the Act, 1860 by insertion of Sub-section (1-A) which for the sake of convenience is reproduced as under:

"STATEMENT OF OBJECTS AND REASONS

The Societies Registration Act, 1860 (Act No. 21 of 1860) has been enacted by the Parliament to provide for the registration of literary, scientific and charitable societies. There is no provision of appeal in the said Act against the decision of the Registrar given under sections 3 and 4 and the decision of the Prescribed Authority given under section 25 of the said Act due to which the only remedy available is to file a writ petition which is time-consuming and expenditure-provable for the common man. Therefore, it has been decided to amend the said Act to make Commissioner as the appellate authority for the decision of the Registrar and the Prescribed Authority given under the said sections. Further, in order to ensure that changes in the list of General Assembly happens in a rational way, it has been decided to amend section 48 to provide that any change in the list of General Assembly should be considered valid only after the approval of the managing body. Also, in order to ensure that the transfer of immovable properties does not take place in an irregular manner, it has been decided to insert a section in the said Act providing that if the immovable property of the society is transferred without prior permission of the competent Court, the same shall not be lawful. A need has also been felt to put an end to the representation of unqualified persons in societies. Hence, it has been decided to

amend the said Act to provide that a person who is found guilty by the competent Court in any criminal matter where the punishment is a sentence of two years or more, then such a person shall be ineligible to hold office in a Society.

In order to incorporate the aforesaid amendments, it has been decided to amend the aforesaid Act.

The Societies Registration (Uttar Pradesh Amendment) Bill 2021 is introduced accordingly."

15. A perusal of the aforesaid section thus makes it clear that Subsection (1) of Section 4 of the Act, 1860 provides for filing of a list every year of managing body to be filed with the Registrar. The proviso to Sub-section (1) of Section 4 of the Act, 1860 provides that if the Managing Body is elected after the last submission of the list, the counter signature of the old members be obtained on the list. If the old office bearers do not counter sign the list, the Registrar may issue a public notice or notice to such persons as he thinks fit inviting objections within a specified period, and he shall decide all objections received within the said period.

16. Sub-section (1-A) of Section 4 of the Act, 1860 provides an appeal against an order made under **this section** to be preferred to the Commissioner of the Division within one month but the appellate authority may admit an appeal even after the expiry of the said period, provided sufficient cause is shown.

17. Sub-section (2) of Section 4 of the Act, 1860 provides that together with the list mentioned in Sub-section (1) i.e. the list which is to be filed with the Registrar of

the names, addresses and occupations of the Governors, Council, Director etc. entrusted with the management of the affairs of the society, the Registrar shall also send a copy of the Memorandum of Association including any alteration, extension or abridgment of purposes made under Section 12 and of the rules of the society corrected up to date.

18. Thus, a plain reading of Sub-section (1), (1-A) and (2) of Section 4 of the Act, 1860 leads to the conclusion that a person aggrieved by an order of the competent authority made under Section 4 may file an appeal to the Commissioner of the Division. The appeal as provided under Sub-section (1-A) lies against all order passed under Section 4 and not only against an order passed under Sub-section (1) of Section 4 of the Act, 1860.

19. Though from the aforesaid discussion, it is clear that an appeal shall lie against all orders passed under Section 4 of the Act, 1860 yet as an abundant precaution, the Court may also see the statement of objects and reasons which led to the aforesaid amendment, per which Sub-section (1-A) of Section 4 of the Act, 1860 was brought into force.

20. However, whether the statement of objects and reasons can be used to determine the true meaning and effect of the substantive provisions of a statute ?

21. This aspect of the matter has been considered by the Hon'ble Supreme Court in the cases of **Narain Khamman Vs. Parduman Kumar Jain (1985) 1 SCC 1** as well as **Kumar Jagdish Chandra Sinha and Others Vs. Eileen K. Patricia D'Rozarie (MRS) (1995) 1 SCC 164**.

22. The Apex Court in the case of **Narain Khamman (supra)** has held as under:

"12. It is now well settled that though the Statement of Objects and Reasons accompanying a legislative Bill cannot be used to determine the true meaning and effect of the substantive provisions of a statute, it is permissible to refer to the Statement of Objects and Reasons accompanying a Bill for the purpose of understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy."

23 . Likewise in the case of **Kumar Jagdish Chandra Sinha (supra)**, the Apex Court has held as under:

"13. It is undoubtedly true that the Statement of Objects and Reasons accompanying a legislative bill cannot be used to ascertain the true meaning and effect of the substantive provisions of the legislation, but it can certainly be pressed into service for the limited purpose of understanding the background, the antecedent state of affairs and the object the legislation sought to achieve."

24. From perusal of the aforesaid judgments, it emerges that though it is undoubtedly true that the statement of objects and reasons accompanying a legislative bill cannot be used to ascertain the true meaning and effect of the substantive provisions of the legislation but it can certainly be pressed into service for the limited purpose of understanding the background, the antecedent state of affairs and the object the **legislation sought to**

achieve or the evil which the statute sought to remedy.

25. Considering the aforesaid, the Court now has to consider the statement of objects and reasons in order to find out the object the legislation by way of introducing the provision of appeal, sought to achieve or the evil which the statute sought to remedy.

26. Perusal of statement of objects would indicate that the object the legislation sought to achieve was that as there was no provision of appeal in the Act, 1860 against the decision of the Registrar given under Sections 3 & 4 and the decision of the prescribed authority given under Section 25 of the said Act due to which the only remedy available was to file a writ petition which was a time-consuming and expenditure provable for the common man therefore, it was decided to bring in the provision of an appeal.

27. Thus from the statement of objects also it clearly emerges that a provision of appeal has been made against the orders passed under Section 4 of the Act, 1860.

28. The Court concludes that Sub-section (1-A) of Section 4 of the Act, 1860 provides for an appeal against an order made under Section 4 of the Act, 1860 to the Commissioner and not only against Section 4(1) of the Act, 1860.

29. Accordingly, as by means of the order impugned dated 26.08.2023, the Deputy Registrar has approved the amendment in the bye-laws and has registered the same, consequently against the order passed under Section 4 of the Act, 1860 a statutory remedy of appeal is

available to the petitioners before the Commissioner of the Division.

30. Keeping in view of the aforesaid discussion, the preliminary objection as raised by the private respondents is upheld.

31. However, as the petitioners have directly approached this Court against the order impugned despite having the remedy of appeal and this Court has been seized of the matter as such it is provided that in case an appeal is filed by the petitioners before the appropriate authority within a period of two weeks from today along with a certified copy of this order then the appellate authority shall proceed to decide the appeal in accordance with law on merits after hearing all the parties concerned within a period of two months from the date of filing of the appeal.

32. Accordingly, the writ petition is **dismissed** on the ground of alternate remedy, subject to aforesaid observations.

(2023) 11 ILRA 907
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.11.2023

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Writ-C No. 9521 of 2023

Riyaz Ahmad	...Petitioner
State of U.P. & Ors.	...Respondents
Versus	

Counsel for the Petitioner:
 Satish Kumar Sharma, Anurag Shukla

Counsel for the Respondents:
 C.S.C.

Civil Law - U.P. Panchayat Raj Act, 1947 - Sections 11-B, 11-C, 12, 12-H & 12-J - Casual Vacancy -Temporary Arrangement - Death of Gram Pradhan - Sections 12-H and 12-J are to be read harmoniously. Section 12-H deals with a permanent vacancy which may occur by resignation, death, or otherwise, in the office of the Pradhan. It provides for filling the vacancy by way of election as prescribed under Sections 11-B and 12 of the Act where the residual term exceeds six months. Interim arrangement: Until such elections are held, a temporary arrangement must be made under Section 12-J of the Act. The Prescribed Authority is empowered to nominate a member of the Gram Panchayat to discharge the duties of the Pradhan. While exercising powers under Section 12-J, the Prescribed Authority must act in accordance with the majority opinion of the Members of the concerned Gram Panchayat. The District Magistrate is required to ascertain the wishes of the Members before nominating any person on an officiating basis to perform the duties and functions of the Gram Pradhan. (Para 12)

Dismissed. (E-5)

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

1. Heard Shri Anurag Shukla, learned counsel for the petitioner and Shri Abhishek

2. Learned counsel for the petitioner submits that the impugned order has wrongly, illegally and without jurisdiction has been passed by the opposite party no.2/ District Magistrate, Sitapur under Section 12-J of the U.P. Panchayat Raj Act, 1947 (here-in-after referred as the Act), whereas the order could have only been passed under Section 12-H of the Act and accordingly the provisions of Section 11-B, Section 11-C and 12 are to be complied on account of death of Gram Pradhan.

3. He further submits that in case the order would have been passed under Section 12-H, the provisions of Section 11-B would come to operate and in such situation an Administrative Committee or Administrator is to be appointed under Section 11-B(2). He further submits that since the term of Gram Sabha in question is more than six months, therefore as per proviso appended to Section 12-H, the said provision would be applicable and not Section 12-J. He further submits that Section 12-J would be applicable only in case, the term of Gram Panchayat is less than six months and there is no requirement of election under Section 12-H, therefore the petitioner is constrained to approach this Court. Learned counsel for the petitioner relies on **Pushpendra Kumar Vs. State of U.P. through the Secretary, Panchayat Raj, U.P. Lucknow and Others; [2010 (110) RD 46]**.

4. Learned Standing Counsel vehemently opposed the submissions of learned counsel for the petitioner and submits that the order has rightly been passed under Section 12-J for making temporary arrangement on account of death of Gram Pradhan, therefore this petition is misconceived and liable to be dismissed.

5. I have considered the submissions of learned counsel for the parties and I have gone through the records.

6. At the outset, this Court is constrained to record that learned counsel for the petitioner has argued against the pleadings made in the petition and the case which has not been set out in the petition at all, despite being warned by the Court. He also has not argued even a single word on the pleadings made in the petition, therefore it is apparent that the petitioner

has no case on the basis of pleadings, which is liable to be dismissed.

7. However in regard to the legal arguments advanced by the learned counsel for the

"12-H. Casual Vacancy ? *If a vacancy in the office of the Pradhan, Up-Pradhan or a member of a Gram Panchayat arises by reason of his death, removal, resignation, voidance of his election or refusal to take oath of office, it shall be filled before the expiration of a period of six months from the date of such vacancy, for the remainder of his term in the manner, as far as may be, provided in Sections 11-B, 11-C, or 12, as the case may be :*

Provided that if on the date of occurrence of such vacancy the residue of the term of the Gram Panchayat is less than six months, the vacancy shall not be filled.

12-J. Temporary arrangement in certain cases ? *Where the office of Pradhan is vacant by reason of death, removal, resignation or otherwise or where the Pradhan is incapable to act by reason of absence, illness or for any reason whatsoever, the prescribed authority shall nominate a member of the Gram Panchayat, to discharge the duties and exercise the powers of Pradhan until such vacancy in the office of Pradhan is filled in, or until such incapacity of Pradhan is removed."*

8. Section 12-H provides that if a vacancy in the office of the Pradhan, UpPradhan or a member of a Gram Panchayat arises by reason of his death,

removal, resignation, voidance of his election or refusal to take oath of office, it shall be filled before the expiration of a period of six months from the date of such vacancy, for the remainder of his term in the manner, as far as may be, provided in Sections 11-B, 11-C, or 12, as the case may be. Proviso appended to the section provides that if on the date of occurrence of such vacancy the residue of the term of the Gram Panchayat is less than six months, the vacancy shall not be filled. Therefore, in case of vacancy under Section 12-H, the provisions of Section 11-B, 11-C or 12, as the case may be, would be applicable. Section 11-B provides the election of Pradhan, which is extracted here-in-below:-

"11-B. Election of Pradhan ? (1) *The Pradhan of the Gram Panchayat shall be elected by the persons registered in the electoral rolls for the territorial constituencies of the Panchayat area from amongst themselves.*

(2) If at any general election to a Gram Panchayat, the Pradhan is not elected, and less than two-thirds of the total number of members of Gram Panchayat are elected, the State Government or an officer authorized by it in this behalf may, by order, either appoint ?

(i) an Administrative Committee consisting of such number of persons qualified to be elected as members of the Gram Panchayat, as it may consider proper; or

(ii) an Administrator.

(3) The members of the Administrative Committee or the Administrator shall hold office for such period not exceeding six months as the

State Government may specify in the order referred to in sub-section (2).

(4) On the appointment of an Administrative Committee or and Administrator under sub-section (2), the person, if any, chosen as Pradhan or member of the Gram Panchayat before such appointment shall cease to be such Pradhan or member, as the case may be, and all powers, functions and duties of the Gram Panchayat, its Pradhan and Committees shall vest in and be exercised, performed and discharged by such administrative committee or the Administrator, as the case may be.

(5) The Administrative Committee or the Administrator shall be deemed to be duly constituted Gram Panchayat for the purposes of this Act :

Provided that if at any time after the appointment of the Administrative Committee or the Administrator under sub-section (2) the State Government is satisfied that there is no difficulty in duly constituting the Gram Panchayat, the State Government may, notwithstanding that the period for which the Administrative Committee or the Administrator had been appointed has not expired, direct the State Election Commission for holding the elections for constituting the Gram Panchayat.

(6) Except as otherwise provide."

9. Section 11-B(2) provides that if at any general election to a Gram Panchayat, the Pradhan is not elected, and less than two-thirds of the total number of members of Gram Panchayat are elected, the State Government or an officer authorized by it in this behalf may, by order, either appoint

an Administrative Committee consisting of such number of persons qualified to be elected as members of the Gram Panchayat, as it may consider proper; or an Administrator. Therefore, Administrative Committee or Administrator in the said section can be appointed after general election in the Gram Panchayat, if the Pradhan is not elected and less than 2/3rd of the total number of members of Gram Panchayat are elected and not in any other exigency.

10. So far as the submission of learned counsel for the petitioner in regard to the proviso to Section 12-H is concerned, it only provides that if on the date of occurrence of the permanent vacancy, residue of the term of the Gram Panchayat is less than six months, the vacancy shall not be filled, therefore, if the term of the office of the Gram Panchayat is less than six months on the date of vacancy on account of the exigencies given in 12-H, the vacancy shall not be filled in on regular basis for the remaining period of six months, which has no concern with the provision made in Section 12-J for temporary arrangement, which has to be made in both the cases, therefore the contention of learned counsel for the petitioner is misconceived and not tenable and is hereby rejected.

11. Section 12-J provides about the temporary arrangement in certain cases, where the office of the Pradhan is vacant by reason of death, removal, resignation or otherwise or where the Pradhan is incapable to act by reason of absence, illness or for any reason whatsoever, the prescribed authority shall nominate a member of the Gram Panchayat, to discharge the duties and exercise the powers of Pradhan until such vacancy in

the office of Pradhan is filled in, or until such incapacity of Pradhan is removed. Therefore, in case of death of Gram Pradhan, the temporary arrangement is to be made under Section 12-J, whereas, Section 12-H is for permanent vacancy and not for making any temporary arrangement and it provides only filling of the post of the Pradhan, UpPradhan or a member of a Gram Panchayat arisen on account of exigencies provided under the said section.

12. A Division Bench considered this issue in the case of **Pushpendra Kumar Vs. State of U.P. through the Secretary, Panchayat Raj, U.P. Lucknow and Others (supra)**, relied by learned counsel for the petitioner, and held that Section 12-H and 12-J have to be read harmoniously. Section 12-H deals with permanent vacancy, which may occur by resignation or otherwise on the post of Pradhan. It provides for filling up the vacancy by way of election as provided under Section 11-B and Section 12 of the Act, where the residual term is more than six months. However, till the elections are held, a temporary arrangement has to be made taking recourse to the provisions of Section 12-J of the Act and the Prescribed Authority has been given power to nominate a Gram Pradhan to discharge the duty of the Pradhan and relying on a Division Bench judgment of this Court in the case of *Udaivir Vs. State Election Commission of U.P. through its Chairman and Others* [2009 (106) RD 151], this Court has held that the Prescribed Authority has to act in accordance with the majority opinion of the member of the concerned Gram Panchayat while nominating the officiating Pradhan and observed that the law laid down in the aforesaid case is in consonance with the spirit of provisions of Chapter-IX inserted in our Constitution by

the Constitution (73rd) Amendment Act 1992. The relevant paragraph-8 is extracted here-in-below:-

"8. From a perusal of the provisions mentioned herein above, we are of the considered opinion that section 12-H and 12-J have to be read harmoniously. Section 12-H deals with the permanent vacancy which may occur by resignation or otherwise on the post of Pradhan. It provides for filling up the vacancy by way of election as provided under section 11-B and section 12 of the Act where the residual term is more than 6 months. However, till the elections are held, a temporary arrangement has to be made taking recourse to the provisions of section 12-J of the Act and the Prescribed Authority has been given power to nominate a Gram Pradhan to discharge the duty of the Pradhan. The provisions of section 12-J came up for consideration before a Division Bench in the case of Udaivir (supra) and this Court has held that the Prescribed Authority has to act in accordance with the majority opinion of the Members of the concerned Gram Panchayat while nominating the officiating Pradhan. The law laid down in the aforesaid case is in consonance with the spirit of the provisions of Chapter IX inserted in our Constitution by the Constitution (Seventy third) Amendment Act 1992 which provides for constitution of Panchayats at the village, empowering the villagers to manage their affairs at the local level themselves. The learned Counsel for the appellant has not been able to persuade us to take a different view. We are in respectful agreement with the view taken by the Co-ordinate Bench in the case of Udai Veer (supra). In this view of the matter, we are of the considered view that the learned Single Judge was right in

directing the District Magistrate to ascertain the wishes of the Members of the Gram Panchayat before nominating any person on officiating basis to discharge the duties and functions of the Gram Pradhan."

13. In view of above and considering over all facts and circumstances of the case, this court is of the view that submissions advanced by learned counsel for the petitioner are totally misconceived and liable to be repelled and repelled.

14. This petition is, accordingly, **dismissed**. No order as to costs.

(2023) 11 ILRA 912

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 12.10.2023

BEFORE

THE HON'BLE MAHESH CHANDRA

TRIPATHI, J.

THE HON'BLE PRASHANT KUMAR, J.

Writ-C No.15519 of 2023

M/S Jai Hanuman Construction Jagdish Saran **...Petitioner**

Versus

State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Sri Abhinav Gaur, Sri Sanjay Dwivedi (Sr. Adv.)

Counsel for the Respondents:

C.S.C, Sri J.P. Singh, Sri Pushkar Mehrotra, Sri V.K. Singh

Civil Law - Constitution of India – Article 14, Article 226 – Tender Process – Judicial Review – Arbitrariness – Mala Fide – Wednesbury Principle – Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 – Prahari Software – Technical Bid Evaluation

The petitioner, M/S Jai Hanuman Construction Jagdish Saran, challenged the orders dated 24.04.2023 and 25.04.2023 passed by respondent no. 6, declaring the petitioner's technical bid as "non-responsive" and awarding the tender for the expansion and beautification of Ahraura Madihan Laganj Road (St. Highway No. 150, Mirzapur) to respondent no. 10. The tender, invited on 15.12.2022, required bids to be submitted via the Prahari Software and e-tender portal. The petitioner's technical bid was initially deemed "responsive" but was later declared "non-responsive" on twelve counts by the Tender Evaluating Committee due to discrepancies in invoices and documents, while respondent no. 10's bid was found "responsive" and most suitable. The petitioner alleged mala fide actions by respondent no. 9 (Superintending Engineer) for continuing tender evaluation despite being transferred, deletion of documents from the Prahari portal, and favoritism towards respondent no. 10. The respondents countered that the evaluation was transparent, the petitioner's bid failed to meet mandatory technical conditions, and allegations of mala fide and document tampering were baseless. Held: (1) The writ petition was dismissed. (2) The petitioner's bid was rightly declared "non-responsive" on eleven counts after re-evaluation by the District Level Committee, as it failed to meet mandatory technical conditions, including discrepancies in invoices, ownership documents, and equipment specifications. (3) Allegations of document deletion from the Prahari portal were baseless, as the E-1 Sheet remained intact, and the portal was tamper-proof after the submission window closed. (4) Allegations of mala fide against respondent no. 9 were unfounded, as the tender evaluation was finalized by Yogendra Singh, who replaced respondent no. 9, and no evidence supported claims of favoritism. (5) Judicial review of tender processes is limited to examining arbitrariness, mala fide, or violations of natural justice, as per Tata Cellular Vs U.O.I., National High Speed Rail Corporation Ltd. Vs Montecarlo Limited, and Afcons Infrastructure Ltd. Vs Nagpur Metro Rail Corporation Limited. The court cannot substitute its decision for that of technical experts or interfere unless the decision is perverse, arbitrary, or biased. (6) The tender process was transparent, complied with the Wednesbury principle of reasonableness, and showed no procedural errors, jurisdictional overreach, or violations of natural justice. (7) The petitioner failed to establish arbitrariness, mala fide, or perversity, and the award of the contract to respondent no.

10, who had completed substantial work, was valid.

Case Law Cited:

1. M.P. Power Management Company Limited, Jabalpur Vs Sky Power South-East Solar India Pvt. Ltd., (not fully cited in judgment)

2. Tata Cellular Vs U.O.I., (1994) 6 SCC 651

3. National High Speed Rail Corporation Ltd. Vs Montecarlo Limited & anr., (2022) 6 SCC 401

4. Afcons Infrastructure Ltd. Vs Nagpur Metro Rail Corporation Limited & anr., (2016) 16 SCC 818

5. N.G. Projects Ltd. Vs Vinod Kumar Jain & anr., (2022) 6 SCC 127

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

1. Heard Shri Anoop Trivedi, learned Senior Advocate assisted by Shri Vibhu Rai, Abhinav Gaur and Ami Tandon, learned counsel appearing for the petitioner and Shri Manish Goel, learned Additional Advocate General assisted by Mr. Ajit Sinha along w

2. By means of the instant petition, the petitioner has prayed for the following reliefs :-

“(i) issue an appropriate writ, order or direction quashing the order dated 24.04.2023 passed by respondent no. 6 declaring the responsive bids in the tender.

(ii) issue an appropriate writ, order or direction quashing the decision dated 25.04.2023 passed by respondent no. 6 declaring the result of financial bids.

(iii) issue an appropriate writ, order or direction commanding the respondents concerned to constituted a

High Level Committee to enquire into the fraud committed anyhow to get the contract awarded to respondent no. 10 by manipulating the data on Prahari website.”

3. The respondent no. 5 had issued an advertisement/notice inviting tenders on 15.12.2022 for expansion and beautification of Ahraura Madihan Lalganj Road which is a State Highway No. 150 in District-Mirzapur. This project was to be completed within a period of 18 months. The bids so invited were to be submitted on the official website between 31.01.2023 to 19.01.2023. It was provided in the **Notice Inviting Tender1** that the technical evaluation of bids will be done using “Prahari” Software having URL- <http://wms.uppwd.gov.in/prahari/>. The bidders were supposed to upload all kinds of information and documents at Prahari Software. After uploading all kinds of information and documents on the <http://etender.up.nic.in> website, the bidders were supposed to download the technical sheet and uploaded the scanned copy of the technical sheet on e-tender portal i.e. <http://etender.up.nic.in>.

4. The petitioner claims that he had duly submitted its technical bid online on 21.01.2023 on Prahari website and the technical sheet was then downloaded and re-uploaded on the e-tender website i.e. <http://etender.up.nic.in>.

5. The result of the analysis of technical bids and documents in the said bid on the Prahari website were declared online on 23.01.2023 in which, the technical bid of the petitioner was declared as “responsive” in all respects.

6. Thereafter, all of the bidders were granted 72 hours to submit their objections,

if any, on the technical bids and documents submitted on Prahari website by other bidders. Various objections were raised by the other bidders on the veracity & authenticity of documents uploaded by the petitioner.

7. The Tender Evaluating Committee after evaluating the objections, declared the bid of respondent no. 10 as “responsive” and the bid of the petitioner as “non-responsive” on the ground that there were certain discrepancies in respect of the invoices provided by the petitioner. It is worthwhile to mention that out of eight bidders, only bid of two bidders were found to be “responsive”. The petitioner objected to the decision of the Tender Evaluating Committee. He submitted that earlier his bid was “responsive” on the Prahari App but the Tender Evaluating Committee had malafidely declared as “non-responsive”.

8. An allegation of mala fide was made by the petitioner on the ground that, in the Tender Evaluating Committee, respondent no. 9 who was the Superintending Engineer and was handling the tender evaluation, had been promoted, so the Engineer-in-Chief vide letter dated 01.03.2023 requested respondent no. 9 to handover the entire tender evaluating work to Shri Yogendra Singh who was then supposed to complete the tender process on his behalf. It is further alleged that in spite of the direction of the Engineer-in-Chief to hand over the tender process to Yogendra Singh, respondent no. 9 continued with the tender evaluation and took decision which was illegal and mala fide. The learned counsel for the petitioner further made an allegation that certain documents which were uploaded by him, had been deleted from the Prahari Website.

9. On the representation of the petitioner, the State Level Tender Committee gave an opportunity to the petitioner to get verified the original invoices/agreement of certain machineries which was submitted by him on which the other bidders had objection. The State Level Committee relegated vide its order dated 26th March, 2023 and asked the District Level Committee to look into the matter. The petitioner appeared before the District Level Committee and gave all information sought by the Committee.

10. The District Level Committee, in response to the directions of the State Level Committee, had taken a view to open the financial bid of the companies, which were responsive. Since, the technical bid of the petitioner was not “responsive”, hence, the bid of the petitioner was not opened. The bid of the other bidders who were technically “responsive” were opened. The bid of the respondent no. 10 was found to be “responsive” and most suitable and accordingly, the contract was awarded to him.

Learned counsel for the petitioner further relied on the judgement passed by the Hon’ble Supreme Court in the matter of **M.P. Power Management Company Limited, Jabalpur v. Sky Power South-East Solar India Pvt. Ltd.**², wherein, the Hon’ble Apex Court has defined the scope of judicial review of an action by the State in matter arising from a contract. The court held that, to find out whether an act is arbitrary or not, the Court must carefully attend to the facts and the circumstances of the case. The duty of the Court is to ascertain whether the impugned decision is based on any principle. If not, it may unerringly point to arbitrariness. If the act betrays caprice or the mere exhibition of

the whim of the authority it would sufficiently bear the insignia of arbitrariness. In this regard supporting an order with a rationale which in the circumstances is found to be reasonable will go a long way to repel a challenge to State action. No doubt the reasons need not in every case be part of the order as such. If there is an absence of good faith and the action is actuated with an oblique motive, it could be characterised as being arbitrary. A total non-application of mind without due regard to the rights of the parties and public interest may be a clear indicator of arbitrary action. A wholly unreasonable decision which is little different from a perverse decision under the 'Wednesbury' doctrine would qualify as an arbitrary decision under Article 14 of the Constitution of India. Ordinarily visiting a part with the consequences of its breach under a contract may not be an arbitrary decision.

11. Per contra, Shri Manish Goel, learned Additional Advocate General appearing on behalf of respondent nos. 1 to 8 submitted that the allegations levelled by the petitioner in this writ petition is absolutely baseless. The petitioner was not technically qualified as per the tender conditions, and after the bid was evaluated by the Tender Evaluating Committee, his bid was found "non-responsive" on several counts. The relevant part of the Tender Evaluating Committee by which the bid of the petitioner held to be "non-responsive" are enumerated herein under :-

Sl. No.	Conclusion on the objections of the other bidders against the petitioner	
1.	Character Certificate	Responsive

2.	Experience Certificate	Responsive
3.	Eight water-tankers have been shown, whose invoices/lease agreement are false	Non-responsive
4.	The name shown of the lease agreement of the tractor was of Rajesh Kumar Singh whereas in the registration certificate, name was shown Navdeep.	Non-responsive
5.	R.C. of the same water tankers have been shown at Sl. Nos. 5 & 2.	Non-responsive
6.	The notary affidavit of lease of water tanker.	Responsive
7.	The invoices dated 27.04.2012 of Vibrator Soil Compactor is of more than ten years	Non-responsive
8.	The notary affidavit dated 06.01.2023 shows that the truck was taken on rent	Responsive
9.	Bidder has uploaded the same invoices at two places at Sl. No. 1 and 4.	Non-responsive
10.	The invoices of the same machine has been uploaded as water tankers	Non-responsive
11.	The bidder has submitted the receipt of the lease of machines for road	Responsive

	marking	
12.	Bidder has uploaded the invoice and lease-deed of Mini Tandem Roller	Responsive
13.	The bidder has uploaded the Gen. Set of 120 KVA and 40 KVA, though the Prahari App is asked for 62.5 KVA	Non-responsive
14.	The name in the invoice of front end loader is shown as Jai Hanuman Industries but the bidder is M/s Jai Hanuman Construction.	Non-responsive
15.	The invoice of the front end loader is not uploaded	Non-responsive
16.	The invoice of Dozer is not uploaded	Non-responsive
17.	The invoice of bitumen sprayer is not uploaded	Non-responsive
18.	In the invoice of Bar Bending & Cutting machines, the name of owner is shown as Jai Hanuman Industries whereas, the bidder is Jai Hanuman Construction Company.	Non-responsive
19.	The lease of Bar Bending & Cutting machines was uploaded	Responsive

20.	Pan Card and Mark-Sheet of technical persons was uploaded.	Responsive
21.	The Mark-Sheet and C.V. of technical person Kripal Singh was uploaded but his Pan Card was not uploaded.	Responsive

12. In altogether, the bid of the petitioner were held to be “non-responsive” on twelve counts. The petitioner never had the requisite technical capabilities to carry out the contract which were the pre-requisite as per the conditions of the notice inviting tender. The counsel for the State further submits that, on the representation made by the petitioner, the State Level Committee gave a chance to the petitioner to give a reply on the points, by which, his bid was held to be “non-responsive” (though the same, was not required) and after considering the representations, out of the twelve counts of “non-responsive”, only one count of “non-responsive” for the front end loader and bar bending machine was changed into as “responsive”, however, still on eleven counts, the bid of the petitioner remained to be “non-responsive”. Since, the bid of the petitioner remained “non-responsive” so the financial bid of the petitioner was not opened.

13. Learned counsel for the State submits that the allegation levelled by the petitioner in the instant petition is devoid of any merit though, he has alleged mala fide but there was nothing on record to prove the same. In fact, the bid of the petitioner was found to be “non-responsive” as he did not qualify the mandatory conditions. The entire tender process was done in the most transparent manner, wherein, all the bidders

were asked to put the details on the website and other bidder was given an opportunity to object on the same. The action of the respondents was absolutely above board. Once the financial bids were opened, the bid of the respondent no. 10 was found to be most suitable and responsive and accordingly, the tender was awarded to him. After awarding the tender respondent no. 10 has proceeded with the work and has already completed a substantial portion of work. Hence, it will be in no one's interest to entertain the writ petition of the petitioner who is technically not qualified and has no ground to challenge the tender proceedings. The State has the power to frame qualifying conditions. Further, the tender procedure are not opened to the judicial scrutiny.

14. Mr. Ajit Sinha, Senior Advocate along with Mr. Anurag Khanna, Senior Advocate assisted by Ms. Devika Kapoor, appeared on behalf of respondent no. 10. Mr. Sinha submitted that the writ petition filed by the petitioner is not maintainable, as he had not come to the Court with clean hands. He could not prove any of the allegations levelled by him, especially the allegation that the documents were deleted from the Prahari App. Mr. Sinha submits that as per Clause 3.1 of the G.O. dated 25.08.2020, the objections to the bids of the bidders can be uploaded on Prahari App within 72 hours. The committee would be responsible for the disposal of the objections to the bids. The petitioner had raised five objections against respondent no. 10 whereas, respondent no. 10 had raised 23 objections against the petitioner within the stipulated time. It was on 01.03.2023 that the District Level Committee after considering the objections, took a decision which was uploaded on 04.03.2023 wherein, six bidders were

declared "non-responsive" and two were declared "responsive".

15. The petitioner was found to be "non-responsive" on twelve counts. On the representation of the petitioner, the State Level Committee had referred the matter back to the District Level Committee to re-examine the objections with regard to the invoices of the machinery of the petitioner and to take decision after re-evaluation of the original invoices. The District Level Committee sought original invoices and other documents to verify the ownership. The documents produced by the petitioner were without GST invoices and the machines were not in the name of the petitioner-company. On 14.04.2023, an internal departmental communication was issued wherein, the petitioner was declared "responsive". A disciplinary proceeding was initiated against the Executive Engineer who has issued the letter, and later he was found to be guilty of the same.

16. The allegations of certain documents being deleted from the website, is completely baseless as the copy of the E-1 Sheet uploaded by the petitioner was found to be intact. The allegation of the petitioner that he was declared "responsive" on all grounds, is completely baseless and contrary to records.

17. The allegation of mala fide against respondent no. 5 as alleged by the petitioner was also baseless as it was not respondent no. 9 who had finalised the tender proceedings but the same was done by Mr. Yogendra Singh, Superintending Engineer, Mirzapur who took charge on the post, re-evaluated the tender and after re-evaluation it was he who found the bid of the petitioner to be "non-responsive" on eleven counts.

18. Mr. Sinha and Mr. Khanna further placed reliance on the judgement passed by the Hon'ble Supreme Court in the matter of **Tata Cellular v. Union of India**³, and submitted that the terms of the invitation to tender, is not open for judicial scrutiny as these decisions are made qualitatively by experts. It is further submitted that the decision of the tender committee can only be tested by the application of Wednesbury Principle of reasonableness.

19. Mr. Sinha further relied on the judgement passed by the Hon'ble Supreme Court in the matter of **National High Speed Rail Corporation Ltd. v. Montecarlo Limited & Another**⁴, wherein, the Hon'ble Supreme Court has held that the court should be extremely careful in exercising the powers in the tender matters. He has also placed reliance on the judgements passed the Hon'ble Supreme Court in **Afcons Infrastructure Ltd v. Nagpur Metro Rail Corporation Limited & Anr**⁵, and **N.G. Projects Ltd. v. Vinod Kumar Jain & Anr**⁶, and **MaaBinda Express Carrier and Anr v. North-East Frontier Railway and Ors**⁷. The other judgements cited by Mr. Sinha also follows the same ratio.

20. Heard learned counsel for the parties and perused the records.

21. In the instant petition, the petitioner has challenged the tender proceedings primarily on three grounds, which are being dealt below :-

(A) That the petitioner was declared "responsive" but was later, held to be "non-responsive". This averment made by the petitioner is not correct as in the beginning, when the petitioner uploaded the bid in the Prahari App initially, the bid

was "responsive" believing all the documents uploaded by the petitioner to be true. However, as per Clause 3 of NIT, an opportunity was given to all the bidders to raise objections on the bids of their competitors. Objections were raised against the technical bids of the petitioner, after the scrutiny of the objections, the Tender Evaluating Committee found the bid of the petitioner to be "non-responsive" on twelve counts. On the representation of the petitioner, the State Level Committee relegated it back to the District Level Committee to look into the grievance of the petitioner on one of the issues. After considering the representation of the petitioner, the District Level Committee found the bid to be "responsive" on one count only, however, on the remaining eleven counts, the bid of the petitioner remained "non-responsive". It seems that the petitioner in connivance with the Executive Engineer got the "responsive" certificate. On inquiry being made, it was found that the Executive Engineer has unauthorisedly and illegally issued a letter on 15.04.2023. Against this Executive Engineer, a disciplinary proceeding was initiated and he was found to be guilty. The petitioner cannot take advantage of the fraud which has been perpetuated by the Executive Engineer and of course, for the benefit of the petitioner. Hence, the bid of the petitioner was rightly declared as "non-responsive" and the allegations of the petitioner that his bid was "responsive", is not correct. The bid still remained "non-responsive" on eleven counts.

(B) The petitioner had alleged in the writ petition that the department, in collusion with the respondent no. 10 have deleted some documents which was uploaded by the petitioner in the Prahari App. This allegation made by the petitioner

is absolutely frivolous and baseless. The E-1 Sheet which is being annexed with the writ petition demonstrates that the number of documents uploaded by the petitioner are exactly the same and nothing has been deleted. The petitioner has failed to demonstrate that any tampering with the Prahari Portal has been done in the instant matter. In fact, the counsel for the State had stated that use of Prahari App is absolutely transparent and tamper-proof. Once the portal closes its windows to upload any documents by the bidders, no one can add or delete any documents from the portal and the same remains open to all for “read only” purposes.

(C) The petitioner, in the instant petition, has also alleged mala fide against respondent no. 9 suggesting that he was promoted and transferred out, still he continued with the bid evaluation procedure and had illegally granted benefit to the respondent no. 10. This allegation again is patently illegal and contrary to the records. The record shows that it was Mr. Yogendra Singh who was in the Tender Evaluating Committee and it was he who had evaluated the technical bid of the petitioner and found him to be “non-responsive”. Even the allegation of mala fide made by the petitioner is devoid of any merit and is completely baseless.

22. It is worthwhile to mention here that the bid submitted by the petitioner was technically “non-responsive” on twelve counts. However, on the representation of the petitioner and reconsideration of his documents, only one of the “non-responsive” bid turned into “responsive” bid but still on eleven counts, the bid of the petitioner was “non-responsive”. Hence, the financial bid of the petitioner was not opened and the financial bids of only the

bidders who were technically qualified/responsive, were opened. After opening the financial bid, the bid of the respondent no. 10 was found to be most suitable and responsive, hence, the tender has been awarded to the respondent no. 10.

23. The petitioner herein has filed the instant petition seeking a direction to declare the bid of the petitioner as “responsive” and further sought a direction to open the financial bid of the petitioner.

24. We are aware that the tender conditions made in the Notice Inviting Tenders is a policy decision which cannot be interfered with by any court of law unless the conditions are absolutely arbitrary whimsically and be made for ulterior purposes. The tender matters are normally not amenable to judicial review, if the State acts within the bound of reasonableness. The State and State instrumentalities are free to draw out any conditions for qualifications for tenders to ensure that the contractor has a capacity and resources to successfully execute the work.

25. If the State or its instrumentalities acts fairly in the tenders proceedings and thereafter award the contract, in that case, interference by the Court is very restrictive as no bidder can claim fundamental right to carry on business with the Government.

26. Wherever, there is a challenge of award of the tender, the Court only has to see whether the decision making process had any error or the authorities have exceeded their jurisdiction or has violated the principles of natural justice. In this case, there is nothing on record to show that the State or its instrumentalities have acted unreasonably, whimsically or with

ulterior motive. There was no error in the decision making process neither the authorities have exceeded the jurisdiction nor there was any violation of natural justice.

27. The Hon'ble Supreme Court in the matter of **Tata Cellular v. Union of India**⁸, has held as under :-

“(a) It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism.

(b) There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power.

94. The principles deducible from the above are : (1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract

is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

28. The Hon'ble Supreme Court in the matter of **Directorate of Education & Ors v. Educomp Datamatics Ltd. & Ors**⁹ has held as under :-

“It is well settled now that the courts can scrutinise the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined by the Hon'ble Supreme Court in the number of decisions like Tata Cellular (supra).”

29. In **Global Energy Ltd & Another v. M/s Adani Exports Ltd. &**

Ors10, the Hon'ble Supreme Court has held as under :-

"10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned Single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender. The order of the learned Single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench."

30. The Hon'ble Supreme Court in the matter of **Michigan Rubber (India) Ltd. v. State of Karnataka**¹¹ has held as under :-

"(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is

required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers. The State and the State instrumentalities are free to make any conditions or qualifications for tenders to ensure that the contractor has the capacity and the resources to successfully execute the work.

(c) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

31. The Hon'ble Supreme Court in the matter of **Afcons Infrastructure Ltd v. Nagpur Metro Rail Corporation Limited**¹², has held that the decision making process in accepting or rejecting the bid should not be interfered with unless it suffers from mala fide or is intended to favour someone, or there is perversity in the decision making process.

32. The Hon'ble Supreme Court in the matter of **National High Speed Rail Corporation Ltd. v. Montecarlo Limited**¹³, has held that the Court should be extremely careful in exercising its powers in the tender matters.

"48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision

should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."

33. The Hon'ble Supreme Court in the number of judgements has held that writ court should refrain itself from imposing its decision over the decision of the employer as to, whether or not, to accept a bid of the bidder. The court does not have expertise to the terms & conditions. The Hon'ble Supreme Court should be more reluctant in interfering any contract involving technical issue as it has no expertise to adjudicate upon such issue. The Court should leave the technical issues to be dealt by the technical experts or by the State.

34. The Hon'ble Supreme Court in the matter of **N.G. Projects Ltd. v. Vinod Kumar Jain & Anr**¹⁴ has held that the construction of road is an infrastructure project and the court should not interfere unless the decision of the State was manifestly arbitrary or unjust. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in mind. Courts should be reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision making process is after complying with the procedure contemplated by the tender conditions. If

the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract.

35. The Hon'ble Supreme Court in a number of judgements has held that the Court would not normally interfere with the policy decision and in the matters challenging the award of contract by the State or public authorities unless the petitioner establishes that the action of the State Authorities was contrary to public interest and beyond the pale of discrimination or unreasonableness, the petition cannot be entertained. The Court further held that the Government or his undertaking shall have a free hand in setting up of the terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated with bias, the Court will interfere in the tender matters.

36. While considering the dispute wherein award of the tender has been challenged, the Court only has to see whether the decision making process had any error or the authorities have exceeded its jurisdiction or there was violation of rules of natural justice.

37. The Hon'ble Supreme Court in the number of decisions, has laid down parameters wherein, the High Court should not interfere in the tender matters unless the same is absolutely *mala fide* and the decision taken by the State is arbitrary. It has also laid down that the terms of invitation to the tender is not opened for judicial scrutiny because the violation of tender is in the realm of contract.

38. In the instant case, since the petitioner has utterly failed to make out a case of arbitrariness, malafide or the decision was intended to favour someone or the decisions suffered from any perversity, even the allegations made against the State Authorities of favouring a particular bidder has been found to be baseless and contrary to record. Hence, there is no merit in the writ petition.

39. Accordingly, the instant writ petition is dismissed.

(2023) 11 ILRA 923
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.10.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-C No. 25986 of 2023

Dayaram Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Shreyas Srivastava

Counsel for the Respondents:

C.S.C, Sri Arun Kumar Pandey, Sri Krishna Mohan

Civil Law - U.P. Revenue Code, 2006 - Section 116 - Partition - Abadi land - Suit for division of holdings - Jurisdiction - Plaintiff (respondent no. 2) filed a suit for division of holdings. Defendant-petitioners filed a written statement specifically contending that the revenue court had no jurisdiction to try the suit under Section 116 of the U.P. Revenue Code, 2006, as the property had been earmarked as *abadi*. In C.H. Form 2A, 18, and C.H. Form 41, the plot in question was mentioned as *abadi*, but in the final C.H. Form 45, plot

no. 1096 (area 0.1010 hectare) was recorded as *bhumidari* plot of the tenure holders (petitioners as well as respondent no. 2). In the *Khatauni* also, the plot in question was mentioned as *bhumidari* land of the petitioners and respondent no. 2. Held: C.H. Form 45 being the final document prepared under the U.P. Consolidation of Holdings Act cannot be ignored in subsequent proceedings. Since the plot in dispute stands recorded as *bhumidari* in C.H. Form 45 as well as in the *Khatauni* prepared by the authorities, no further investigation is required by the Court to determine whether the plot is agricultural or *abadi*.

Dismissed. (E-5)

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Shreyas Srivastava, learned counsel for the petitioners, Mr. Krishna Mohan, learned counsel appearing for plaintiff-respondent no. 2, Mr. Arun Kumar Pandey, learned counsel for respondent no. 3 (Gaon Sahba) and Mr. Abhishek Shukla, learned Additional Chief Standing Counsel for the State-respondents.

2. Brief facts of the case are that plaintiff respondent no.2 filed a suit no.4625 of 2022 for division of holdings in Khasra No.1096 (old no.714/4) area 0.1010 hectare situated in Village- Goharwar Hallu, Pargana Boodpur, Tahsil- Chandpur, District- Bijnor. Defendant- petitioners filed a written statement stating specifically that revenue Court had no jurisdiction to try a suit under Section 116 of U.P. Revenue Code, 2006 as the property had been earmarked as *abadi*. Sub-Divisional Officer / respondent no.4 passed a preliminary decree vide judgment dated 13.12.2022 declaring 1/3 share of plaintiff, 1/3 share defendant no.1 and 1/3 share of defendant no.2. Against the judgment dated

13.12.2022 passed by the Sub-Divisional Officer / respondent no.2, petitioners filed an appeal under Section 207 of U.P. Revenue Code, 2006, which was registered as Case No.228 of 2023, Computerized Case No.202313000000223. Commissioner, Moradabad Division, Moradabad / respondent no.5 dismissed the appeal filed by the petitioners vide order dated 10.7.2023, hence this writ petition. This Court vide order dated 10.8.2023 issued notice to respondent no.4. In pursuance of the order dated 10.8.2023 respondent no.2 has put in appearance and filed his counter affidavit. Petitioners have filed his rejoinder affidavit also.

3. Learned counsel for the petitioners submitted that the property in question was recorded as abadi in the revenue records, as such, the suit for partition is not maintainable before the revenue Court. He further submitted that the specific objection was taken before the Sub-Divisional Officer/ respondent no.4 at the instance of the defendant / petitioners that land in dispute is abadi, as such, the suit for partition under Section 116 of U.P. Revenue Code, 2006 is not maintainable but without considering the objection of the petitioners in accordance with law, the Court has proceeded and passed the preliminary decree in the matter. He further submitted that the property in question had been earmarked as abadi in the consolidation proceeding and kept outside the consolidation scheme. He further placed the C.H. Form 2A, C.H. Form 18 and C.H. Form 41 prepared during consolidation operation, which has been annexed as Annexure Nos.6, 7 & 8 to the writ petition in order to demonstrate that the plot no.1096 (old no.714/4) was recorded as abadi. He further placed the revenue map of the village, which has been

annexed as Annexure No.RA-2 to the rejoinder affidavit dated 8.10.2023 in order to demonstrate that the plot no.1096 has been shown as abadi. He next submitted that the Sub-Divisional Officer has not considered the documentary evidences filed on behalf of the petitioners before the Court and in the arbitrary manner preliminary decree has been passed, which has been maintained in appeal by the Commissioner. He placed the reliance upon the judgment of Hon'ble Apex Court as well as of this Court in order to demonstrate that the suit for partition before the Revenue Court in respect to the abadi land is not maintainable as well as the revenue entry made during consolidation operation cannot be ignored. The particulars of the cases are as follows:

i. 1976 RD 237 (Vishwa Vijay Bharati Vs. Fakhrul Hassan and Others).

ii. 2019 (142) RD 649 (Dharam Singh (D) thr. L.Rs. and Others Vs. Prem Singh (D) Thr. L.Rs.).

iii. 1983 RD 279 (Hashmat Khan Vs. Imams).

iv. 1974 Allahabad Civil Nirnaya 70 (Ram Saran and Another Vs. Drigraj and Others).

v. 1979 RD 78 (Kamla Shanker and Others Vs. Dy. Dir. of Consolidation and Others).

vi. 2004 A.L.J. 1498 (Ram Prasad Vs. Deputy Director of Consolidation Pratapgarh).

4. On the other hand, Mr. Krishna Mohan, learned counsel appearing on behalf of plaintiff-respondent no.2 submitted that in C.H. Form 45 and in the

Khatauni plot no.1096 is not recorded as abadi. He placed the certified copy of the khatauni before the Court on the date of argument in which plot no.1096 area 0.1010 hectare is recorded in the name of petitioner nos.1 & 2 and respondent no.2 as Class 1 (Ka) (Sankarmai bhumidhar). He further submitted that even in the khatauni plot no.1096 area 0.1010 hectare is recorded in the name of both parties as Class 1 (Ka) (Sankarmai bhumidhar), as such, the objection taken by the petitioners that land is abadi cannot be entertained. He further submitted that the C.H. Form 45 is the final document of the consolidation operation, as such, the suit filed for partition of plot no.1096 cannot be dismissed on the ground that plot is abadi. He further submitted that petitioner no.1 has filed his written statement in the suit but petitioner no.2 never filed his written statement in support of the allegation of the petitioner no.1. He further submitted that the petitioner intentionally did not file the recent khatauni as well as the C.H. Form 45 in respect to the plot no.1096, as such, the writ petition filed by the petitioners is liable to be dismissed. He further placed the khatauni of 1429-1434 fasli (1.7.2021-30.6.2027) in respect to plot no.1096 area 0.1010 hectare, which has been annexed as Annexure No.2 to the counter affidavit in order to demonstrate that the plot in dispute is recorded as bhumidhari plot in the name of both parties. He further submitted that the Additional Commissioner while dismissing the appeal filed by the petitioners has mentioned that Khatauni of 1429-1434 fasli in respect to the plot no.1096 is on the record of the trial Court which demonstrate that the disputed plot is agricultural plot. He further submitted that the petitioners along with respondent no.2 was recorded in C.H. Form 45 as well as in the Khatauni, as such, it cannot be said that

the petitioners were not aware about the entry of the plot in dispute. He also submitted that the case law cited by learned counsel for the petitioners will not be applicable in the facts and circumstances of the case as in the final revenue records the plot in dispute is recorded as bhumidhari plot of the petitioners as well as contesting respondent no.2. He further submitted there is no order under Section 80 of U.P. Revenue Code, 2006 to declare the plot in dispute as non-agricultural. He lastly submitted that no interference is required in the matter and the writ petition is liable to be dismissed.

5. Mr. Abhishek Shukla, learned Additional Chief Standing Counsel for the State-respondents also placed the reliance upon the judgment of this Court reported in **2019 (145) RD 195 (Dr. Prem Narain & Others vs. Board of Revenue & Others)** in order to demonstrate that the question relating to the jurisdiction in respect to the suit for partition was entertained by this Court in exercise of jurisdiction under Article 226 of the Constitution of India and matter was remanded back to the trial Court to examine the issue relating to the jurisdiction afresh after setting aside the earlier orders passed by the Court concerned. He placed reliance upon the paragraph nos.25, 26 & 27 of the aforementioned judgment.

6. I have considered the argument advanced by learned counsel for the parties and perused the records.

7. There is no dispute about the fact that respondent no.2 filed a suit under Section 116 of U.P. Revenue Code, 2006 for partition impleading the petitioners as defendants in respect to plot no.1096 area 0.1010 hectare of Khata no.221. There is

also no dispute about the fact that petitioner no.1 (Dayaram Singh) has filed his written statement taking ground that suit is not maintainable in respect to plot no.1906 as the same is abadi. There is also no dispute about the fact that respondent no.4 / Sub-Divisional Officer has passed the preliminary decree dated 13.12.2022, which was maintained in appeal by the Commissioner vide order dated 10.7.2023.

8. In order to appreciate the controversy involved in the matter, perusal of Sections 116 & 117 of U.P. Revenue Code, 2006 will be relevant, which are as under:

"116. Suit for division of holding."(1) *A bhumidhar may sue for the division of the holding of which he is a co-sharer.*

[(2) In every such suit, the Court may also divide the trees, wells and other improvements existing on such holding but where such division is not possible, the trees, wells and other improvements aforesaid and valuation thereof shall be divided and adjusted in the manner prescribed.]

(3) One suit may be instituted for the division of more holdings than one where all the parties to the suit other than the [Gram Panchayat] are, jointly interested in each of the holdings.

(4) To every suit under this section, the [Gram Panchayat] concerned shall be made a party.

117. Duty of Court in suits for division of holding."(1) *In every suit for division of holding under Section 116 the Court of Assistant Collector shall:*

(a) follow such procedure as may be prescribed;

(b) apportion the land revenue payable in respect of each such division.

(2) A division of holding referred to in Section 116 shall not affect the joint liability of the tenure-holders there of in respect of the land revenue payable before the date of the final decree."

9. Perusal of revenue records cited by learned counsel for the parties demonstrate that in C.H. Form 2A, 18 and C.H. Form 41, the plot no.1096 (old plot no.714 /2) is mentioned as abadi but in the final C.H. Form 45, the plot no.1096 area 0.1010 hectare is recorded as bhumidari plot of the tenure holders (petitioners as well as respondent no.2). C.H. Form 45 is final document prepared under the U.P. Consolidation of Holdings Act, as such, the same cannot be ignored in the subsequent proceeding. In the Khatauni also the plot no.1096 area 0.1010 hectare is mentioned as bhumidhari land of the petitioners as well as respondent no.2. Consolidation operation has already been concluded in the village in question, as such, the entry made in the C.H. Form 45 and the Khatauni prepared accordingly, in respect to the plot in question cannot be ignored. C.H. Form 45 although has not been annexed by the petitioners as well as respondent no.5 but Mr. Krishna Mohan, learned counsel for respondent no.2 has placed the certified copy of the C.H. Form 45 before the Court, which is taken on record. Copy of the Khatauni of 1429-1434 fasli has been annexed as Annexure No.2 to the counter affidavit although the petitioners have not annexed the copy of the khatauni along with the writ petition, which also demonstrates that plot no.1096 area 0.1010

hectare is recorded as bhumidhari plot of both parties.

10. I have considered the case law cited by learned counsel for the petitioners as well as learned Additional Chief Standing Counsel for the State-respondents and after thorough consideration, Court is of the view that plot in dispute is recorded as bhumidhari plot in C.H. Form 45 as well as Khatauni prepared by the authorities, as such, no further investigation is required by the Court to determine whether the plot is agricultural plot or abadi. If the entry of C.H. Form 45 as well as Khatauni are not correct then the petitioners should avail the proper remedy for correcting the revenue entry in accordance with law.

11. Considering the entire facts and circumstances of the case, no useful purpose will be achieved by remanding the matter to the trial Court to re-examine the issue of maintainability of suit on the ground of abadi land/bhumidhari land as final revenue entry fully demonstrate that plot in dispute is recorded as bhumidhari of petitioners as well as respondents.

12. Considering the entire facts and circumstances, no interference is required in the matter.

13. The writ petition is *dismissed accordingly*. However, trial Court is directed to conclude the proceeding of the pending suit in accordance with law.

(2023) 11 ILRA 927

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 26.09.2023

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Writ-C No. 29722 of 2023

Ram Babu

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Vinod Kumar Patel

Counsel for the Respondents:

C.S.C

Civil Law - U.P. Panchayat Act, 1947 - Sections 28-A & 28-B - U.P. Revenue Code, 2006 - Sections 60, 62, 72 & 73 - Petitioner claiming to be authorised by Gram Panchayat, filed instant writ petition alleging that on pasture land, respondent no. 4 started illegal construction and despite his complaint, authorities taken no action - Objections regarding statutory provisions not followed for filing petition - From perusal of specific provision, it is clear that to file any suit or proceeding on behalf of Gaon Sabha, Land Management Committee must pass resolution, obtain permission from S.D.M. or Collector and proceed through panel lawyer under Section 72 of Code, 2006, unless prior written permission granted by Collector to engage private counsel - Petitioner relied on authority letter claiming authorization from Land Management Committee to file petition, said letter is vague, lacks copy of referenced resolution, letter issued by pradhan to himself without date, no averment that S.D.M. or Collector ever granted permission to file writ petition - Petition not maintainable, dismissed - (Para 2, 24, 37, 38)

Writ petition dismissed. (E-13)

List of Cases cited:

1. Land Management Committee Nainu Patti through Pradhan Gaon Samaj Pergana and District Mathura Vs Board of Revenue, U.P. Allahabad & ors. reported in 1965 ALJ 858, (Paras 3 to 7)

2. Gram Samaj Kairadih through its Sabhapati Ram Ujagar, Pargana Ungli, Tahsil Shahganj, district Jaunpur Vs Dy. Director of Consolidation U.P. Lucknow Camp at Jaunpur & ors. reported in 1969 AWR 500, (Paras 5 to 14, 18)

3. Dhani Ram & ors. Vs Deputy Director of Consolidation & ors. reported in AIR 1977 All 491, (Paras 6, 7)

4. Gram Samaj Manauta Vs Bhondi & ors. reported in 1985 AWC 191, (Para 7)

5. Manoj Kumar Yadav Vs St. of U.P. reported in 2018 (139) RD 189

6. Daulat Ram (village pradhan) & anr. Vs St. of U.P. reported in 2017 (134) RD 830

7. Neeraj Kumar Vs St. of U.P. reported in 2015 (3) AWC 3167

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. This writ petition has been filed for following prayer:

A) Issue a writ, order or direction in the nature of mandamus directing the Respondent no. 3 to demarcate the Gata No. 402 from the Gata No. 350 as well as assure that the nature of the pasture land may not be changed which is located at village-Chandravat @ Pure Matadin, Pargana-Sikandra, Tehsil-Phoolpur, District Prayagraj.

B) Issue a writ, order or direction in the nature of mandamus directing and commanding the respondent no. 3 to assure that status quo relating to the Gata No. 402 (Pasture land) may be maintained unless and until the demarcation of the aforesaid Gata No. 402, located at village-Chandravat @ Pure Matadin, Pargana-Sikandra, Tehsil-Phoolpur, District

Prayagraj, is made by the team of the Lekhpals of other circule.

C) Issue any other writ, order or direction which this Hon'ble Court may deem fit in the facts and circumstances of the case.

D) Issue the award cost of the writ petition.

2. Brief facts of the case are that this petition has been filed by Ram Babu i.e. petitioner claiming himself to be authorised by Gram Panchayat for filing this writ petition. It has been stated in the writ petition that Gata No. 402 located at Village Chandravat @ Pure Matadin, Pargana Sikandra, Tehsil Phoopur, District Prayagraj is the pasture land over which respondent no. 4 started illegal construction and complaint regarding this was made by the petitioner to respondent authorities but no action has been taken by the respondent authorities.

3. A preliminary objection has been raised as regards to maintainability of writ petition by the learned Standing Counsel on following grounds:

1. This writ petition has been filed by one Rambabu son of Kedar Nath but there is no averment in the present writ petition that Rambabu, petitioner is the pradhan of the village and petition has not been filed on behalf of Gaon Sabha or Land Management Committee.

2. The instant petition has been filed without resolution of the Land Management Committee to file this petition and without obtaining approval to any such resolution from the Sub Divisional Officer/Collector which is a statutory

requirement in terms of the various provisions contained in the U.P. Revenue Code, 2006, U.P. Revenue Code Rules, 2016, U.P. Gram Sabha Manual, U.P. Panchayat Raj Act and the rules framed thereunder.

प्रधान"

3. In absence of requisite resolution duly approved by the S.D.M./Collector for engaging a private counsel, the petition can be filed only by the counsel appointed by the State Government to represent the Land Management Committee before this Court and not by any other private counsel.

4. In rebuttal, learned counsel for the petitioner contended that the petitioner is the pradhan of the village Chandrawat (Khargu Ka Pura), Post Tejpur, Police Station Mauaima, District Prayagraj and has relied upon the authorization dated 20.07.2023 filed as annexure no. 1 to the writ petition. The authorization relied upon by the learned counsel for the petitioner is quoted as under:

“ग्राम पंचायत चन्द्रवट उर्फ पूरे मातादीन वि० ख० बहरिया
तहसील फूलपुर. जनपद प्रयागराज।

रामबाबू (ग्राम प्रधान)
निवास

मो०नं०- 6392261376
(खरगू का पूरा) पो० तेजपुर.

ग्राम चन्द्रावट

थाना मऊआइमा
जिला-प्रयागराज।

ग्राम प्रधान द्वारा माननीय उच्च न्यायालय में गाटा संख्या 402 चारागाह भूमि को इलाहाबाद उच्च न्यायालय में किसी भी अधिवक्ता द्वारा रिट याचिका दाखिल करने का 20.07.2023 के प्रस्ताव के आधार पर ग्राम प्रधान की तरफ से रिट याचिका करने निर्णय कराया जाये।

ह० राम बाबू

5. Before examining the rival contention of the parties, it will be appropriate to look into the statutory provisions made in this regard.

6. U.P. Revenue Code, 2006 as amended by U.P. Act, 2016 repealed as many as 39 enactments, including U.P. Zamindari Abolition and Land Reforms Act, 1950 and century old U.P. Land Revenue Act, 1901. The, U.P. Revenue Code, 2006 is uniformly applicable to whole of Uttar Pradesh. Sub Section (22) of Section 4 of U.P. Revenue Code, 2006 provides word and expressions “Gram fund” “Gram Sabha” and “Gram Panchayat” shall have the meaning assigned to them in the U.P. Panchayat Raj Act, 1947. Sub Section (5) of Section 4 of U.P. Revenue Code provides “Bhumi Prabandhan Samiti” means a Bhumi Prabandhan Samiti constituted under Section 28-A of the U.P. Panchayat Raj Act, 1947.

7. Section 28-A of the U.P. Panchayat Act, 1947 provides Bhumi Prabandhan Samiti. Section 28-A of the U.P. Panchayat Act, 1947 is quoted as under:

“28-A. Bhumi Prabandhak Samiti – The [Gram Panchayat] shall also be Bhumi Prabandhak Samiti and as such discharge the duties of up-keep, protection and supervision of all property belonging to or vested in or held by the Gram Panchayat under Section 117 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951) or under any other provisions of that Act.

(2) The Pradhan shall be the Chairperson of the Bhumi Prabandhak

Samiti, and the Lekhpal of the area comprised in the jurisdiction of the [Gram Panchayat] shall be its Secretary”.

8. Section 28-B of the U.P. Panchayat Raj Act, 1947 provides for the function of Bhumi Prabandhan Samiti. Section 28-B of U.P. Panchayat Raj Act is quoted as under:

“28-B. Functions of the Bhumi Prabandhak Samiti – (1) The Bhumi Prabandhak Samiti shall, for and on behalf of the Gram Panchayat be charged with the general management, preservation and control of all property referred to in Section 28-A including –

(a) the settling and management of land but not including the transfer of any property for the time being vested in the 5 [Gram Panchayat] under Section 117 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950 (U.P. Act No. 1 of 1951) or under any other provision of that Act;

(b) the preservation, maintenance and development of forests and trees;

(c) the maintenance and development of abadi sites and village communication;

(d) the management of hats, bazaars and meals;

(e) the maintenance and development of fisheries and tanks;

(f) the rendering of assistance in the consolidation of holdings;

(g) the conduct and prosecution of suits and proceedings by or against the

Gram Panchayat relating to or arising out of the functions of Samiti;

(h) the performance of functions specifically assigned to the Bhumi Prabandhak Samiti under the U.P. Zamindari Abolition and Land Reforms Act, 1950 or any other enactment; and

(i) any other matter relating to such management, preservation and control as may be prescribed;

and may exercise all powers of the [Gram Panchayat] necessary for or incidental to the discharge of such duties.

(2) The Bhumi Prabandhak Samiti shall function subject to the provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1950.

9. Section 28-B of the U.P. Panchayat Raj Act, 1947 describes various statutory function of the Bhumi Prabandhan Samiti for and on behalf of Gram Panchayat which includes the General Management and control of all property belonging to or vested in or held by Gram Panchayat. The function of Land Management Committee also includes conduct and prosecution of suits and proceedings by or against the Gram Panchayat.

10. Section 60 of the U.P. Revenue Code, 2006 also provides for superintendence, management and control of Bhumi Prabandhan Samiti. Section 60 of the U.P. Revenue Code, 2006 is quoted as under:

“60. Superintendence, management and control by Bhumi Prabandhak Samiti. -(1) Subject to the provisions of this Code, every Bhumi

Prabandhak Samiti shall be charged, for and on behalf of the Gram Panchayat, with the superintendence, preservation, management and control of all land and other things entrusted or deemed to be entrusted to that Gram Panchayat under section 59 or over which such Gram Panchayat is entitled to take possession under this Code or any other law for the time being in force.

(2) Without prejudice to the generality of the foregoing provisions, the functions and duties of the Bhumi Prabandhak Samiti shall include:-

(a) the settlement and management of land;

(b) the preservation, maintenance and development of forests and trees;

(c) the maintenance and development of abadi sites and village communications;

(d) the management of hats, bazaars and melas;

(e) the maintenance and development of fisheries and tanks;

(f) the development of cottage industries;

(g) the development and improvement of agriculture;

(h) the conduct and prosecution of suits and proceedings by or against the Gram Panchayat; and

(i) such other matters as may be prescribed ”

11. Thus, in view of above quoted provisions of U.P. Panchayat Raj Act, 1947 and U.P. Revenue Code, 2006, it is a duty of Land Management Committee to manage and preserve and supervise all property belonging to Gram Panchayat. It is also one of the statutory duties cast upon the Land Management Committee to conduct and prosecute suits and other legal proceedings by or against the Gram Panchayat. Though, the Land Management Committee is bound by the statutory duty to conduct and prosecute legal proceedings by or on behalf of Gram Panchayat, however, the function of Bhumi Prabandhan Samiti are regulated by the provisions of U.P. Gaon Sabha Manual, U.P. Revenue Code, 2006 and Rules framed under the U.P. Revenue Code, 2006 known as U.P. Revenue Code Rules, 2016.

12. Section 62 of the U.P. Revenue Code, 2006 provides for contesting of suits and legal proceedings which is as under:

“62. Conduct of suits and legal proceedings.- (1) Subject to the provisions of sub-section (2) and such other conditions as may be prescribed, the Chairman or such members of the Bhumi Prabandhak Samiti as may be authorised in this behalf by such Samiti, may sign any document and do all other things for the proper conduct and prosecution of suits and other proceedings for and on behalf of the Gram Panchayat.

(2) No suit or other proceedings to which any Gram Panchayat is a party shall be compromised or withdrawn on behalf of such Gram Panchayat, unless such compromise or withdrawal is approved by a resolution of the Bhumi Prabandhak Samiti and prior sanction of the Sub-Divisional Officer is obtained.”

13. Sub Section (1) of Section 62 provides that subject to the provisions of Section 62 and such other conditions and as may be prescribed, chairman or member of Bhumi Prabhandhan Samiti as may be authorise and such Samiti do all other things for proper conduct and prosecution of the suits and other proceedings for and on behalf of Gram Panchayat.

14. It is pertinent to mention that such other conditions as may be prescribed as mentioned in Sub Clause (1) of the Section 62 are not being provided in the U.P. Revenue Code Rules 2016 but Sub rule (1) of Rule 74 of U.P. Revenue Code Rules, 2016 provides that other duties of Penal Lawyers and the control of Collector Commissioner, the Secretary Board of Revenue or the Government, as the case may be, over there and conduct of suits and legal proceedings shall be governed by the instructions regarding conduct of Gram Panchayat Litigation contained in Appendix-II to these rules or the instructions issued by the State Government from time to time. Appendix-II to the U.P. Revenue Code Rules 2016 which contains the instructions for the conduct of Gram Panchayat litigation provides procedure for litigation to be conducted by Gram Panchayat. Paragraph 1 of the Appendix-2 provides that Gram Panchayat is a corporate body which is vested with the capacity of suing and being sued in its statutory name. On its behalf the Land Management Committee and its chairman are responsible for conduct of all litigation affecting generally the Gram Panchayat, subject to the control, generally of the Government and locally Collector or S.D.M.

15. Paragraph no. 2 of the aforesaid appendix provides that the conduct of

Gram Panchayat litigation shall not depend upon individual discretion of the chairman of the Land Management Committee, but shall be matter of resolution of Land Management Committee as a whole. In urgent case, however, the chairman can take action on his own and seek rectification of the Land Management Committee afterwards by including it in the agenda of the next ensuing meeting.

16. Apart from the other, paragraph no. 12 of the Appendix-II to the U.P. Revenue Code, 2006 also provides, the chairman of the Land Management Committee shall not be entitled to take any action in any suit or proceedings unless he consults the panel lawyer and obtains permission by the S.D.M. or the Collector. Sub para 2 of the paragraph no. 12 of the appendix-2 provides that before instituting a suit or proceeding, the chairman of the Land Management Committee should report full facts to the Tehsildar along with resolution of the Land Management Committee for filing the suit or proceedings. The Tehsildar shall after making such enquiry as may be necessary and after consulting the panel counsel submit his report to the S.D.M. along with written opinion of the Tehsil panel lawyer. If the suit or proceeding is to be instituted in the Court of Tehsil Headquarters, the S.D.M. shall take a decision. If the suit, instituted in a Court at the District Headquarters, the S.D.M. shall submit all the papers to the Collector for orders. The Collector shall then decide whether a suit or proceeding is to be instituted or not. He may, in this connection, consult the Headquarter panel lawyer or the District Government Counsel, if he considered necessary.

17. It will be useful to look into the provisions as made in the U.P. Gaon Sabha Manual which are held to be mandatory by various pronouncements made by this Court.

Paragraph nos. 101, 105, 110 and 111 of the Gaon Sabha Manual are extracted hereinbelow:

“101. Gram Sabha's litigation.- The conduct of Gram Sabha's litigation shall not depend upon the individual discretion of the Chairman of the Bhumi Prabandhak Samiti but shall be a matter of resolution of the Bhumi Prabandhak Samiti as a whole. In urgent cases, however, the Chairman can take action on his own and seek ratification of the Bhumi Prabandhak Samiti afterwards by including in the agenda of the next ensuing meeting.[Vide G.O. No. 2240-AZ/ZA-1165-1954, dated 20th August, 1958].

105. Power to engage Panel lawyer.- (1) Only the Collector or Sub-Divisional Officer are authorised to grant sanction to engage Panel Lawyers. In every case, the Bhumi Prabandhak Samiti shall obtain their sanction for engagement of such lawyers and shall not engage them directly.

(2) The Bhumi Prabandhak Samiti cannot, except by the specific permission of the Collector, engage any lawyers other than Panel Lawyer.

(3) Generally, Collector shall only in those cases, which can be of special intricacy or in which it can be apprehended that panel lawyer will collude with opposite party, grant permission to engage a lawyer other than the Panel Lawyer.[Vide sub-para

(3) of Para 1 of G.O. No. C-5777/ VII-B-F-1239-53, dated 30th March, 1954].

(4) Fresh sanction of the Collector or Sub-Divisional Officer is essential to engage a counsel in an appeal against Gram Sabha (either alone or along with the State as a party), if the lawyer is the same, who had been allowed to appear in original suit, from which said appeal has been arisen.[Vide G.O. No. 2550 (M)/ID-2020-50, dated 1st December, 1962].

110. To conduct appeal and revisions etc. by the Panel lawyer.- Under the provisions of sub-para (4) of Para 117 the appeals or revisions in the case of Gram Sabha before the Collector, the Civil Judge or the District Judge at the headquarter of a district or before the Additional Commissioner or the Commissioner at the headquarter of a division are conducted by the panel lawyers (civil and revenue) of the district, where these courts set in consultation with the District Government Counsel. All the revenue cases before the Board of Revenue and all the civil cases arising out of the U.P. Zamindari Abolition and Land Reforms Act and writs before the High Court, in which State of U. P. and Gram Sabha both are parties or Gram Sabha alone is a party, are to be conducted by the lawyers of Gram Sabha so appointed by the State Government in this regard. In districts, where no panel lawyer (civil) exists, District Government Council will conduct the civil appeals or revisions. All revenue cases before the Board of Revenue, in which State of Uttar Pradesh and Gram Sabha both are parties and Gram Sabha alone is party, has to be conducted by the lawyers of Gram Sabha. All the civil cases arising out of the U. P. Zamindari Abolition and Land Reforms Act, 1950 and writs before the High Court, in which State of U.

P. and Gram Sabha both are parties or Gram Sabha alone is party has to be conducted by the lawyers of the Gram Sabha so appointed by the State Government in this regard and in such cases, the Collector will have to obtain sanction of the Government in the Revenue Department. Generally, District Panel Lawyer will get fees as admissible, if Collector in particular cases does not certify that case is of intricate nature or for any other reason, he is entitled to get additional fees. Payment of the bills relating to the above cases and other miscellaneous expenses relating to that district shall be made from the Consolidate Gram Fund. [Vide G.O. No. C-831/VII-B-F-III-3-53, dated March, 1953, 2108/VII-F-E-1239/53, dated 24th August, 1959 and G.O. No. A-4477/VII-B-F-1239-53, dated 3rd March, 1960].

111. Instituting suit with consultation of Panel lawyer.- (1) Gram Sabha will either be plaintiff instituting a suit or a defendant to contest a suit. The Chairman of Bhumi Prabandhak Samiti will have no right to institute any suit or proceedings, until he has consulted the panel lawyers and has obtained orders of the Collector or Sub-Divisional Officer.

(2) Before instituting a suit, Bhumi Prabandhak Samiti shall report full facts to the Tahsildar alongwith a copy of the resolution of the Samiti for instituting the suit or proceeding. Tahsildar shall after making such enquiry, as may be necessary and after consulting with Panel Lawyers of Tahsil, submit his report to Sub-Divisional Officer alongwith the opinion of Penal Lawyers of Tahsil. If suit or proceeding has to be instituted before Court of Tahsil headquarter, the Sub-Divisional Officer will decide. If suit or proceeding has to be

instituted before court of District headquarter, Sub-Divisional Officer shall present all papers before Collector for order. The Collector will decide as to whether suit or proceeding be instituted or not. In this connection, he may consult with the District Penal Lawyer or District Government Counsel.

(3)

18. Thus, from the perusal of the aforesaid provisions contained in Gaon Sabha Manual, U.P. Revenue Code, 2006 and appendix-II to U.P. Revenue Code Rules 2016, it is clear that Gaon Sabha or the Land Management Committee cannot prosecute or attend litigation on behalf of the Gaon Sabha without there being a resolution of the Land Management Committee in this regard(except in case of urgency and subject to rectification by Land Management Committee in next ensuing meeting) and further Sub Clause (2) of paragraph 111 of U.P. Gaon Sabha Manual requires that before instituting a suit, Bhumi Prabandhan Samiti shall report complete facts to the Tehsildar along with the copy of resolution of the Land Management Committee for instituting the suit or proceedings. It further provides that the Tehsildar will thereafter make an enquiry as may be necessary and will consult with the panel lawyer of the Tehsil and may submit his report to the S.D.M. or Collector along with opinion of panel lawyer and accordingly, the S.D.M. or the Collector will decide as to whether the suit or proceedings are to be instituted. Similar provision has been made in Sub-para (2) of Paragraph No. 12 of the Appendix-II to the U.P. Revenue Code Rule, 2016.

19. Section 72 of U.P. Revenue Code, 2006 provides for appointment of Standing

Counsel and other lawyers to represent at High Court, Board of Revenue and other Courts. Section 72 of the U.P. Revenue Code, 2006 is quoted as under:

“72. Standing Counsel and other lawyers.— (1) The State Government may, on such terms and conditions and in such manner as may be prescribed, appoint-

(a) one or more Standing Counsel (Revenue) each at Allahabad High Court and Lucknow Bench thereof;

(b) one or more Standing Counsel (Revenue) each for Board of Revenue Allahabad and Lucknow;

(c) one or more Divisional Government Counsel (Revenue) for the divisional head-quarter; and

(d) one District Government Counsel (Revenue) and one or more Additional District Government Counsel (Revenue) for the district head-quarter.

(2) The Collector may, on such terms and conditions and in such manner as may be prescribed appoint not more than two Panel Lawyers (Revenue) for every tahsil.

(3) Subject to the provisions of sub-section (2) of section 62, the legal practitioners appointed under sub-section (1) or sub-section (2) may plead or act, without any written authority, on behalf of any Gram Sabha, Gram Panchayat or Bhumi Prabandhak Samiti in any Court or authority for which he is so appointed.

(4) No Gram Sabha, Gram Panchayat or Bhumi Prabandhak Samiti shall engage any legal practitioner other

than one appointed under this section without prior permission of the Collector.

(5) Notwithstanding anything contained in the Court Fees Act 1870 (Act No.7 of 1870) no Court fee shall be payable on any vakalatnama or memo of appearance filed by any legal practitioner appointed under this section.

(6) The legal practitioners appointed under this section shall not be competent to plead or act against any Gram Sabha, Gram Panchayat or Bhumi Prabandhak Samiti before any Court for which he is so appointed.

(7) The State Government may, by notification in the gazette, issue any direction, for monitoring of cases filed by or against Gram Panchayat, Gram Sabha or Bhumi Prabandhak Samiti and performance based annual appraisal of Panel Advocates appointed under this Code or the enactments repealed by it, and also for appointing any law officer for the aforesaid purpose”.

20. Section 73 of the Revenue Code, 2006 provides that representation of Gram Panchayat in suits and other proceedings under the U.P. Revenue Code, 2006. Section 73 of the Revenue Code, 2006 is quoted as under:

“73. Representation of Gram Panchayat.—(1) In any suit or other proceedings under this Code, the Gram Panchayat shall be represented-

(a) in proceeding before the Collector or in a Civil Court, by the District Government Counsel (Revenue);

(b) in proceeding before the Commissioner, by the Divisional Government Counsel (Revenue), and;

(c) in proceeding before the Board or the High Court by the separate Standing Counsel (Revenue) of Lucknow or Allahabad, as the case may be.

(2) Nothing in this chapter shall preclude the State Government or the Collector from appointing special counsel for the conduct of any suit or proceeding to which any Gram Panchayat is party on such terms and conditions as may be prescribed.”

21. The Sub Clause 4 of Section 72 prohibits the Gaon Sabha, Gram Panchayat or Bhumi Prabandhan Samiti to engage any legal practitioner other than one appointed under Section 72 of the U.P. Revenue Code, 2006 without prior permission of the Collector.

22. Rule 72 of the U.P. Revenue Code Rules 2016 provides for appointment of counsels to represent the Gaon Sabha, Gram Panchayat or Bhumi Prabandhan Samiti.

23. Rule 74 of the U.P. Revenue Code Rules, 2016 provides for other terms and conditions of the counsel referred in Section 72 of U.P. Revenue Code Rules 2016. Sub Rule (e) of Rule 74 of U.P. Revenue Code Rules 2016 provides that no panel lawyer shall institute, contest or conduct in case unless he is authorised to do so by the Sub Divisional Magistrate or Collector or the Board of Revenue or Government as the case may be.

24. Thus, from the perusal of provisions of law quoted above, it is clear

that for filing or initiating any suit or proceedings before the court of law on behalf of Gaon Sabha, the Land Management Committee has to pass a resolution to the effect and has also to obtain the permission from the S.D.M. or Collector as the case may be. Further, the Land Management Committee has to file the suit or proceeding through panel lawyer appointed under Section 72 of the U.P. Revenue Code, 2006 and in any case cannot engage a private counsel except with the prior permission in writing by the Collector in this regard.

25. It has been contended by the learned counsel for the petitioner that the provisions contained in U.P. Gaon Sabha Manual and Appendix-II of the U.P. Revenue Code Rules, 2016, are not mandatory and are only directory. Learned counsel for the petitioner has relied upon the judgment of this Court in case of **Land Management Committee Nainu Patti through Pradhan Gaon Samaj Pergana and District Mathura v. Board of Revenue, U.P. Allahabad and others** reported in **1965 ALJ 858** in support of his contention. Learned counsel for the petitioner placed reliance upon paragraph no. 3, 5, 6 & 7 of the aforesaid judgment. Paragraph 3, 5, 6 & 7 of the judgment in **Land Management Committee v. Board of Revenue (Supra)** are quoted as under:

“3. When this petition was taken up, a preliminary objection was raised by the learned Counsel for the opposite parties 2 and 3 to the effect that this writ petition was not properly presented and that Sri G.N. Verma, learned Counsel for the Petitioner, could not be heard. According to the learned Counsel the Pardhan who had signed Vakalatnama appointing Sri. G.N.

Verma has not been proved to be the Chairman of the Land Management Committee. As such he was not competent to authorise Sri. G.N. Verma to file the writ petition against the order of the Board. The second submission of the learned Counsel was that in view of paragraph 131 of the Gaon Samaj Manual it is a panel lawyer appointed by the State who could file the writ petition and could be heard in support of it and not any other counsel.

5. Now coming to the second objection of the learned Counsel, it has been submitted on behalf of the Petitioner by Sri G.N. Verma that para-graph 131 of the Gaon Samaj Manual is only a direction issued by the State Government. It has no force of Statutory law. Moreover, this paragraph is only directory and non-compliance of it would not make the petition incompetent. Moreover it was submitted that so far as the High Court is concerned no lawyer has been appointed to conduct Gaon Samaj litigation. Sri. S.B L. Gaur, learned Counsel for the Respondents on being asked expressed his inability to inform the Court as to whether any counsel has been appointed for conducting the litigation for and on behalf of the Gaon Samaj in this Court.

6. Section 127B of the U.P. Zamindari Abolition and Land Reforms Act deals with the panel of lawyers which is as follows:

"127B. Panel lawyers. (1) The State Government may, on such terms and conditions and in such manner as may be prescribed, appoint in each district a panel of lawyers to conduct suits and other proceedings by or against the Gaon Sabhas in respect of their functions under this Act.

(2) A panel lawyer shall with respect to such Gaon Sabhas in district, as may be prescribed, be their agent for the purpose of receiving processes issued by any court or any authority against them in respect of their functions under this Act, and shall be deemed to be the recognised agent by whom appearances, acts and applications under this act of the U.P. Land Revenue Act, 1901 or any other law relating to land tenure may be made or done on behalf of such Gaon Sabhas."

By virtue of Section 128(2)(k) rules have been framed for the conduct and prosecution of the suits and proceeding by or against the Land Management Committee. In pursuance of this provision the State Government has made Rule 114 in this respect which is as follows:

"114 In For the conduct of suits, applications and other proceedings, by or against the Gaon Samajes, the following shall be appointed to the panel of lawyers in each district for the courts specified against each:

(a) The District Government Counsel (Civil) appointed by the State Government for civil courts at district headquarters

(b) The District Government Counsel (Revenue) appointed or to be appointed by the State Government for revenue courts at district headquarters. The District Government Counsel (Civil) and the District Government Counsel (Revenue), appointed in the manner given above, shall be the recognised agent of all Gaon Samajes in the District for civil and revenue work as the case may be.

(c) A Mukhtar, a revenue agent or a lawyer to be selected for appointment by the Collector who is hereby empowered to make appointment on behalf of the State Government for revenue courts at Tahsil headquarters. He shall be the recognised agent of the Gaon Samajes only for cases in revenue courts at Tahsil headquarters.

(d) The Sub District Government Counsel (Civil) appointed by the State Government for civil courts at tahsil headquarters, wherever they exist. He shall be the recognised agent of the Gaon Samajes only for cases in civil courts at tahsil headquarters.

(2) The term of the tahsil panel lawyers shall not exceed three years but the appointing authority may remove and such lawyer before the expiry of his term.

(3) District Officer shall maintain a confidential personal file of every panel lawyer and shall annually enter therein remarks on the lawyer's capacity, efficiency and integrity.

(4) The terms and duties of the panel lawyers and the control of the Collector over them shall be governed by the instructions for the conduct of Gaon Samaj litigation issued in GO No. 2240 AZ/I A-1165 1954, dated August 20, 1958, or such instructions as may be issued by the State Government from time to time.

It is apparent from this rule that no counsel has been appointed to conduct cases on behalf of the Gaon Samaj in this Court. In absence of any mention of this Court one could think that standing Counsel may be considered to be such counsel for the conduct of the case on behalf of the Gaon Samaj. But, in my

opinion, this assumption cannot be made for the simple reason that the Standing Counsel represents the Board of Revenue and subordinate courts. As such it is not possible to consider that the Standing Counsel might be deemed to be a counsel for the Land Management Committee. In absence of any such appointment when the Chairman, Land Management Committee is a person authorised under the law to conduct a litigation for or against the Gaon Samaj and when he appoints a counsel for that purpose, it cannot be said that the counsel has no authority to file the petition or to argue the case on his behalf. Moreover in my opinion, paragraph 131 of the Gaon Samaj Manual is only a direction given by the State Government to the Land Management Committee and has not the force of statutory law. Non-compliance of it cannot be considered to be fatal to the presentation of the writ petition or the appointment of Sri. G.N. Verma as counsel for the Land Management Committee. NO objection had been taken in the counter affidavit in this respect as well. Consequently no evidence could be brought on the record to show that the Chairman, Land Management Committee had taken special permission for the engagement of Sri. G.N. Verma as provided by paragraph 131 of the Gaon Samaj Manual itself.

7. Since the Chairman, Land Management Committee is authorised to conduct litigation for or against the Land Management Committee and he appoints a lawyer to conduct a case why should this Court in absence of any statutory prohibition go into this question and refuse to hear the counsel appointed by the Chairman, Land Management Committee. If the Chairman, Land Management Committee has acted in contravention of certain directions of the State, it is for the

State or the person aggrieved to take action against the Chairman, Land Management Committee for disobeying the directions issued by the State Government. This Court will not go into this question when there is no legal prohibition in the Act or the Rules made in this respect for engaging a private counsel for the conduct of a litigation on behalf of the Gaon Samaj so far as this Court is concerned. In view of what has been said above, the preliminary objection raised is overruled.”

26. Per contra, learned Standing Counsel appearing on behalf of State respondent contended that in case of **Gram Samaj Kairadih through its Sabhapati Ram Ujagar, Pargana Ungli, Tahsil Shahganj, district Jaunpur v. Dy. Director of Consolidation U.P. Lucknow Camp at Jaunpur and others** reported in 1969 AWR 500, this Court has held that provisions are mandatory. It was further submitted that in case of Gram Samaj (Supra), the Hon’ble Court has also considered the judgment in case of **Land Management Committee (supra)**. Learned Standing Counsel has relied upon paragraph nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 18 of the judgment in case of Gram Samaj (supra) which are quoted as under:

“5. Two questions arise for consideration: whether the Chairman of the Land Management Committee, that is, the Sabhapati of the Gaon Samaj, could file the written statement and also prefer an appeal or revision without any resolution of the Land Management Committee; and secondly, if the Gaon Samaj could engage a private lawyer, and not a lawyer appointed to prosecute or

defence cases of the Land Management Committee.

6. Section 122 A of the UP ZA and LR Act was deleted under section 273 of the UP Adhiniyam, 33 of 1961. The present case, however, is governed by the provisions as in force prior to the enforcement of UP Adhiniyam, 33 of 1961. U/sub-S. (3) of this section the Chairman or any other office bearer or member of the Land Management Committee shall, subject to such conditions, as may be prescribed, be entitled to sign any document and to do all other things for the conduct and prosecution of suits and other proceedings. The subsection merely speaks of the signing of the plaint or written statement, but not whether the Chairman can institute a legal proceeding on his own. Neither does the subsection authorize the Chairman to defend a suit or proceeding on his own. What the sub section lays down is that once the suit has to be instituted or defended, the Chairman can sign the document and do all other things necessary for its conduct and prosecution. As the suit is instituted or defended by the Land Management Committee, the decision to sue or defend has to be taken by the Land Management Committee, and cannot be taken by the Chairman or any office bearer in his individual capacity. It must be the collective decision of the Land Management Committee, and not of any individual member thereof.

7. Clause (k) of Section 128 (2) of the UP ZA and LR Act gives power to the State Government to make rules for the conduct and prosecution of suits and proceedings by or against the Land Management Committee. Such rules are contained in Rr. 115-A and 115-13 of the UP ZA and LR Rules. To make this

judgment complete it may be mentioned that the rule contemplated by Section 122-A is contained in R. 110-A of the UP ZA and LR Rules. As the validity of the proceedings taken by the Chairman are dependent upon the rules framed under section 128 (2) (k), and not upon the rules pertaining to the signing of the plaint or the written statement, it is not necessary to make any further comment on the scope of S, 122-A (3) and R. 110-A.

8. U/R. 115-A the State Government can issue directions to the Land Management Committee on matters detailed therein. One of the matters enumerated in clause (3) thereof makes reference to subcls. (a) to (h) of clause (1) of R. 115. The material provision is contained in clause (g) of R. 115 (1). Thereunder the Land Management Committee has to perform the function of "the commencement or defence, for and on behalf of the Gaon Samaj, of all suits or proceedings arising from or under the provisions of the Act." The State Government can, therefore, issue directions how the suit shall be instituted or defended.

9. R. 115-B of the UP ZA & LR Rules not only lays down the mode of communication of the directions to the Land Management Committee, but also provides in the Explanation thereto that the directions contained in the Gaon Samaj Manual shall be deemed to be the directions issued in accordance with R. 115-A.

10. Provisions pertaining to the commencement or defence, for and on behalf of the Gaon Samaj, of all suits or proceedings arising from or under the provisions of the UP ZA & LR Act are contained in paragraphs 128 and 131 of the

Gaon Samaj Manual. Paragraph 128 runs as below :-

"The conduct of Gaon Samaj litigation shall not depend upon the individual discretion of the Chairman of the Land Management Committee, but shall be a matter of a resolution of the Land Management Committee as a whole. In urgent cases, however, the Chairman can take action on his own and seek ratification of the Land Management Committee afterwards, by including it in the agenda of the next ensuing meeting."

11. This paragraph having been framed under the rule making power conferred on the State Government, shall have the force of law.

12. The next point for consideration is whether this provision is mandatory or merely directory. Suits by or against the Gaon Samaj are instituted or defended by the Land Management Committee on behalf of the Gaon Samaj. The Land Management Committee consists of many members and it is not necessary that what the Chairman desires is the will of the majority of the members of the Land Management Committee. The Chairman may like to institute a suit or defend it, while the majority of the members of the Land Management Committee may be of a different view. The same can be said where the Chairman does not wish to institute or defend a suit. Consequently, the first part of paragraph 128 is a salutary one and if it is held to be merely directory, it will cause complications in view of the fact that the will of the Chairman or a person authorised to sign the plaint or written statement shall prevail and it shall be open to him to defy the majority decision of the Land Management Committee.

13. Paragraph 128 is also a complete provision. The State Government realized that occasions may arise where it may become necessary for the Chairman to take action before the Land Management Committee can meet to discuss the matter. Consequently it was provided in paragraph 128 that in urgent cases the Chairman can take action on his own and seek ratification of the Land Management Committee by including it in the agenda of the next ensuing meeting. The underlying purpose evidently is that eventually the decision of the Land Management Committee shall prevail. If the Land Management Committee does not approve of the action taken, such action shall become ineffective and a suit, if already instituted, shall fail.

14. When paragraph 128 is complete, reasonable and equitable, and lays down how the Land Management Committee can sue or defend, it must be held to be mandatory.

15...

16...

17....

18. In the Land Management Committee Nainu Patti v. The Board of Revenue, UP Allahabad (1965 AWR 515) S.N. Singh, J., regarded this paragraph to be directory having no force of a statutory law. Considering that paragraph 131 is incomplete and can result in gross injustice to the Land Management Committee, of course, in exceptional circumstances, I (sic) no reason to disagree with the view expressed by brother Singh in the above case. Occasions may arise when there may be difference in opinion between the Land Management Committee on one side and

the Tehsildar and the Sub-divisional Officer, on the other. Consequently, if the lawyer is engaged by the Tehsildar or the Sub-divisional Officer, it can happen that the interest of the Land Management Committee may not be suitably safeguarded. In very extraordinary circumstances it may also happen that the Gaon Samaj lawyer is one who can not for one reason or the other, properly prosecute or defend a suit or proceeding instituted or defended by the Land Management Committee. Paragraph 131 empowers the engagement of special lawyers in important cases only. It makes no provision for the appointment of special lawyers in cases which cannot be classed among important cases. Paragraph 131 of the Gaon Samaj Manual, as it stands at present, must, therefore, be regarded as directory. ”

27. In case of **Dhani Ram and others v. Deputy Director of Consolidation and others** reported in **AIR 1977 All 491**, it has been held by this Court that chairman of the Land Management Committee could not have filed the written statement or preferred an appeal or revision without the Land Management Committee having passed the resolution or the action of the chairman being ratified by Land Management Committee in the next ensuing meeting. Paragraph nos. 6 & 7 of the aforesaid judgment are quoted as under:

“6. Mr. S. Mirza appearing for the petitioners has placed four contentions before me. They are as follows:- (1) No resolution of Gaon Sabha was passed to contest the matter before the consolidation authorities at the time of the filing of the written statement by them nor any resolution is on record for filing any appeal or revision. This is in violation of paragraph 128 of the U. P. Gaon Samaj

Manual. For a convenient perusal the provisions of paragraph 128 of the Gaon Samaj Manual is reproduced below :-

128. "The conduct of Gaon Samaj litigation shall not depend upon individual discretion of the Chairman of the Land Management Committee, but shall be a matter of a resolution of the Land Management Committee as a whole. In urgent cases, however, the Chairman can take action on his own and seek ratification of the Land Management Committee afterwards, by including it in the agenda of the next ensuing meeting." He has relied on the case, *Gram Samaj Kairadih v. Deputy Director of Consolidation U. P., Lucknow* (1969 All WR (HC) 500), a judgment by Mr. Justice D. S. Mathur, as he then was. At page 503 paragraph 19, while interpreting paragraph 128 of the Gaon Samaj Manual it was held :-

"To sum up, the Chairman of the Land Management Committee could not have filed a written statement or preferred an appeal or revision without the Land Management Committee having passed a resolution, or the action of the Chairman being ratified by the Land Management Committee in the next ensuing meeting. The Land Management Committee had not passed such a resolution till the decision of the first revision, nor was the action taken by the Chairman ratified in the next meeting of the Land Management Committee. Hence, neither the written statement nor the appeal nor the revision, was maintainable. In the circumstances, when no written statement could be filed, no second revision could also be preferred by the Chairman after the passing of the resolution by the Land Management Committee, at a belated stage. The second

revision under Section 48 of the Act was thus also liable to dismissal."

(2)

(3)

(4)

7. Mr. B. R. Gupta appearing for respondent. No. 3 has replied to the contentions raised by Mr. Mirza as follows :-

(1) That a resolution was passed on 16-6-1963 which is Annexure-C-1 to the counter affidavit which authorised the fighting of the litigation before the consolidation authorities. He conceded that the case was started on 7-9-1962 when objection under Section 9 was filed by the petitioners. He also admitted that a written statement on behalf of Gaon Sabha was filed on 22-2-1963. He has not been able to point out to me whether there was any authority of the Gaon Sabha or of the Chairman, Land Management Committee for filing of the written statement. In this view of the matter the authority referred in 1969 All WR (HC) 500 (*Gram Samaj Kairadih v. Deputy Director of Consolidation, U. P. Lucknow*) and the portion cited completely applied to the present case."

28. Again in case of **Gram Samaj Manauta v. Bhondi and others** reported in **1985 AWC 191** in paragraph no. 7 of the aforesaid judgment, this Court has taken the same view. Paragraph no. 7 of the aforesaid judgment is quoted as under:

"7. It was also contended by the learned Counsel for the opposite parties that the present revision is incompetent as it

has not been filed by a Counsel competent to represent the Gaon Sabha (Gram Samaj) or a panel lawyer appointed by the resolution of Gaon Sabha or by the Collector. The present revision has been filed by Sri R.H. Zaidi, Advocate, who is neither panel lawyer for the Gaon Sabha (Gram Samaj) Manauta nor he was appointed by a resolution of the Gaon Sabha or by the Collector, Bijnor. This contention of the learned Counsel for the opposite parties finds support from the provisions contained in paras 128 and 131 of the U.P. Gaon Sabha and Bhumi Prabandhak Samiti Manual. In support of his contention the learned Counsel for the opposite parties has cited Gaon Sabha Damanpur v. Jagan Nath Singh 1984 ALJ 518 wherein an Hon'ble Judge of this Court has held that an appeal filed by a private Counsel on behalf of the Gaon Samaj is not maintainable. Therefore, I hold that the revision filed in this Court by Sri R.H. Zaidi, Advocate, as a private Counsel on behalf of Gaon Samaj (Gaon Sabha) Manauta is not a legally filed revision and thus it is not maintainable.”

29. Learned Standing Counsel further contended that in view of proviso to Section 230 of Revenue Code, 2006, Rules, manuals, assessments, notifications, under any of the enactment repealed by U.P. Revenue Code, 2006 in so far as they are not inconsistent with the provisions of U.P. Revenue Code, 2006, be deem to have been issued under the corresponding provisions of this Court and shall continue to be in force accordingly unless and until they are superseded by anything done or action taken under the U.P. Revenue Code, 2006. Proviso to Section 230 of U.P. Revenue Code, 2006 is quoted as under:

“**230. **Repeal.**-- (1) The enactments specified in the First Schedule are hereby repealed.

(2).....

(a).....

(b).....

(c).....

(d).....

(e).....

Provided that anything done or any action taken (including any rules, manuals, assessments, appointments and transfers made, notifications, summonses, notices, warrants, proclamation issued, powers conferred, leases granted, boundary marks fixed, records of rights and other records prepared or maintained, rights acquired or liabilities incurred) under any such enactment shall, insofar as they are not inconsistent with the provisions of this Code, be deemed to have been done or taken under the corresponding provisions of this Code, and shall continue to be in force accordingly, unless and until they are superseded by anything done or action taken under this Code.”

30. Section 233 of U.P. Revenue Code, 2006 provides for rule making power of the State Government. Under Sub Clause 14 of Sub Section (2) of Section 233 of the U.P. Revenue Code, 2006 empowers the State Government to make rules providing the procedure relating to conduct and prosecution of suits, appeal and other proceedings including the procedure of conducting various enquiries under the provisions of U.P. Revenue Code, 2006.

Relevant extract of Section 233 is quoted as under:

“233. Power to make rules.-(1)

The State Government may by notification make rules for carrying out the purposes of this Code.

(2) Without prejudice to the generality of the foregoing power, such rules may also provide for-

(i)

(ii).....

(iii).....

(iv).....

[(iv-a).....

(v).....

(vi).....

(vii).....

(viii).....

(ix).....

(x).....

(xi).....

(xii).....

(xiii).....

(xiv) The procedure relating to the conduct and prosecution of suits, appeals and other proceedings, including the procedure of conducting various

inquiries under the provisions of this Code,”

31. Power to make law rest with the legislature, what the legislature may confer rule making power on the Sub-ordinate Authority like State Government. Once such rules are made, they are enforceable as part and partial of the principle Act.

32. I do not find any inconsistency in the provisions made in U.P. Gaon Sabha manual and provisions of U.P. Revenue Code, 2006 and Rules made thereunder i.e. U.P. Revenue Code Rules, 2014, rather the provisions of Gaon Sabha manual, U.P. Revenue Code, 2006 and U.P. Revenue Code Rule, 2016 are supplemental to each other.

33. Further in view of the specific provision made in Sub Section (4) of Section 72 of U.P. Revenue Code, 2006, Gaon Sabha, Gram Panchayat or Bhumi Prabandhan Samiti shall not engage any legal practitioner other than one appointed under Section 72 without prior permission of the Collector.

34. I am supported in my view by the judgment of this Court referred in case of Manoj Kumar Yadav v. State of U.P. reported in 2018 (139) RD 189 where it has been held that no Gram Panchayat, Gaon Sabha, Land Management Committee shall engage any legal practitioner other than appointed under Section 72 of the U.P. Revenue Code, 2006 without prior permission of the Collector.

35. Section 73 also provides for representation of Gram Panchayat and Sub Section (1)(c) states that in proceedings before the Board (Board of Revenue) or High Court. Gram Sabha shall be

represented by a separate Standing Counsel (Revenue) of Lucknow and Allahabad as the case may be. Sub Section (2) of Section 73 of U.P. Revenue Code, 2006, however provides that nothing in this chapter shall precluded State Government or for appointing such counsel for the conduct or suit provided in which Gram Panchayat is a party on such terms as may be prescribed.

36. Similarly, in case of Daulat Ram (village pradhan) and another v. State of U.P. reported in 2017 (134) RD 830, it has been held that the writ petition at the instance of the petitioner is not maintainable since it has not been filed by counsel as provided under Section 73 of the U.P. Revenue Code, 2006.

37. Learned counsel for the petitioner further tried to raise an argument on the basis of authority letter, annexed as annexure no. 1 to the petition, quoted above, that the petitioner has been authorised by Land Management Committee to file this petition before this Court.

38. From the perusal of the aforesaid authority letter, it is clear that it is vague, though it refers to a resolution dated 20.07.2023 but the copy of the same has not been filed by the petitioner. Further, the aforesaid authority letter has been given by the pradhan to himself and that too without any date. There is not averment in the writ petition as to the fact that ever permission was granted on the resolution of the Land Management Committee by the S.D.M. or Collector for filing the writ petition.

39. Learned Standing Counsel pointed out that the present petition has been filed by Rambabu son of Kedar Nath in his individual capacity. Even in the writ petition there is no averment that the petitioner is a pradhan of the village. It has been further contended by the learned Standing Counsel that a writ petition by a pradhan in individual capacity is not maintainable.

The petition is to be filed either by the Gram Sabha or concerned Land Management Committee and not individually by Pradhan in his personal capacity. In this regard, learned Standing Counsel relied upon the judgment of this Court in Neeraj Kumar v. State of U.P. reported in 2015 (3) AWC 3167 wherein it has been held that a petition in individual capacity by a member of the Gram Panchayat without there being a resolution of Gram Sabha is not maintainable. Further as per the Appendix-2 to the U.P. Revenue Code Rules, 2016, it is the Gram Panchayat which is a body corporate and vested with the capacity of suing and being sued in its statutory name. Even by a resolution, the Land Management Committee cannot authorise an individual member of Gaon Sabha (even pradhan) to institute the proceedings on behalf of Gaon Sabha in his individual capacity.

40. In view of the forgoing discussion, I am of the view that the writ petition as framed is not maintainable and is accordingly, **dismissed**.

(2023) 11 ILRA 945
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.10.2023

BEFORE

THE HON'BLE MRS. MANJU RANI
CHAUHAN, J.

Writ-C No. 34527 of 2023

Munni Devi		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:

Sri Bal Mukaund Singh, Sri Shri Prakash Mishra, Sri Ravi Kant (Sr. Adv.)

Counsel for the Respondents:

C.S.C., Sri Nisheeth Yadav, Sri Pradeep Kumar, Sri Sanjay Kumar Yadav, Sri Tarun Agrawal, Sri C.B. Yadav (Sr. Adv.)

U.P. Kshettra Panchayat and Zila Panchayat (Election of Adhyaksha and Upadhyaksha) Rules, 1994 - Rules 35, 43, 44 & 49 – Election petition – Order declaring election of returned candidate void - Maintainability of writ petition –

Held : In the instant case **the nomination of one candidate was rejected and the other candidate had withdrawn**, leaving only one candidate (petitioner) in the field, and the Election Tribunal declared his (petitioner) election void under **Rule 43**, there being **no other candidate who could be declared duly elected under Rule 44, no appeal lies under Rule 49** which is confined to an order made under Rule 44. The order declaring the election of the returned candidate as void comes within the ambit of Rule 43 of Rules of 1994 and thus, no appeal lies. Right of appeal as provided under Rule 49 of Rules of 1994 is confined and limited to order made by Judge under Rule 44 of the Rules of 1994. Remedy of appeal is available only when the returned candidate is replaced by another candidate. (Paras 15, 16, 20) (E-5)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Ravi Kant, learned Senior Advocate, assisted by Mr. Bal Mukund Singh, learned counsel for the petitioner, Mr. C.B. Yadav, learned Senior Advocate, assisted by Mr. Sanjay Kumar Yadav, learned counsel for respondent no.6 and learned Standing Counsel for the State-respondents.

2. The writ petition has been filed assailing the impugned order dated 20.09.2023 passed by respondent no.2 vide which election of petitioner for the office of Block Pramukh of Block Gangoh

Provincial Election Area No.98, District Saharanpur, has been declared void.

3. The petitioner was elected as a Block Pramukh of Block Gangoh, Tehsil-Nakud, District-Saharanpur under O.B.C. (Woman) reserved category in the uncontested elections held under Rule 14 of U.P. Kshetra Panchayat (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1994 by the results declared on 10.07.2021.

4. An election petition under Rule 35 of Rules of 1994 was filed by respondent no.6 on 06.08.2021 with a prayer to set aside the uncontested election of the petitioner (opposite party no.4 in the election petition) dated 10.07.2021 for the office of Block Pramukh of Block Gangoh, Provincial Election Area No.98, Saharanpur declaring the election of the returned candidate (petitioner) as void. The election petition came to be decided finally on 20.09.2023 wherein the order dated 10.07.2021 passed by opposite party no.3 was set aside and the election of petitioner, the returned candidate, was declared void. Challenging the aforesaid order, the present petition has been filed.

5. Learned counsel for respondent no.6 raising preliminary objection regarding maintainability of the writ petition, submits that Rule 35 provides manner and time of presenting the election petitions.

6. As per Rule 37, the election petitioner may claim either of the following declarations/reliefs;

(a) that the election of returned candidate is void; and

(b) that the election of returned candidate is void and that he himself or any other candidate has been duly elected.

7. As per Rule 43 of Rules of 1994, if a Judge hearing the election petition, after making such enquiry finds in respect of any person whose election is called in question by means of filing an election petition, that his election was valid, he shall dismiss the petition as against such person. However, if the Judge finds that the election of any person is invalid, he shall either-

(a) declare a casual vacancy to have been created; or

(b) declare another candidate to have been duly elected.

8. As per Rule 44 of Rules 1994, if any person who has lodged an election petition has, in addition to calling in question the election of returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the Judge is of the opinion that in fact the petitioner or such other candidate received a majority of the valid votes, Judge shall after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected.

9. Emphasising upon Rule 49, learned counsel for respondent no.6 submits that an appeal shall lie against every order made by the Judge under Rule 44 to the High Court within 30 days from the date of order.

10. Emphasising upon the aforesaid provisions, he submits that election petition, which has been filed under Rule 35, has to be presented praying for relief

either to declare the election of the returned candidate void, and that the election of the returned candidate is void and that he himself i.e the election petitioner or any other candidate has been duly elected. In the present case, the election petition challenging the election of the petitioner as Block Pramukh has been filed with the relief to set aside the election dated 10.07.2021 and declare the election of the returned candidate i.e the petitioner, as void.

11. Learned Senior counsel next contended that the order impugned dated 20.09.2023 has been passed declaring that the election of the returned candidate is void, therefore, the same has been passed under Rule 44 of Rules of 1994 as there is no finding that the election of the petitioner was invalid, hence no declaration that casual vacancy has been created nor any other candidate has been declared as duly elected. In the present case Rule 49 is very specific about filing of appeal against order passed under Rule 44.

12. While elaborating his arguments, he further submits that the election of the petitioner as Pramukh has been declared void i.e. "0" Shunya and not invalid. Word 'invalid' cannot be taken to mean void, thus, order has been passed under Rule 44.

13. Rebutting the submissions as made by learned counsel for respondent no.6, learned counsel for the petitioner submits that under Rule 44 read with Rule 40(e) and Rule 49 of Rules of 1994; an appeal does not lie against the order impugned in the facts of the case. He further submits that in the present case, the petitioner was elected as Pramukh of Block Gangoh, Provincial Election Area No.98 in the uncontested election, results of which

were declared on 10.07.2021 as the nomination papers filed by one candidate were rejected and the other withdrew his candidature.

14. Needless to say that the election petition can be filed claiming either of the following declarations;

(a) that the election of returned candidate is void; and

(b) that the election of returned candidate is void and that he himself or any other candidate has been duly elected.

15. In the present case, there being no other candidate as the petitioner was elected unopposed being the only qualified candidate, there was no question or occasion to declare the election petitioner or any other candidate as duly elected. Even otherwise, the relief as claimed by the respondent no.6 while filing the election petition is to declare the election of returned candidate as void.

16. Rule 44 deals with the grounds on which a candidate other than the returned candidate may be declared to have been elected. As there was no other candidate who could have been declared as elected, therefore, the appeal as provided under Rule 49 does not lie in the present facts of the case and the writ petition is maintainable.

17. Emphasising upon the provisions of Rule 40(e), he submits that no appeal or revision shall lie on a question of fact or law against any decision of the Judge. The provisions of Rule 44 has to be read with Rule 40(e) in order to see as to whether as per the Rule 49, an appeal lies against the order declaring the election of the returned

candidate as void or not. He further submits that two situations should be there to see that the order has been passed under Rule 44, one, the election of returned candidate is declared void and the other that the candidate who has secured majority of valid votes has been declared duly elected.

18. Learned Chief Standing Counsel for the State Mr. Kunal Ravi Singh and learned counsel for Election Commission Mr. Tarun Agrawal, while assisting the Court, submit that Rule 49 of Rules of 1994, provides for an appeal against the order passed under Rule 44, it does not provide for an appeal in any other case.

19. As per Rule 37, (i) election petitioner can claim either of the two reliefs mentioning therein that the election of the returned candidate is void; and (ii) that the election of the returned candidate is void and that he himself or any other candidate has been duly elected.

20. Rule 44 covers only the situation contemplated in Rule 37(b), therefore, remedy of appeal is available only when the returned candidate is replaced by another candidate. Rule 40(e) bars any appeal or revision except for cases covered by Rule 49 read with Rule 44.

21. Rule 43(2) also maintains the distinct nature of the reliefs and orders can be passed by the Judge.

22. Elaborating their arguments, the aforesaid counsels submit that in the case of election of a Pradhan, which is a direct election, Section 12-C(6) of U.P. Panchayat Raj Act provides for a remedy of revision against any order passed by the Election Tribunal whereas Section 14(2) makes the decision of Election Tribunal final and

binding in the case of members. No appeal or revision is provided. The only remedy is writ petition. The position is re-affirmed by U.P. Kshettra Panchayat (Removal of Disqualification and Settlement of Disputes Relating to Disqualification and Membership) Rules of 1994.

23. The aforesaid counsels submit that the election for the office of Block Pramukh or Pramukh of Zila Panchayat, U.P. is governed under (Election of Adhyaksha and Up-Adhyaksh and Settlement of Election Disputes) Rules of 19942 and that of Block Pramukh of Kshettra Panchayat by Rule of 1994, accordingly, as per Rule 35, the petitioner may claim either of the following declarations;

(i) that the election of the returned candidate is void; and

(ii) that the election of the returned candidate is void and that he himself or any other candidate has been duly elected.

24. As per Rule 40 of the Zila Panchayat Rules, 1961, if the Judge finds that the election of any person is invalid, he shall either declare a casual vacancy to have been created or declare any other candidate to have been duly elected.

25. As per Rule 42, the ground for which a candidate other than the returned candidate may be declared to have been elected.

26. Rule 47 provides for an appeal from every order made by a Judge under Rule 40.

27. Placing the aforesaid provisions, learned counsels submit that the aforesaid rules of Zila Panchayat Rules are pari-materia to Rules of 1994 i.e. (i) Rule 35 of Zila Panchayat Rules is pari-materia with that of Rule 37 of Rules of 1994; (ii) Rules 40 with that of Rule 44 of Rules of 1994.

28. That though the Zila Panchayat Rules provide a remedy for an appeal under Rule 47 against any orders passed under Rule 40 which is pari-materia to Rule of 43 of Rules of 1994, no such appeal is provided under Rule 49 of the Rules of 1994 against any order passed under Rule 44 and not Rule 43.

29. To make it more specific, when all the provisions of Zila Panchayat Rules and that of Rules of 1994 dealing with the elections of Kshettra Panchayat and Zila Panchayat respectively, both are pari-materia to each other and the provisions of Rule 40 of Zila Panchayat Rules and that of Rule 43 of Rules of 1994 provide that the Judge can pass an order declaring a casual vacancy to have been created if he finds the election of any person is invalid or can declare any other candidate to have been duly elected. In one, against the order, the aforesaid appeal is provided whereas in the other no appeal is provided against the aforesaid, the intention of legislation is very clear.

30. Thus, they submit that the present writ petition is maintainable and no appeal lies against the order impugned.

31. Heard learned counsel for the parties.

32. Before dealing with the issue of maintainability, it would be appropriate to

place aforesaid provisions of Rules of 1994.

33. The Rules 37, 40(e), 43, 44 and 49 of Uttar Pradesh Kshettra Panchayats (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1994, are quoted herein below:

“37. Relief that may be claimed by the petitioner- A petitioner may claim either of the following declarations-

(a) that the election of the returned candidate is void; and

(b) that the election of the returned candidate is void and that he himself or any other candidate has been duly elected.

*** **

40. Procedure- Except so far as provided by the Act or in the Rules, the procedure provided in the Civil Procedure Code, 1990 in regard to suits, shall, insofar as it is not inconsistent with the Act or any provision of these Rules and it can be made applicable, be followed in hearing of the election petition;

(e) no appeal or revision shall lie on a question of fact or law against ny decision of the Judge;

*** **

43. Finding of the Judge.- (1) If the Judge after making such inquiry as he deems fit finds in respect of any person whose election is called in question by a petition, that his election was valid he shall dismiss the petition as against such person and award costs at his discretion.

(2) If the judge finds that the election of any person was invalid he shall either-

(a) declare a casual vacancy to have been created; or

(b) declare another candidate to have been duly elected and in either case may award costs at his discretion.

44. Grounds on which a candidate other than the returned candidate may be declared to have been elected.- If any person who has lodged an election petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the Judge is of the opinion that in fact the petitioner or such other candidate receive a majority of the valid votes, the Judge shall after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected.

Provided that the petitioner or such other candidate shall not be declared to be duly elected if it is proved that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election.

*** **

49. Appeal against the order of the Judge- An appeal shall lie from every order made by the judge under Rule 44 to the High Court within thirty days from the date of the order.”

34. Having perused the provisions as referred to above, it is very clear that in an election petition as presented under Rule 35, the relief of declaring the election of returned candidate as void and that the election petitioner or any other candidate has been duly elected, can be prayed for. While hearing the petition, if the Judge finds that the election of the returned candidate is invalid, he shall declare casual vacancy to have been created or declare any other candidate to have been duly elected. Thus, in the present case, where the respondent no.4 has been declared as winning candidate in the uncontested elections, as the nominations filed by one of the candidates was rejected and that of the other was withdrawn, there being no other candidate, once the election of the returned candidate is declared void, a vacancy automatically arises and no declaration of casual vacancy having been created is required. To clarify the position, in the facts of the present case, there was no other candidate available to have been declared duly elected. Therefore, the order declaring the election of the returned candidate as void comes within the ambit of Rule 43 of Rules of 1994 and thus, no appeal lies.

35. A right of appeal is a statutory right and is available for the purpose for which such an appeal is provided for. The entire object of the provision of an appeal is to provide of a forum for challenging the order relating to the orders passed while deciding the election petition. When once the relief claimed by the election petitioner is to declare the election of the returned candidate as void, there being no other candidate, the case does not fall under the ambit of Rule 44.

36. The right of appeal as provided under Rule 49 of Rules of 1994 is clearly confined and limited to every order made by Judge under Rule 44 of the Rules of 1994. Rule 44 speaks about the grounds on which a candidate other than the returned candidate may be declared to have been elected, which means, in case, in addition to calling in question, the election of the returned candidate, the election petitioner claims a declaration that he himself or any other candidate has been duly, elected, then on the basis of the majority of valid votes as received by such a candidate, the Judge after declaring the election of returned candidate to be void, declare such person, be the election petitioner or such other candidate, as the case may be, to have been duly elected.

37. From the aforesaid, it can be said that plain and ambiguous meaning being given to Rule 44, the same would require some other candidate to have been duly elected, once the election of returned candidate has been declared void. In the present facts of the case, this is not the situation where in the uncontested election of the returned candidate i.e. the respondent no.4, has been declared void, without specifying that a casual vacancy has arose and without there being any declaration of any other candidate, who is not available in the present case, has not been duly elected.

38. In other words, the language of Rule 44 is clear and the rule does not demand that we should substitute any other word or read the word interchangeably for achieving the object in purpose of any Act or Rule. On the contrary, the objective of the Act is more than clear that the legislature intended to provide a very limited right to appeal. The orders which can be appealed against have been

specifically stipulated by unambiguously excluding the provisions which the legislature did not intend to make appealable under the provisions of the Act. It is always expected of the Court to apply plain rule of construction rather than trying to read the words into the statute which have been specifically omitted by the legislature.

39. It is well known that the right of appeal is not a natural or inherent right. It cannot be assumed to exist unless expressly provided for by statute. Being a creature of statute, remedy of appeal must be legitimately traceable to the statutory provision.

40. A statute is stated to be the edict of legislature. It expresses the will of legislature and the function of the court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of the statute that the provisions should be interpreted by applying plain rule of construction. The courts normally would not imply anything which is inconsistent with the words expressly used by the statute. In other words, the court would keep in mind that its function is *jus dicere*, not *jus dare*. The right of appeal being creation of the statute and being a statutory right does not invite unnecessarily liberal or strict construction. The best norm would be to give literal construction keeping the legislative intent in mind.

41. While reading the analogous provisions of rules of Zila Panchayat Rules and Rules of 1994, Rule 40 of Zila Panchayat Rules being *pari-materia* to Rule 43 of Rules of 1994, the legislature in its wisdom made difference in Rule 40 capping the same with provisions of Rule

47 of Zila Panchayat Rules providing for appeal against the aforesaid, while looking into the provisions of Rule 43 of Rules of 1994, no such appeal is provided. Likewise, there is difference in Rule 49 of Rules of 1994 wherein appeal is provided against every order passed under Rule 44, which is analogous with the provisions of Rule 42, against which, no appeal is provided under Rule 47 of Zila Panchayat Rules. Thus, where no other candidate has been duly elected after declaration of election as void, it cannot be interpreted in a manner to create a situation that filing of appeal is required in the present case.

42. It is well settled that literal interpretation should be given to a statute if the same does not lead to an absurdity.

43. Rule 44 should be interpreted in the natural and ordinary sense. It is well settled in several decisions of Apex Court as well as High Court that the interpretative function of the Court is to discover the true legislative intent. It is trite that in interpreting a statute the Court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, the words should be given the same meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When a language is plain and unambiguous and admits of only one meaning no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is

more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the Court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional.

44 . It is equally well settled that in interpreting a statute, effort should be made to give effect to each and every word used by the Legislature. The Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors.

45. Be that as it may, having considered the provisions enshrined under Zila Panchayat elections where remedy of appeal lies from every order made by the Judge under Rule 44, it has to be seen that Rule 44 provides the grounds on which a candidate other than the returned candidate may be declared to have been elected. In the present facts of the case, the uncontested election of returning candidate has been declared as void and as there was no other candidate, who has been duly elected, no ground exists on which candidate other than returned candidate could have been declared elected. Thus, impugned order does not fall within the ambit of Rule 44, hence no appeal lies.

46. In view of the above submissions made by learned counsel for the parties and the aforesaid discussion, this Court finds that present writ petition is maintainable.

47. Put up as fresh on 20.11.2023 to be heard on merits at 2:00 P.M.

48. As an interim measure, the State Election Commissioner (Panchayat and Local Bodies), State Election Commission, U.P., Lucknow i.e. respondent no.2 is directed not to notify the elections in question without leave of the Court.

(2023) 11 ILRA 953
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2023

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.

Writ-C No. 60108 of 2008

Smt. Mutuni	...Petitioner
Versus	
The Collector, District Sant Ravidas Nagar Bhadohi & Ors.	...Respondents

Counsel for the Petitioner:
 Sri N.D. Shukla

Counsel for the Respondents:
 C.S.C.

A. Civil Law – Constitution of India, 1950 – Article 300-A – Right to Property – Adequate Compensation Right to property is not merely a constitutional or statutory right but also a human right. In a welfare State, statutory authorities are bound to pay adequate compensation to persons whose property has been acquired by the appropriate Government. Article 300-A provides that no person shall be deprived of his property save by authority of law. Taking possession of or acquiring the property of a citizen amounts to deprivation, which can occur only in

accordance with "law". Such deprivation cannot be effected by executive fiat, order, or administrative caprice, but only by following the procedure prescribed by statute. The obligation to pay compensation, though not expressly mentioned in Article 300-A, is implicit therein. (Para 13)

B. Civil Law - Land Acquisition Act, 1894 - Sections 23 & 23(1-A) – Compensation – Interest –

Petitioner, Bhumidhar with transferable rights of Plot Nos. 437 and 438 (total area 10 bisssa 5 dhur), was dispossessed in 1988. Constructions, including Morwa Bridge and Road, were made by the P.W.D. over the said land, leaving no portion vacant. However, no acquisition proceedings were initiated nor compensation paid. Petitioner was subsequently paid Rs. 3,28,000/-, which was less than the market value based on the circle rate. Held: Petitioner is entitled to compensation for the said plots to be calculated in accordance with Section 23 of the Land Acquisition Act, 1894. Collector was directed to determine the compensation on the basis of the factors enumerated in Section 23 and the prevailing market value of the land. Statutory benefits, including interest under Section 23(1-A) of the Act, 1894, was directed to be paid from 1988, the date of dispossession. Cost of the writ petition was quantified at Rs. 5,00,000/- (Rupees Five Lakhs). (Paras 17, 19)

Allowed. (E-5)

(Delivered by Hon'ble Salil Kumar Rai, J.)

The petitioner is the *Bhumidhar* of Plot No. 437 (area 0-3-0) and Plot No. 438 (area 0-7-5) situated in Village Lakhanpur

alias Abhayapur, Tehsil Bhadohi, District Sant Ravidas Nagar. The total area of the aforesaid plots is 10 bisssa 5 dhur (0-10-5). The said fact is supported by the Khatauni of the plots annexed as Annexure No. 1 to the writ petition. In 1998, the State Public Works Department, Gyanpur, District Sant Ravidas Nagar, Bhadohi took possession of the aforesaid plots for construction of Morwa Bridge on Bhadohi - Varanasi Road without acquiring the plots and without following the procedure prescribed in the Land Acquisition Act, 1894 (hereinafter referred to as, 'Act, 1894') or in any other relevant statute. No compensation was paid to the petitioner for the aforesaid plots despite repeated representations by the petitioner to the State Government and its officers. The petitioner filed C.M. Writ Petition No. 17681 of 2002 in this Court which was disposed of by order dated 29.4.2002 directing the Collector / District Magistrate, Sant Ravidas Nagar to decide the representation submitted by the petitioner for payment of compensation. In response to the order dated 29.4.2002, the Special Land Acquisition Officer, Sant Ravidas Nagar, District Bhadohi, vide order dated 11.8.2003, summoned a report from the Tehsildar, Sant Ravidas Nagar, Bhadohi and the Executive Engineer, State Public Works Department. A report dated 5.9.2003 was submitted before the Special Land Acquisition Officer noting that Morwa Bridge and road had been constructed by the Public Works Department over the whole of Plot Nos. 437 and 438. Consequently, the total area of Plot Nos. 437 and 438, of which the petitioner was the *Bhumidhar*, was in possession of the Public Works Department and the petitioner stood dispossessed from the plots. Subsequently, the Special Land Acquisition Officer vide his letter dated 16.9.2003 requested the Executive

Engineer, State Public Works Department to pay compensation to the petitioner. An order dated 5.11.2003 was also passed by the Collector holding the Public Works Department responsible to pay compensation to the petitioner.

2. However, despite the aforesaid orders and letters written by different officers, the petitioner was not paid any compensation. Hence, the present petition was filed praying for a mandamus directing the respondent no. 3, i.e., the Executive Engineer, Public Works Department (P.W.D.) to pay compensation to the petitioner for the plots at the present market rate along with solatium, interest at the rate of 12% and additional interest and also for payment of special damages to the petitioner for not paying compensation to her till date.

3. On 28.11.2008, the following order was passed by the Court :-

“Despite the orders of this Court dated 20.11.2008 the learned standing counsel is not in a position to explain as to why compensation in terms of the order dated 5.11.2003 passed by the District Magistrate has not been paid to the petitioner who is a poor widow.

In the given circumstances we have no alternative but to direct the respondent No. 3 to be present before this Court along with the admitted amount of compensation to be paid to the petitioner and to explain why it has not been paid to her on the next date fixed.

List it on 12.12.2008.”

4. Subsequently, the case was again taken up on 12.12.2008 when the Executive

Engineer, P.W.D. who was personally present in the Court pleaded his inability to pay compensation to the petitioner because there was no sanction by the State Government. The Court on 12.12.2008 passed the following order : -

“Heard learned counsel for the petitioner and Sri C.K. Rai, learned Standing Counsel for the State of U.P.

Petitioner’s land was acquired without taking recourse to the provisions of Land Acquisition Act as a result where of petitioner approached to this court by filing writ petition wherein direction was issued pursuant to which District Magistrate, Sant Ravi Das Nagar (Bhadohi) has passed a detailed order on 5th November, 2003 wherein claim of petitioner was recorded and further direction was given to the Public Works Department to make payment of compensation to the petitioner to the extent of the land stated to have been occupied by the P.W.D.

When nothing was done petitioner filed this petition in which on 28.11.2008 following order was passed-

“Despite the orders of this Court dated 20.11.2008 the learned Standing Counsel is not in a position to explain as to why the compensation in terms of the order dated 5.11.2003 passed by the District Magistrate has not been paid to the petitioner who is a poor widow.

In the given circumstances we have no alternative but to direct the respondent No. 3 to be present before this Court along with the admitted amount of compensation to be paid to the petitioner and to explain why it has not been paid to her on the next date fixed.”

On communication of this order Shri F. Bhan Rao, Executive Engineer, P.W.D. Gyan Pur, Sant Ravi Das Nagar (Bhadohi) is present before this court.

*Sri C.K. Rai, learned Standing Counsel on the basis of the instructions so received has urged that demand was made from the State Government to release all the permitted dues way back in the year 2004 and copy of the said letter dated 31st June, 2004 has been placed before this court. There after there appears to have been done nothing in order to ensure payment to the petitioner. It is only after the order was passed on 28.11.2008 on the basis of the instructions so received from Sri Rao, Executive Engineer, P.W.D. who is present in the court **learned Standing Counsel Sri Rai submits that it is not possible to make payment to the petitioner in view of there being no sanction by the State Government.***

We are surprised to hear the statement being made before this court in as much as five years have passed after the order passed by the District Magistrate, i.e., dated 5th November, 2003. Petitioner who appears to be a poor widow is being harassed for the last five years by the authority.

In view of the aforesaid, we direct the petitioner to implead Principal Secretary, P.W.D. as respondent no. 4 in this petition during course of the day.

In the circumstances, indicated above, we have no alternative but to summon the respondent no. 4 before this court on 18th December, 2008 on which date the said respondent alongwith

Executive Engineer, P.W.D. and the Collector, Sant Ravi Das Nagar (Bhadohi) shall be present in the court.

Let a copy of this order be provided to Sri C.K. Rai, learned Standing Counsel who has attended the matter free of charge, by tomorrow who is to ensure compliance of this order."

5. Subsequently, a counter affidavit was filed on behalf of the State respondents in which it has been stated that the Collector, Sant Ravidas Nagar has calculated the compensation amount as Rs.5,24,672/-. The said amount includes the market value of the plots calculated on the basis of circle rate of Rs.32,812/- per biswa, 30% solatium and 20% other charges. The total market value of the land was determined as Rs.3,36,328.12/-. A cheque of Rs.2,00,000/- was produced by the Special Land Acquisition Officer in the Court for payment to the petitioner. It was stated that sanction from the State Government was necessary for payment of balance amount as P.W.D. did not have sufficient amount to pay the balance. This Court after taking note of the aforesaid facts and the statement, passed an order dated 18.12.2008:-

"Heard learned counsel for the petitioner and Sri Chandra Kesh Rai, learned Standing Counsel.

An affidavit has been filed by Mr. F. Khan Rao, Executive Engineer, who is present in Court along with Sri Kapil Dev Principal Secretary, Public Works Department, Lucknow, and Smt. Dipika Duggal, District Collector.

It is unfortunate that the Secretary of the Public Works Department,

is stating before the Court that Public Works Department did not have enough amount in its coffers to make the payment as proposed by the District Collector and a draft of only Rs.2 Lacs has been presented before the Court.

However, upon instructions from Sri Kapil Dev, Sri C.K. Rai states that the proposed entire amount shall be disbursed to the petitioner within 15 days from today.

List the matter on 9.1.2009.

In case the entire balance amount as proposed by the Collector is disbursed to the petitioner by the said date fixed, then in that event the said Officer need not be present in Court on the date fixed.

A draft of Rs.2 Lacs has been handed over to the learned counsel for the petitioner, who shall issue appropriate receipt to the learned Standing Counsel for the same."

6. Subsequently, again a counter affidavit dated 13.04.2009 was filed by the State respondents. In Paragraph 6 of the counter affidavit, it has been stated that Rs.1,28,000/- was paid to the petitioner on 7.1.2009. The said fact has been stated in paragraph no. 6 of the counter affidavit filed by the Standing Counsel.

7. When this petition was heard on 17.5.2023, the Standing Counsel handed over the calculation chart indicating as to how the amount of Rs.5,24,671.88/- was obtained. The amount of Rs.5,24,671.30/- includes the solatium and 20% other charges but does not include the interest stipulated under Section 23 (1-A) of the Act, 1894 and other charges which the petitioner would have been entitled if the

plots had been acquired under the Act, 1894. The said calculation chart is a part of the record of the case. Till date, the petitioner has been paid only Rs.3,28,000/- which is less than even the market value of the plots calculated on the basis of circle rate and shown in the calculation chart.

8. It was argued by the counsel for the petitioner that admittedly, the petitioner was owner of the plots and the respondents have taken possession of the same without taking recourse to the provisions of Act, 1894. It was argued that the respondents have taken possession of the plots illegally and deprived the petitioner of her property without authority of law in violation of Article 300-A of the Constitution. It was argued by the counsel for the petitioner that she was entitled to compensation calculated on the market rate of the plots and in accordance with Section 23 of the Act, 1894 and also for damages for having been illegally deprived from possession of her plots and also the cost of the writ petition.

9. Contesting the claim of the petitioner, the Standing Counsel has argued that no proceedings for acquisition of the plots of the petitioner were taken and, therefore, the petitioner cannot be paid compensation in accordance with Section 23 of the Act, 1894 and the cost price of the land has already been paid to the petitioner in as much as Rs.2,00,000/- was paid to the petitioner on 18.12.2008 and subsequently, a cheque of Rs. 1,28,000/- (Cheque No.A00979811) dated 31.12.2008 has also been given to the petitioner. It was argued that in view of the aforesaid, the petitioner has already been paid the cost price of the land and the petition is, therefore, liable to be dismissed.

10. We have considered the submissions of the counsel for the parties and also perused the records.

11. It is the admitted case of the parties that the petitioner was the Bhumidhar with transferable rights of Plot Nos. 437 and 438 (total area 10 bisas 5 dhur). It is also apparent that the petitioner was dispossessed from the plots in 1988. It is also the admitted case of the State Government that no proceedings under any relevant statute were taken to acquire the plots of the petitioner and to pay compensation to her in accordance with the said statute. It is also the admitted case of the State Government that constructions, including Morwa Bridge and Road, have been made over the plots by the P.W.D. and no area in the said plot is at present vacant. It is also apparent from the records that the petitioner has still not been paid even the market value of the plots as shown in the calculation chart.

12. Evidently, the petitioner has been deprived of her property rights without following the procedure prescribed in law and without paying any compensation to her. The issue before this Court is the remedy to which the petitioner is entitled.

13. Article 300-A of the Constitution provides that no person shall be deprived of his property save by authority of law. In ***Tukaram Kana Joshi & Ors. vs. Maharashtra Industrial Development Corporation & Ors.*** 2013 (1) SCC 353, the Supreme Court observed that ‘even after the right to property ceased to be a fundamental right, taking possession of or acquiring the property of a citizen mostly certainly tantamounts to deprivation and such deprivation can take place only in accordance with “law” as the said word has

specifically been used in Article 300-A of the Constitution.’ ***The deprivation cannot be done by way of executive fiat or order or administrative caprice but can be only by resorting to procedure prescribed by the statute.*** It was further observed by the Supreme Court that right to property is not only a constitutional or a statutory right but also a human right and in a welfare State, the statutory authorities are bound to pay adequate compensation to persons whose property have been acquired by the appropriate Government. It was further observed by the Supreme Court that in a democratic polity, governed by Rule of Law, the State cannot be allowed to deprive a citizen of his property without authority of law.

14. The aforesaid view was also reiterated by the Supreme Court in its judgment reported in ***Vidya Devi vs. State of Himachal Pradesh & Ors.*** 2020 (2) SCC 569. In ***Vidya Devi (supra)***, the Supreme Court held that the obligation of the State to pay compensation for dispossessing a citizen from his property can be inferred from Article 300-A of the Constitution of India. The relevant observations of the Supreme Court in ***Vidya Devi (supra)*** are reproduced below :-

“12.2. *The right to property ceased to be a fundamental right by the Constitution (Forty Fourth Amendment) Act, 1978, however, it continued to be a human right in a welfare State, and a Constitutional right under Article 300-A of the Constitution. Article 300-A provides that no person shall be deprived of his property save by authority of law. The State cannot dispossess a citizen of his property except in accordance with the procedure established by law. The obligation to pay compensation, though*

not expressly included in Article 300-A, can be inferred in that Article.

12.3. To forcibly dispossess a person of his private property, without following due process of law, would be violative of a human right, as also the constitutional right under Article 300-A of the Constitution. Reliance is placed on the judgment in Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai, wherein this Court held that:

*“6. ... Having regard to the provisions contained in Article 300-A of the Constitution, the State in exercise of its power of "eminent domain" may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and **reasonable compensation therefore must be paid.**” (emphasis supplied)*

12.4. In N. Padmamma v. S. Ramakrishna Reddy, this Court held that:

“21. If the right of property is a human right as also a constitutional right, the same cannot be taken away except in accordance with law. Article 300-A of the Constitution protects such right. The provisions of the Act seeking to divest such right, keeping in view of the provisions of Article 300-A of the Constitution of India, must be strictly construed.” (emphasis supplied)”

15. In light of the aforesaid judgments of the Supreme Court, it is held that the petitioner is entitled to compensation calculated in accordance with law and not only the cost price of the plots, i.e., its market value. The stand of the State respondents that the petitioner is not entitled to any compensation as she has

already been paid the market value of the plots stands rejected. The stand of the State smacks of arbitrariness and is not a stand expected from a democratic State governed by Rule of Law but resembles the conduct of criminals and land mafia who illegally grab the land of ordinary citizens of this country and then coerce the citizen to accept the price fixed by the land grabber.

16. In 1988, when the State respondents took possession of the plots of the petitioner, the powers of the appropriate Government to acquire property of any citizen, the procedure to be followed while acquiring the property of any citizen, and the determination of compensation was regulated by the Land Acquisition Act, 1894. In case, the plots of the petitioner had been acquired in accordance with the procedure prescribed in the Act, 1894, the petitioner would have been entitled to compensation for the said plots calculated in accordance with Section 23 of the Act, 1894. The Act, 1894 has now been repealed and the power of the appropriate Government to acquire land and the modalities of payment of compensation are now regulated by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. It would not be feasible, in the circumstances of the case, to direct the State respondents to pay compensation to the petitioner calculated in accordance with the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 as the State took possession of the land of the petitioner in 1988. The case of the petitioner has to be considered under the Act, 1894. In *Delhi Airtech Services Pvt. Ltd. & Anr. vs. State of U.P. & Anr. (2022) SCC OnLine SC 1408*, where the land loser had not been

paid compensation and consequently the acquisition proceedings had lapsed, the Supreme Court directed that compensation payable to the land loser be calculated after determining the market value of the land on the date the award, regarding other lands acquired by the appropriate Government, had been passed and by applying the yardstick under the Act, 1894. The Supreme Court further observed that statutory benefits would be calculated from the date of the original notification. The observations of the Supreme Court in Paragraph 25 of the aforesaid judgment is reproduced below :-

“25. On weighing all aspects of the matter, we deem it appropriate that it will serve the ends of justice to direct the respondents to determine the market value insofar as the appellant’s land is concerned by reckoning the relevant date as 09.06.2008 (i.e. the date on which the award was ultimately passed), by applying the yardstick under Act, 1894. It is made clear that only the market value be determined as on that date but for awarding the statutory benefits, it shall be calculated from the date of the original notification since admittedly the appellant has been dispossessed on 04.02.2003 pursuant to the notification dated 17.04.2002. Further, from the date on which the fresh award is passed pursuant to this judgment, the appellant would get the cause of action for seeking reference if dissatisfied with the quantum of compensation awarded. It is made clear that the determination of compensation, in this case, shall not give rise to any right in favour of any other land loser whose land was acquired under the same notification, to seek for re-determination of compensation where the same has already attained finality.”

17. In the present case also, we consider it just and equitable to take a similar approach as adopted by the Supreme Court in ***Delhi Airtech Services (supra)***. In the present case, the State has already determined the market value of the land and has paid part of the market value, but other statutory benefits as provided under the Act, 1894 have not been paid to the petitioner. The petitioner is also entitled to the statutory benefits under the Act, 1894. The Collector, District Sant Ravidas Nagar, Bhadohi is directed to determine the compensation of the land of the petitioner on the basis of factors enumerated in Section 23 of the Land Acquisition Act, 1894 and on the market value of the plots as stated in the calculation chart. It is clarified that the statutory benefits payable to the petitioner shall be calculated from 1988, i.e., the date on which the petitioner was dispossessed from the plots. The statutory benefits include interest to the petitioner under Section 23(1)(A) of the Act, 1894.

18. The petitioner is also entitled to cost of the petition. The petitioner, who is a widow, has not only been harassed and forced by the State Authorities to unnecessarily approach this Court in its equitable jurisdiction under Article 226 of the Constitution of India but during the proceedings, the approach of the State Authorities has been inhuman as would be evident from their stand that the petitioner was not entitled to any compensation because she had already been paid the market value of her plot. The cost of the writ petition is quantified as Rs.5,00,000/- (Five Lacs).

19. The cost of the writ petition shall be paid to the petitioner within one month from today. The compensation payable to

the petitioner calculated in accordance with Section 23 of the Act, 1894 and the interest under Section 23(1-A) shall be computed within two months from today and the total amount quantified, including the balance of the market value determined by the Collector, shall be payable within one month from the date the same is computed. The due amount shall, in any case, be paid by ***12th of February, 2024.***

20. With the aforesaid directions and observations, the writ petition is ***allowed.***

21. A copy of this order shall be sent to the Collector, District Sant Ravidas Nagar, Bhadohi by the Registrar (Compliance) within three days.
